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A TREATISE

ON THE

LAW OF INSURANCE

IN ALL ITS BRANCHES, ESPECIALLY FIRE, LIFE, ACCIDENT, MARINE, TITLE, FIDELITY, CREDIT, AND EMPLOYERS' LIABILITY

WITH

AN APPENDIX OF STATUTES AFFECTING THE INSURANCE CONTRACT AND A COLLECTION OF FORMS

BY

GEORGE RICHARDS, M.A.

OF THE NEW YORK BAR, FORMERLY LECTURER ON INSURANCE LAW IN THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY AND THE NEW YORK LAW SCHOOL

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PREFACE TO THIRD EDITION

I

This volume, like prior editions, is designed primarily for the class room, and is the result of an effort to unite and harmonize the distinctive advantages of the general treatise with those of the casebook.

In the present revision, or rather rewriting of this book, the coarse print text and fine print footnotes combined cover a very wide range. Believing that the safe counsellor in insurance law is one who (1) is well grounded in general principles and (2) is imbued with the spirit of many modern decisions, the writer has endeavored to treat this difficult subject with a large measure of thoroughness; but the coarse print text, to which, if necessary, study may be limited, is concise. To the legal proposition in the text there has usually been added explanation in the text, and, where deemed desirable, copious illustration from the reports. Some of these illustrative cases are briefly given, but in numerous instances and especially in dealing with abstruse doctrines and with important clauses of modern policies the case system is followed to this extent that, instead of cursorily describing the cases cited, the writer has extracted the facts from the original reports with all the detail considered desirable, and so far as relevant to the point in hand, and has given the exact holding of the court in juxtaposition with the precise statement of facts in concrete form. The opinions of the courts occasionally are given in the footnotes and often are reflected in the general explanations of the text. This compact but accurate method of presenting the whole law of an important case, while quite consistent, if time allows, with the use of a supplementary case volume, is for certain purposes thought to be the most effective. The ruling and principle involved are thus most quickly apprehended, most firmly impressed upon the memory, and from time to time most easily reviewed. The student having before him the exact premises and the exact conclusion may profitably be left in certain instances to construct the argument for himself and perhaps may be encouraged to subsequently compare his own course of reasoning with the well-

rounded and more logical opinion of the learned court to be found in the official report.[1] To the voluminous footnotes have been relegated incidental and subsidiary points, occasional quotations from the opinions of the courts, together with very numerous citations. From the cases cited the instructor will find material on almost any point, from which he can cull statements of fact to be submitted to his pupils, leaving it to them, if he choose, to discover the principle applicable and the judgment to be rendered.[2]

In part I, general principles of insurance law are stated, explained and illustrated. In part II, the provisions of the policies are considered clause by clause in the phraseology and sequence in which they occur in the several instruments, only scant attention being given to those many cases, which construe forms of policies no longer used, and which often are positively misleading. This arrangement is believed to be the most convenient for student and practitioner. In appendix chapter I will be found classified lists of references to the statutes of the state legislatures affecting the contract, with a specimen statute serving to show the general character of each group. These were made up from the original statutes of all the states. Chapter II of the appendix contains all the standard fire policies, a New York standard life policy, the ancient Florentine marine policy, other forms of modern policies, a large collection of special clauses, and binders, applications, proofs of loss, etc.

Grateful acknowledgments are due to kind friends for their assistance voluntarily and unstintingly rendered. Prof. Robert D. Petty of the New York Law School assumed the great labor of reading over all the book in galley proof and drew upon his long experience in teaching this branch of the law to offer many suggestions of highest value. Prof. Francis M. Burdick of the School of Law of Columbia University was so good as to furnish a list of illustrative cases which he had found specially well adapted for use in the class room. Harrington Putnam, Esq., of the New York bar, reviewed the proof of the chapters on general average and marine insurance and thus courteously brought to bear his learning on those subjects, much more profound than the writer's. He also prepared the example of an adjustment in general average spread out with explanations in appendix chapter III. Willis O. Robb, Esq., secretary, general adjuster and expert of the loss committee of the New York Board

[1] If the opinion or argument of the court is always furnished, as in the casebook, less opportunity is afforded for independent thought on the part of the pupil.

[2] This is a mental exercise which the successful lawyer must frequently summon to his aid.

of Fire Underwriters, kindly wrote for this book a summary on the perplexing subject of non-concurrent apportionments given in the footnotes at pages 440–443. He also tabulated instances of the operation of the eighty and one hundred per cent coinsurance clauses as set forth in appendix chapter III.

The special thanks of the writer are likewise due to Messrs. Elijah R. Kennedy, chairman of the committee which framed the New York standard fire policy, E. H. A. Correa, vice president of the Home Insurance Company of New York, E. J. Richards, resident manager of the North British & Mercantile Insurance Company, Cecil F. Shallcross, resident manager of the Royal Insurance Company, Seelye Benedict of the brokerage house of Benedict & Benedict, Hendon Chubb, marine underwriter, Clarence H. Kelsey, president of the Title Guarantee & Trust Company and to the insurance departments of all the states. Citations were verified by Mr. James J. Dillon, assistant librarian of the Bar Association. The index was prepared and the appendix chapter I was brought down by the author of a well-known text-book on insurance law.

II

The following observations are offered, especially to instructors, in explanation of the method which finds embodiment in this book.

The law of insurance is a branch of the wide law of contracts, but in certain of its underlying principles and also in its application to modern forms of policies it stands in marked contrast with other branches of the law. In its first stages, many of its peculiar doctrines were founded upon trade usages, and the early decisions in controversies relating to marine insurance were for the most part rendered by arbitrators or by commissioners, acting outside the jurisdiction of the common-law courts of England, decisions which doubtless gave shape to trade usages and thus through the medium of custom powerfully influenced the action of the Westminster and American courts when subsequently they came to apply and further develop the doctrines of insurance law.

The custom of closing insurance contracts by preliminary binding-slips, the doctrines of indemnity, insurable interest, and highest good faith, the exacting doctrine of warranties, the implied condition that facts material to the risk must be disclosed, the implied warranties of seaworthiness of the ship, and against deviation from the course, the unexpressed exception of deck cargo, the obligation inferentially

resting upon marine underwriters to make payment towards general average and salvage, the obligation inferentially imposed upon the insured to become coinsurer for the amount of deficit, if his marine insurance is short of value—all, at once usages and legal dogmas, justly impress us as unusual when compared with principles governing in other departments of law.

Certain of these familiar features in the law of insurance, though exceptional, are comparatively clear and in the main easily applied, but there are other developments in this branch of the law, now to be adverted to, which are more confusing, and in their nature perhaps quite as exceptional. Partly as an offset to this rigorous doctrine of warranties already mentioned, and in order to evade forfeitures deemed to be unconscionable, the courts have leaned towards an interpretation of the clauses of all policies, which shall be favorable to the insured. And naturally some of the judges lean further than others. In this regard, we may as well confess, the aim has been, not so much to ascertain and give effect to the legal intendment of the language employed, even though that language be prescribed by legislatures, as to ascertain what the assured might fairly suppose it to mean,[1] and to relieve him from fatal consequences of any innocent breach of contract regarded by the court as technical rather than substantial. Manifestly such methods of interpretation must give uncertain results, results which cannot be predicted with confidence in advance by any course of *a priori* reasoning.[2]

This purpose of the courts has found expression in various rules or doctrines, the application of which, by no means concordant in the many jurisdictions of this country, has also exhibited a varying degree of departure from common-law canons as applied to other branches of the law, and which together with the doctrine of warranty embrace perhaps the larger part of what may be called the active and operative law of insurance to-day. Among these doctrines four may be mentioned: (1) the general rule that all ambiguities in

[1] See *Hermann* v. *Mechanics' Ins. Co.*, 81 N. Y. 188; *Donley* v. *Glens Falls Ins. Co.*, 184 N. Y. 107; *Tisdell* v. *New Hampshire Ins. Co.*, 155 N. Y. 163.

[2] In the last volume of the Insurance Digest by Deitch, 424 appeals are cited, a large minority of which show reversals. The comfortable theory that familiarity with a volume of leading cases will enable one safely to forecast the further rulings of the courts in matters relating to insurance is a delusion. This cannot be done either by the tyro or by the experienced lawyer. Doubtless most of the defeated parties in the cases mentioned were honestly advised by counsel that they had a fair prospect of success on appeal. In general only cases appealed reach the reports. A few of these cases constitute no substitute for a comprehensive digest of all.

the policy are to be resolved in favor of the insured; (2) the subsidiary rule that a statement in the policy of present condition is not necessarily to be construed as a warranty of continuance; (3) the subsidiary rule that to prevent forfeiture of the whole contract and to save a part, the fire insurance contract, though stated to be "entire," shall be held divisible; and (4) the doctrine known briefly as "parol waivers and estoppels." [1]

Involving the application either of the stringent doctrine of warranty or of some one of the four countervailing principles just mentioned, hundreds of insurance litigations are brought to trial every year, many of the distinctions drawn by the courts in their determination are exceedingly fine, many of the conclusions of law reached are necessarily more or less arbitrary, many points are decided one way in some states and other ways in other states. Moreover, the attitude of the courts in this regard has found much more than an echo among the legislatures of all the states, and numerous enactments affecting the terms of the contract have been adopted which, while bringing relief to the insured in special instances, have at the same time further complicated this branch of the law. It becomes obvious at a glance that a few isolated instances, a few reported cases, no matter how carefully selected, fail hopelessly to stand for the great body of insurance law as developed in recent times. Each decision is but a pin point on a vast surface.[2] By what means, then, may this subject of insurance law best be presented to student and practitioner? by text-book or case-book, or by aid of a book which, in its plan, shall omit the inconveniences, and borrow the meritorious features of each of the others?

However perfect law may be when theoretically considered, we know that as applied by human tribunals it must always be regarded as an imperfect and inexact science, but also a progressive science. While the opinions of the justices must always be tinged with error, time will bring detection and amelioration as to most of these errors. Cases once called leading are constantly being distinguished or modified, if not overruled. Nor do the opinions of the courts, which occupy the major part of the official reports, con-

[1] So far as it allows terms of the policy to be abrogated by parol evidence of what was said and done prior to the closing of the contract, this may be called a modern American doctrine.

[2] Many years ago, when engaged for a season in lecturing at a law school, the writer was asked by the dean to make a selection of insurance cases to use with the class. A painstaking effort was made to meet the request, but it was found impossible to cover the subject with any degree of success by that method alone. The task would be much more difficult now.

stitute, strictly speaking, any part of the law. As the late James C. Carter, himself an advocate of the case system, has admitted, the law "is alone found in those adjudications, those judgments, which from time to time its ministers and its magistrates are called upon to make." [1]

Furthermore, we must concede that a judge, in deciding the precise litigated point before him, often has no right and little opportunity to address himself to the broader task of a lecturer, and for this reason doubtless in part it is, that some of the most illustrious of judges feel moved to write commentaries and scientific treatises on subjects with which they are specially familiar, to the great advantage of students and the profession. The hypothesis that a jurist can produce the happiest results towards furnishing a scientific exposition of a subject in its entirety, when his aim is to offer persuasive arguments for the determination of the narrow issues usually involved in litigated cases, carries no compliment to the bench. Court opinions when severed from their particular environment of fact are proverbially misleading. A few instances out of many that might be gathered from insurance case-books must here suffice. Two interesting cases, rightly decided by prominent state courts,[2] are given at length to describe the nature of representations and warranties. From the opinions we read: "The essential difference between a warranty and a representation is that in the former it must be literally fulfilled or there is no contract." But how about all those many warranties, not before the court, which are conditions subsequent, and which, if broken, avoid the contract at common law, only from the time of breach? Again, we read: "An express warranty in a policy of insurance is a condition precedent the burden of proving performance of which rests upon the assured." But how about the innumerable decisions establishing the rule for most jurisdictions that in the case of many classes of warranties, not before the court, the burden rests upon the insurer to allege and prove a breach? Again, we read: "A representation on the other hand is not part of the contract but is collateral to it." But how about the many statements contained in policies which the courts have construed to be representations only and not warranties? And how about the statutes of many states expressly converting warranties into representations? Again, from Lord Mansfield's famous opinion

[1] 1 Yale Law Jour. 147. Under the French system of jurisprudence opinions at large are not reported, but only the decisions of the courts.

[2] *McLoon* v. *Commercial Ins. Co.*, 100 Mass. 472; *Aetna Ins. Co.* v. *Grubs*, 6 Minn. 82.

on concealments in marine insurance,[1] we read: "The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows to draw the other into a bargain from his ignorance of that fact and his believing the contrary," a statement permissible perhaps as argument, but, in giving the impression that the effect of concealment on the validity of the marine policy is the same as its effect in the case of other dealings, certainly not a safe guide. Again, from a leading English case given on subrogation,[2] we read: "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong." But how about the well-established rule that if marine insurance is short, the insured is coinsurer for the deficiency, and therefore in case of loss, though less than the face of his policy, he may be entitled to collect only a minute fraction of indemnity? It was not within the plan of the compilers to vouchsafe explanations or qualifications as a part of these case-books. That would savor of the general treatise; and so the first impressions of the student, who relies upon them without other helps, are likely to be erroneous, touching the very fundamentals of insurance law.

Not only then is it obvious that the expert master can deduce general principles from a wilderness of reported cases more successfully than can his inexperienced pupil, but it seems to follow also that for an accurate presentation of unchangeable doctrines and of the maturest views of the courts on mooted points as well, a good text-book furnishes a useful adjunct in the class room.[3] Only thus can the results of past labors of myriads of workers in the judicial field be garnered and sorted out for present use. Within the broad

[1] *Carter* v. *Boehm*, 3 Burr. 1905.

[2] *Castellain* v. *Preston*, 11 Q. B. D. 380.

[3] For the view that the text-book must play its part and that a discussion of selected cases is not the only process of legal culture, see articles by the Hon. Edward J. Phelps and Prof. Christopher G. Tiedeman, 1 Yale Law J. 139, 150; Prof. John Wurts, 17 *id.* 86; the Hon. Simeon E. Baldwin, 14 Harvard Law Rev. 358; Dean Chas. F. Carusi, 2 Am. Law School Rev. 213.

scope of a general treatise principles can be concisely stated and systematically arranged, not only for purposes of study in the first instance, but also for subsequent reference and frequent review; the relations of different cases to one another can be compared and explained; decisions can be given with as great accuracy as in the official reports, but unincumbered by subsidiary points and voluminous opinions; rulings seemingly inconsistent can be harmonized; historical developments can be briefly but adequately summed up, and many particulars and distinctions of greater or less importance which could not possibly be touched upon within the bounds of any selection of isolated cases, can be enumerated or brought within the reach of general rules. Indeed, many legal doctrines are never more clear than when crystallized in the form of approved definitions. To this class in a measure belong the doctrines of insurable interest, seaworthiness and subrogation. A comprehensive treatment of these subjects with a few illustrative cases, especially border line cases, is more effective than a treatment by illustrative cases alone. The statement of the important rule that the insurance company, to serve an operative notice of cancellation under the New York standard fire policy, must also tender the unearned portion of the premium, if the premium has been collected, carries with it its meaning, and calls for little space in a book. On the other hand, such doctrines as warranty, proximate cause, waiver and estoppel, and others, when stated merely as abstractions, produce an impression of vagueness and haziness, and therefore any attempt to embody them in general rules must be accompanied by copious illustration and abundant application. Nevertheless, after all this is well done, we find that the application of such doctrines to concrete cases is not enough. The principles involved are so elusive and so difficult to master, that thorough explanation and analysis, in printed and permanent form, are required at the hands of someone who has made the tenor and trend of a perfect maze of decisions the subject of his special study and practice for a long term of years.

What, then, is the criticism which the legal instructor may justly put upon the conventional text-book? Why did certain successful professors banish all general treatises from their class rooms some thirty-five years ago, actually discourage their pupils from consulting them and substitute in place of them volumes of selected cases transcribed from the official reports? [1] Why did a high exponent of their views, the dean of a law school, dispose of all our text-books

[1] See articles by Dean William A. Keener, and Prof. John C. Gray, 1 Yale Law J. 143, 159.

with the published assertion, "The opinion of the court, giving the reasons for the conclusion reached, is really the only authoritative treatise which we have in our law"?[1] The answer is not far to seek. The usual text-book does not limit itself to a statement of general principles or rules. It devotes the larger part of its space to a description of a multitude of actual decisions separately noticed. The law of insurance is composed of upwards of thirty thousand reported cases, in the English language, to which must be added a great body of statutory law affecting the contract and the relations of the parties. Obviously there must be condensation of some sort for the use of both student and practitioner. In the case-book a comparatively small number of cases are spread out more at length.[2] In the text-book the abridgment is rather in the form and substance of every case. In the latter, the author endeavors in a few words of his own to give the pith and point of each case. This description in many instances owing to brevity is indefinite. The result is well-nigh a series of abstractions lacking not only perspective and color but also precision. Nobody feels full confidence in such a meagre description of a case, convenient though it is for ready reference, until he has looked up the original in the reports to ascertain the exact scope of the decision. Even the accomplished barrister is never content with a perusal of his attorney's brief, but must resort to the official reports to make sure of the cases described.

Accordingly, the conclusion was reached by a few teachers that students should be referred exclusively to original sources of authority supplemented by oral explanations. It was found by experiment, and must be conceded, that the official statement of facts, together with the precise holding of the court based upon them, makes a much more interesting and instructive subject for debate in the class room than a secondhand epitome of a case which amounts to little more than an abstract generalization. This revolt from the use of the text-book, however, went to a needless extreme in the other direction. Many conspicuous advantages of the general treatise were thus altogether lost. Students were overwhelmed with a mass of material, put together in volumes, which they understood fairly well, as they studied it from day to day, but which they could not carry in mind and which they were discouraged, by the magnitude of the task, from attempting to review. Index, table

[1] 1 Yale Law J. 145.

[2] But it must be remembered that the official report is only an abridgment, made from the record at the discretion of the reporter, who may not be an expert in a particular branch of law.

of contents, and syllabus, all were deliberately eliminated from some of the case-books. Definitions, general principles, rules, and explanations, which might have been concisely and admirably stated in the language of the learned editor were also omitted out of deference to the main object sought to be attained.[1] In spite of a bewildering number of selected reports, only a part of the required ground could ever be covered by the new method. The larger portion of each compilation was occupied, as in the official reports, with opinions voluminous, though often curtailed, separating the statements of fact from the decisions rendered by a long course of reasoning, only the drift of which could be remembered. Even points of counsel were often transcribed from the reports. In consequence, we find that in the insurance case-books little space is left for treatment of the clauses of the standard and other modern policies which constitute the principal subject of inquiry by our clients. Reasons and explanations can be provided by the case method only as they chance to be given in reported cases. Thus in these insurance collections we find no case explaining why the peculiar doctrine of warranty was adopted, none explaining the marked difference in the attitude of the courts towards marine and towards fire underwriters, none contrasting the effects of a transfer by subrogation and a transfer by abandonment. Yet one of these volumes of cases numbers over eleven hundred and sixty pages.

Take any practical and important topic you may choose—the appraisal clause of the New York standard fire policy, the pro rata clause as applied to non-concurrent apportionments, the application of coinsurance clauses, the legal rights and relations existing between insured owners and insured first and second mortgagees and their respective insurers, assessments valid and invalid, waiver and estoppel,—study only the necessarily sparse selection of cases spread out at length in the best case volume of practicable dimensions that human skill can devise, and then ask yourself whether it is possible out of such slender resources to gain anything approaching an accurate conception of that aggregation of decisions known as "the law." Will it be as sound a conception as one based upon the wealth of good material close at hand, properly digested and presented? You cannot build your house, if you are content to stop at the cellar foundation, nor can you make a single brick without the necessary

[1] Too much disputation and friction over the issues of isolated cases, it is suggested, has a narrowing influence upon the mind of the novice. Quietly to ponder over the meaning of well worded generalizations, the ripened product of many adjudications, also, is profitable.

ingredients. Put your case-book to some test. Ascertain, for instance, whether it meets the needs of the practicing lawyer at any point or on any important subject. If not, the inference is clear; we must omit from our college hand-book much that the courts have said, in order to make room for much that the courts have done. And such is the very general consensus of opinion.

By the adoption of this plan, involving the omission from individual cases of incidental points and voluminous opinions, the loss to the profession would be irreparable were there no official reports left extant, but the opportunity for gain in simplicity, accuracy, and thoroughness is very great; for example, not to speak of definitions, rules, general principles, and explanations, room is found for a greater number of illustrative cases, detailed at some length, on the important subjects of warranty, proximate cause, waiver, and the clauses of modern policies, in the text of this treatise, covering without notes all told only about three hundred and sixty pages, than in all the insurance case-books combined, including among them part II of the former editions of this book, while as to a few of the many topics omitted from the case-books it may be observed that more than one hundred cases are here cited under the cancellation clause of the standard fire policies, more than fifty on the divisibility of the New York standard fire policy,[1] more than one hundred on assessments valid and invalid, more than one hundred on the employers' liability policy, more than forty on credit insurance, more than a dozen on title insurance, and more than forty on the sue and labor clause of the marine policy.[2]

[1] One of the recent questions for admission to the New York bar was based on this point.

[2] In only one case-book is there a case on the sue and labor clause, *Atchison* v. *Lohre*, 4 App. Cas. 755, holding, for England, that salvage charges and general average are not recoverable under that clause, but as to general average the law in this country is otherwise.

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PART I

GENERAL PRINCIPLES OF INSURANCE LAW

THE LAW OF INSURANCE

PART I

GENERAL PRINCIPLES OF INSURANCE LAW

CHAPTER I

INTRODUCTORY

Nature, Origin, and Description of Insurance and Insurance Companies

§ 1. **Nature of Insurance.**—There are certain serious casualties or accidents, such as shipwreck, fire, and premature death or disability, to which exposure is very common among mankind, but which actually occur in comparatively few instances. It is difficult or impossible to predict or prevent the happening of these misfortunes, but it is often of the greatest moment to those intimately concerned to guard against the loss of property or future earnings which their occurrence entails.

This result may be accomplished by means of a general fund obtained by the imposition of a proportionate contribution, called the premium, upon many who are exposed to the common hazard, out of which the few who actually suffer may be indemnified.

Insurance is the system for distributing losses of this character in the manner just described.[1] Its principal branches are fire, life (including also accident), and marine insurance;[2] and, as an institution, the development of these branches of insurance among

[1] The contract of insurance is "a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks," *People* v. *Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124, citing also many other definitions of insurance. "A contract, whereby for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils," *State* v. *Pittsburg, etc., R. Co.*, 68 Ohio St. 9, 67 N. E. 93, 96 Am. St. R. 635. "A contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest," *Claflin* v. *U. S. Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. R. 528. The written instrument embodying the contract is called a policy. The party promising protection is called the insurer or underwriter. The other party is called the insured or assured, *Great Brit., etc., Ins. Assn.* v. *Wyllie* (1889), 22 Q. B. D. 724, 726. As to benefits accruing from practice of marine insurance, see 1 Duer, Ins., p. 54.

[2] The purposes for which insurance corporations may be organized in New York are enumerated in the Ins. Law of 1892, c. 690, as amended L. 1906, c. 326 and L. 1907, c. 206.

civilized peoples of modern times has assumed a vast and increasing importance.

Fire insurance concerns a larger number of persons probably than any other branch, though life insurance has become very popular, especially in this country,[1] while marine insurance, from its nature, is somewhat restricted and localized, and both the business and the practice of the law of this class of insurance fall into the hands of specialists to a greater extent than in the case of any other.

Certain other forms of insurance, some of them rapidly developing, must not be overlooked, for example, insurance against loss by lightning, tornadoes, hail-storms, boiler explosions, automobile collisions, burglaries and thefts, injuries to plate glass, liability of employers for negligence of employees and for injuries to their employees, defaults or breaches of trust on the part of officers, trustees, agents, or employees, defects in real estate titles, death to live-stock, and to indemnify merchants for loss from giving credit.

Insurance against accident to the body or health of persons may be considered a branch of life insurance, and subject to the same principles of law.

§ 2. **Conditions Necessary.**—The conditions which in general are necessary to the successful operation of a system of insurance are said to be these: There must be a risk of real loss which it ought to be beyond the power of either the insurer or the insured to avert or to hasten; a large number of persons must be liable to the like risk; the casualty contemplated must be likely to fall on a comparatively small number of the persons exposed to the risk of it; the probabilities of its occurrence must be capable of being estimated beforehand with some approximation to certainty; the loss apprehended must be so considerable when it does occur as to be worth providing against; and the cost of that provision must be comparatively so small as not to be prohibitive.

To this list of requisites may be added an honest administration, and some means of securing permanency and integrity to the general fund.

§ 3. **Insurance Companies.**—The bulk of the business of insurance is now transacted by corporations, which, on account of their exemption from liability to natural death, and their facility for rais-

[1] The recent spread of industrial insurance among the working classes may bring up the number in life insurance well-nigh to an equality with the number of those insured against fire loss

ing capital and extending their operations over wide areas of territory, are peculiarly well adapted to serve in the capacity of insurers.[1]

A not inconsiderable part of life insurance business, however, is in the hands of fraternal organizations and benefit societies, guilds, orders, Odd Fellows, Knights, and unions, of one sort or another, most of which are incorporated, and some of which are not. The members of these organizations are governed by their constitution and by-laws, as well as by the statutes and common law of the land.[2]

[1] Where, however, no statute prohibits, individuals or unincorporated associations may lawfully engage in the business of insurance upon compliance with statutory regulations, *Hoadley* v. *Purifoy*, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351; *Barnes* v. *People*, 168 Ill. 425, 48 N. E. 91. Such associations in this country are often known as "Lloyds" or "individual underwriters." See § 11. But it has been held that a statute confining the business of insurance exclusively to corporations is not an unreasonable interference with the freedom of the individual citizen and is a constitutional exercise of police power, *Commonwealth* v. *Vrooman*, 164 Pa. 306, 80 Atl. 217, 25 L. R. A. 250, 44 Am. St. R. 603, three judges dissenting. Compare as to constitutional right of citizen to pursue ordinary occupations without unreasonable interference, *Butcher Union Slaughter House Co.* v. *Crescent City Live Stock, etc., Co.*, 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585; *Lochner* v. *New York*, 198 U. S. 45, 25 S. Ct. 539; *Matter of Jacobs*, 98 N. Y. 98; *Schnaier* v. *Hotel & Import. Co.*, 182 N. Y. 83, 74 N. E. 561; *Wright* v. *Hart*, 182 N. Y. 330, 75 N. E. 404. A statute limiting business of banking to corporations is held constitutional in *State* v. *Woodmansee*, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420. But see *State* v. *Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. R. 756. The interesting question involved in such an inquiry is not destined, probably, to play a very important part eventually in the law of insurance, since it is easily within the power of a legislature to pass binding regulations governing the conduct of insurance, which it would be impracticable for individual underwriters generally to observe with any assurance of pecuniary profit to themselves. See § 6. *Gundling* v. *Chicago*, 177 U. S. 183, 188, 20 S. Ct. 633; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, 21, 22, 22 S. Ct. 1. Individual underwriters have already been driven out of business to some extent by state statutes. N. Y. Laws, 1903, c. 471, 1902, c. 297, 1892, c. 690, § 57.

[2] *Fidelity Mut. Life Assn.* v. *Mettler*, 185 U. S. 308, 46 L. Ed. 922, 22 S. Ct. 662; *Modern Woodmen* v. *Tevis*, 117 Fed. 369, 54 C. C. A. 293; *Treadway* v. *Hamilton Mut. Ins. Co.*, 29 Conn. 68; *People* v. *Grand Lodge*, 156 N. Y. 533, 51 N. E. 299 (holding that the constitution, by-laws, and certificate when authorized by law form the contract upon which the rights of the parties rest). "The modern mutual benefit life insurance organizations generally called benefit societies have a dual nature and in determining their responsibilities, powers, and rights and those of their members this fact must never be lost sight of. . . . They are, in the first place, social organizations or clubs. . . . They are also business organizations. . . . These societies are the poor man's life insurance companies, for they furnish to those of moderate income a cheap and simple substitute for life insurance." Bacon, Ben. Societies, §§ 1*a*–3. "A benevolent association which issues benefit certificates to its members payable from a fund maintained by assessments upon the certificate holders is in effect a mutual life insurance company and is governed by the general rules of law applicable to such companies," *Modern Woodmen* v. *Coleman*, 68 Neb. 660 (1903), 94 N. W. 814, 96 N. W. 154. "The chief difference between ordinary contracts of life insurance companies and those usual in benefit societies is that in the former the policy and documents referred to in it contain the agreement, while in the latter the certificate together with the charter and by-laws are to be looked to for the contract," *Shipman* v. *Protected Home Circle*, 174 N. Y. 398, 409, 67 N. E. 83,

§ 4. What are Insurance Companies.—In the case of beneficiary and other associations, the furnishing of insurance may be only one of many objects of the organization, perhaps purely incidental at that, and the question sometimes arises whether the company granting insurance is to be regarded as an insurance company,

63 L. R. A. 347. The same doctrine governs the distribution of assets after insolvency of the company, *Betts* v. *Conn. Life Ins. Co.*, 78 Conn. 442, 62 Atl. 345. By-laws or other rules of the beneficiary association may be expressly made a part of the contract of insurance by reference, *Robson* v. *United Order of Foresters*, 93 Minn. 24, 100 N. W. 381. But without express reference it has been held that they are binding upon the members, *Conway* v. *Supreme Council*, 131 Cal. 437, 63 Pac. 727; *Farmers' Mut. Hail Ins. Assn.* v. *Slattery*, 115 Iowa, 410, 88 N. W. 949; *Maginnis* v. *Aid Assn.*, 43 La. Ann. 1136, 10 So. 180; *Supreme Council* v. *Brashears*, 89 Md. 624, 43 Atl. 866; *Newton* v. *Northern Mut. Relief Assn.*, 21 R. I. 476, 44 Atl. 690. *United Moderns* v. *Colligan*, 34 Tex. Civ. App. 173, 77 S. W. 1032. The member is bound to take notice of them, though not specifically referred to in his certificate or contract, *Clark* v. *Mut. Res. Fund L. Assn.*, 14 App. D. C. 154, 43 L. R. A. 390; *Pfister* v. *Gerwig*, 122 Ind. 567, 23 N. E. 1041; *Sulz* v. *Mut. Res. Fund Life Assn.*, 145 N. Y. 563, 568, 40 N. E. 242, 28 L. R. A. 379; *United Moderns* v. *Colligan*, 34 Tex. Civ. App. 173, 77 S. W. 1032. The association in its contract often expressly reserves the right to subsequently change the constitution and by-laws. The members will then be bound by such changes if not unreasonable, *Bowie* v. *Grand Lodge*, 99 Cal. 392, 34 Pac. 103; *Gilmore* v. *Knights of Columbus*, 77 Conn. 58, 58 Atl. 223 (occupation of switchman added to extra hazards). *Covenant Mut. Life Ins. Co.* v. *Kentner*, 188 Ill. 431, 58 N. E. 966; *Shipman* v. *Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 (suicide clause made retroactive), but see *Bottjer* v. *Supreme Council*, 78 App. Div. 546, 75 N. Y. Supp. 805, 79 N. Y. Supp. 684. But the courts are disposed to regard the rights of a member as so far vested that he should be protected from unreasonable changes in the by-laws, though he has agreed to be bound by changes, *Hall* v. *West. Trav. Acc. Assn.*, 69 Neb. 601, 96 N. W. 170 (vertigo); *Russ* v. *Modern Brotherhood*, 120 Iowa, 692 (1903), 95 N. Y. 207 (definition of "broken leg" reasonable); *Starling* v. *Supreme Council*, 108 Mich. 440, 66 N. W. 340, 62 Am. St. R. 709 (definition of total disability); *Ayers* v. *Grand Lodge*, 188 N. Y. 280 (excluding occupation of liquor selling unreasonable); *Evans* v. *So. Fier, etc., Assn.*, 152 N. Y. 453, 75 N. E. 317; *Beach* v. *Supreme Tent*, 177 N. Y. 100, 69 N. E. 281; *Wiedynska* v. *Pulaski, etc., Soc.*, 110 App. Div. 732, 97 N. Y. Supp. 413; *Williams* v. *Supreme Council*, 80 App. Div. 402, 80 N. Y. Supp. 713 (definition of total disability unreasonable). *Matter of Brown* v. *Order of Foresters*, 176 N. Y. 132, 68 N. E. 145; *Berg* v. *Verein*, 90 App. Div. 474, 86 N. Y. Supp. 429; *Strauss* v. *Mut. Res. Fund Life Assn.*, 128 N. C. 465, 39 S. E. 55; *Sovereign Camp* v. *Fraley*, 94 Tex. 200, 59 S. W. 879, 51 L. R. A. 898. As to proper and improper amendments see *Parish* v. *N. Y. Produce Exchange*, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149. Thus it has repeatedly been held that it is not permissible for the company to change the amount payable from $5,000 to $2,000, *Supreme Council* v. *Jordan*, 117 Ga. 808, 45 S. E. 33; *Russ* v. *Supreme Council*, 110 La. 588, 34 So. 697, 98 Am. St. R. 469; *Porter* v. *American Legion*, 183 Mass. 326, 67 N. E. 238; *Newhall* v. *Supreme Council*, 181 Mass. 111, 63 N. E. 1; *Langan* v. *Supreme Council*, 174 N. Y. 266, 66 N. E. 932. And see *McAlarney* v. *Supreme Council*, 131 Fed. 538; *Smith* v. *Supreme Council*, 94 App. Div. 357, 88 N. Y. Supp. 44. But the contract cannot be changed by subsequent amendments of constitution or by-laws if no such right is reserved, *Miller* v. *Tuttle* (Kan. 1903), 73 Pac. 88; *Weber* v. *Supreme Tent*, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. R. 753 (unreasonable change from one to five years in self-destruction clause). *Fargo* v. *Supreme Tent*, 96 App. Div. 491, 89 N. Y. Supp. 65 (suicide clause).

and its certificate or contract, an insurance contract, within the meaning of the body of statutes and decisions relating to this subject.

Thus, it has been held that the relief department of a railway company, organized to collect and manage a common fund and to make payments from it upon the death or injury of members, is not an insurance company, nor its establishment by the railway company an act *ultra vires;* [1] nor the contract between the railway company and the member an insurance contract.[2] But where a corporation in return for a specified consideration undertook to guarantee a fixed revenue per acre from farming lands, and agreed to pay such fixed amount for the crop irrespective of its actual value, the contract was held to be one of insurance,[3] and a corporation engaged in the business of guaranteeing the fidelity of persons holding places of trust, and the performance of contracts, or undertakings, is an insurance company.[4]

Fraternal beneficiary associations and similar organizations are in general held to be life insurance companies,[5] but special regard

[1] *Donald* v. *Chi., B. & Q. Ry. Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492; *Maine* v. *Chi., B. & Q. R. Co.*, 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *State* v. *Pittsburg, etc., Ry. Co.*, 68 Ohio, 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. R. 635; *Johnson* v. *Phil. & R. R. Co.*, 163 Pa. 127, 29 Atl. 854. But see *Mason* v. *Mason*, 160 Ind. 191, 65 N. E. 585.

[2] *Beck* v. *Penn. R. R. Co.*, 63 N. J. L. 232, 43 Atl. 908, 76 Am. St. R. 211. Many railways have such departments coupled with hospital and other privileges, in return for which the member often must agree to release the railway from common-law liability and to allow abatement of part of his salary. Such agreement is binding, *Chi., B. & Q. R. Co.* v. *Curtis*, 51 Neb. 442, 71 N. W. 42; *Ringle* v. *Penn. R. R.*, 164 Pa. 529, 30 Atl. 492. The business of inspecting and certifying as to the sanitary condition of buildings and premises is not insurance, *People* v. *Rosendale*, 142 N. Y. 126, 36 N. E. 806. Nor an agreement in consideration of a specified annual payment to repair or replace bicycles injured or destroyed by accident, *Commonwealth* v. *Provident Bicycle Assn.*, 178 Pa. 636, 36 Atl. 197, 36 L. R. A. 589.

[3] *State* v. *Hogan*, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. R. 759. So also an agreement with a firm to purchase for a fixed price the unsatisfied accounts which it might have with insolvent or judgment debtors, *Claflin* v. *U. S. Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. R. 528.

[4] *American Surety Co.* v. *Pauly*, 170 U. S. 133, 18 S. Ct. 563, 42 L. Ed. 987; *People* v. *Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124. As to whether contract is one of suretyship or one of insurance, see *Dane* v. *Mtge. Ins. Corp.* (1894), 1 Q. B. 54; *Denton's Estate* (1904), 2 Ch. 178. For comparison between contract of guarantee and contract of insurance, see *Anglo, etc., Bk.* v. *London, etc., Ins. Co.* (1904), 10 Com. Cas. 8; *Seaton* v. *Heath* (1899), 1 Q. B. 792.

[5] *Supreme Lodge* v. *Wellenvoss*, 119 Fed. 671, 674, 56 C. C. A. 287 ("they do not issue policies of insurance strictly speaking, but the benefit certificate is a contract of insurance none the less"). *Brown* v. *Modern Woodmen*, 115 Iowa, 450, 88 N. W. 965; *Catholic Knights* v. *Board of Review*, 198 Ill. 441, 64 N. E. 1104; *State* v. *Nichols*, 78 Iowa, 747, 41 N. W. 4; *Sherman* v. *Commonwealth*, 82 Ky. 102, 105; *Sims* v. *Commonwealth*, 114 Ky. 827, 71 S. W. 929; *Kern* v. *Supreme Council*, 167 Mo. 471; 67 S. W. 252, as to foreign companies; *Modern Woodman* v. *Coleman* 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Alden* v. *Supreme Tent*, 178 N. Y. 535, 71 N. E. 104 (construing N. Y.

must be had to the phraseology of the statutes applicable in each case.[1]

§ 5. **Corporations Classified.**—In this country insurance corporations are usually organized under general laws instead of special charters and are divided into stock, mutual, and mixed companies.

A stock or proprietary company has for its basis a capital stock, owned by stockholders who constitute the corporation,[2] and who may be quite distinct from the insured. Its profits over and above the liabilities of the company and required accumulations are divided in the shape of dividends among the shareholders.

In strictly mutual companies there are no stockholders, but the insured themselves are the members of the company, entitled to manage its affairs through officers and agents and to receive any share of divisible surplus over and above the funds retained to meet losses and other liabilities.[3] Thus, the members of a mutual company in their aggregate or corporate capacity are the insurers while individually they are the insured. While a stockholder need not be one of those insured by his company, one insuring in a mutual company thereby becomes a member of the association and thus occupies in a sense the dual relationship of insurer and insured.[4] The capital fund of such organizations is often obtained by cash premiums or assessable premium notes or both, contributed by the members ratably.[5]

Ins. L. Art. 7); *Lubrano* v. *Imperial Council*, 20 R. I. 27, 37 Atl. 345, 38 L. R. A. 546, where the benefit accruing upon the death or disability of a member was conditioned upon the collection of assessments. *Supreme Council* v. *Larmour*, 81 Tex. 71, 16 S. W. 633; *Daniher* v. *Grand Lodge*, 10 Utah, 110, 37 Pac. 245. *Contra*, Pennsylvania, where beneficiary associations are classed as philanthropic societies, *Commonwealth* v. *Eq. Ben. Assn.*, 137 Pa. 412, 18 Atl. 1112; *N. Masonic Aid Assn.* v. *Jones*, 154 Pa. 99, 26 Atl. 253.

[1] *Newton* v. *S. W. Mut. L. Assn.*, 116 Iowa, 311, 317, 90 N. W. 73; as to Missouri statute see *Tcomey* v. *Supreme Lodge*, 147 Mo. 129, 48 S. W. 936 (suicide a defense); *Hudnall* v. *Modern Woodmen*, 103 Mo. App. 356, 77 S. W. 84, Rev. Stat. (Mo.) 1899, §§ 1408–1410. Fraternal beneficiary associations often are expressly excepted from the application of certain general insurance laws, the state regarding them as so far philanthropic that they ought to be specially encouraged, *Marshall* v. *Grand Lodge*, 133 Cal. 686, 66 Pac. 25; *Schillinger* v. *Boes*, 85 Ky. 357, 3 S. W. 427; *State ex rel. Royal Arcanum* v. *Benton*, 35 Neb. 463, 53 N. W. 567. And see N. Y. Ins. L. § 57.

[2] *Commercial Fire Ins. Co.* v. *Board of Revenue*, 99 Ala. 1, 14 So. 490, 42 Am. St. R. 17.

[3] *Carlton* v. *Southern Mut. Ins. Co.*, 72 Ga. 371.

[4] *Treadway* v. *Hamilton Mut. Ins. Co.*, 29 Conn. 68; *Corey* v. *Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490; *Lehigh Valley Fire Ins. Co.* v. *Schimpf*, 13 Phila. (Pa.) 515; *Great Brit., etc., Asso.* v. *Wyllie* (1889), 22 Q. B. D. 710, and opinion of Mathew, J., at p. 723. But a mere applicant for insurance is not yet a member, *Russell* v. *Detroit Mut. Fire Ins. Co.*, 80 Mich. 407, 45 N. W. 356; *Eilenberger* v. *Protective Mut. Fire Ins. Co.*, 89 Pa. 464.

[5] *Spruance* v. *Farmers' & M. Ins. Co.*, 9 Colo. 73, 10 Pac. 285; *Taylor* v. *North Star Mut. Ins. Co.*, 46 Minn. 198, 48 N. W. 772.

Coöperative assessment companies and fraternal beneficiary associations are organized upon the mutual plan and for the sole benefit of the members. In the case of an assessment company of any class assessments are generally levied to liquidate specific losses as they occur,[1] whereas in the regular or old-time companies a fixed premium is paid in cash in advance at stated intervals.[2]

Mixed companies partake of the nature of stock and mutual companies, and in them a certain portion of the profits is paid to the stockholders, and the remainder distributed among the insured.

In the United States, as a general thing, in the laws governing the organization and scope of insurance corporations, the business of ocean-marine, fire, and life insurance, respectively, is kept somewhat distinct and exclusive; in New York and elsewhere life companies are not allowed to take marine or fire risks,[3] but fire insurance companies are often organized to insure against inland marine disasters, lightning, and tornadoes.[4]

§ 6. **Statutory Safeguards.**—Every state has now its system of statutory laws, not only governing the organization of insurance companies and associations, and prescribing their powers and duties but also regulating their business.[5] For the better protection of the

[1] *McDonald* v. *Bankers' Life Assn.*, 154 Mo. 618, 55 S. W. 999; *Modern Woodmen* v. *Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *State* v. *Matthews*, 58 Ohio St. 1, 49 N. E. 1034, 40 L. R. A. 418; *State* v. *National Acc. Soc.*, 103 Wis. 208, 79 N. W. 220. The company is bound to levy such assessment, *Lawler* v. *Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113 (containing specimen of certificate and by-laws); *Railway Pass., etc., Assn.* v. *Robinson*, 147 Ill. 138, 35 N. E. 168; *Fitzgerald* v. *Eq. Reserve Fund*, 15 Daly, 229, 24 N. Y. St. R. 493, 5 N. Y. Supp. 837, but not until proper proofs of death are received; *Coyle* v. *Ky. Grangers, etc., Soc.*, 8 Ky. L. R. 604, 2 S. W. 676. Not for anticipated losses, *Crossman* v. *Mass. Ben., etc., Assn.*, 143 Mass. 435, 9 N. E. 753. The existence of the lodge system of organization and social intercourse, often coupled with a secret ritual, seems to be a distinguishing feature of the fraternal benefit society, *Supreme Commandery* v. *Hughes*, 114 Ky. 175, 24 Ky. L. R. 984, 70 S. W. 405; *Brotherhood Acc. Co.* v. *Linehan*, 71 N. H. 7, 51 Atl. 266. And see N. Y. Ins. L. § 9.

[2] Assessment company allowed to change to old line plan, *Wright* v. *Minn. Mut. Life Ins. Co.*, 193 U. S. 657, 24 S. Ct. 549, 48 L. Ed. 832. And see *Schwarzwalder* v. *Tegen*, 58 N. J. Eq. 319, 43 Atl. 587. Some companies issue what is known as industrial insurance for the benefit more especially of the working classes, the policies being for comparatively small amounts with weekly premiums, *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 180, 68 N. E. 252, 98 Am. St. R. 656; *Newbold Friendly Soc.* v. *Barlow* (1893), 2 Q. B. 128. And see N. Y. Ins. L. §§ 91, 92, 101. In some countries, notably Germany, the government conducts a system of industrial insurance.

[3] N .Y. Ins. L. § 70.

[4] N. Y. Ins. L. § 110.

[5] *State* v. *Stone*, 118 Mo. 388, 402, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. R. 388; *State* v. *Ackerman*, 51 Ohio St. 163, 190, 37 N. E. 828, 24 L. R. A. 298 (no license); for example, N. Y. General Insurance Law, 1892, c. 690, as amended L. 1906, c. 326.

insured, it has become the custom throughout the states of this Union, as well as in England, to establish an insurance department, or superintendent or commissioner of insurance, or other official [1] with whom, as a rule, foreign insurance companies doing business within the state, and domestic life insurance companies, with certain exceptions, are required, upon organization or commencement of business within the state, to make deposits of money or equivalent securities, which are held as collateral by the department for the security of the insured.[2]

The insurance department receives stated reports under oath from each company, setting forth with some detail its business affairs and financial condition, including its assets and debts, amount of insurance, and other particulars.[3] It also has a visitorial power over the companies, to see that their investments are made according to law, and to examine their books and papers in case of suspected misconduct or insolvency. If it appear that any company falls below the statutory standard of solvency, proper steps may be taken to wind it up and distribute its assets.

In addition to these safeguards, we find laws prescribing a minimum capital stock; laws governing the character of investments

[1] However desirable and economical it might be to place a uniform and effective federal bureau in charge, Congress has no jurisdiction to superintend the business of insurance generally throughout the country, since it has repeatedly been decided that the issuance of a policy by a corporation of one state to a citizen of another is not interstate commerce within the meaning of the federal constitution, *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357 (fire); *Phila. Fire Asso.* v. *New York*, 119 U. S. 110, 7 S. Ct. 108; *Hooper* v. *California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (marine); *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 401, 20 S. Ct. 962 (life, etc.); *List* v. *Commonwealth*, 118 Pa. 322, 12 Atl. 277; *D'Arcy* v. *Mut. Life Ins. Co.*, 108 Tenn. 568, 573, 69 S. W. 768.

[2] Primarily, for the resident insured. Deposit with insurance department is a trust fund and cannot be withdrawn and used like general capital, *Lancashire Ins. Co.* v. *Maxwell*, 131 N. Y. 286, 30 N. E. 192. Interest on deposited securities follows the principal; a receiver of the corporation cannot take it, *People* v. *Ins. Co.*, 147 N. Y. 25, 41 N. E. 423. As to how far an insurance commissioner may or may not in his discretion refuse license to a foreign company applying for admission to do business, see *Am. Casualty Co.* v. *Fyler*, 60 Conn. 448, 22 Atl. 494; *People* v. *Van Cleave*, 183 Ill. 330, 55 N. E. 698; *Citizens' Life Ins. Co.* v. *Commissioner*, 128 Mich. 85, 87 N. W. 126; *U. S. Fidelity & G. Co.* v. *Linehan*, 73 N. H. 41, 58 Atl. 956; *Brotherhood Acc. Co.* v. *Linehan*, 71 N. H. 7, 51 Atl. 266; *People* v. *Payn*, 59 N. Y. Supp. 851, aff'd 60 N. Y. Supp. 1146, 55 N. E. 849; *State* v. *Vorys*, 69 Ohio, 56, 68 N. E. 580; *Bankers' Life Ins. Co.*, v. *Fleetwood*, 76 Vt. 297, 57 Atl. 239. The superintendent may be compelled by mandamus to grant license or file proper certificate if company complies with the statute, *People* v. *Payn*, 161 N. Y. 229, 55 N. E. 849 (his duties largely ministerial); *State* v. *Vorys*, 69 Ohio, 56, 68 N. E. 580. Similarity of name to that of home corporation is good ground for discretionary refusal to grant certificate to foreign corporation, *Employers' Assurance Corporation* v. *Employers' Ins. Co.*, 78 Hun, 446, 29 N. Y. Supp. 217.

[3] Statute requiring such annual report is constitutional, *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 446, 14 S. Ct. 868.

and restricting expenses, and commissions to agents; laws limiting the amount of insurance upon one risk; laws requiring the companies, before paying out dividends or profits, to accumulate and reserve a certain amount of assets with which to meet future liabilities; laws directing foreign companies to appoint a representative within the state upon whom service of papers can be made; [1] laws limiting business to authorized and licensed companies; [2] and laws prohibiting the removal of actions from state to federal courts upon penalty of loss of license to do business within the state.[3]

The object of insurance is to compensate the insured for loss and not to prevent the occurrence of loss; but in many of the cities the fire insurance companies have established a system of patrol with statutory powers, which does much to prevent the spread of fire, and to protect from unnecessary injury or theft the property exposed during and after the conflagration.

Any state has the right to control the conduct of insurance busi-

[1] In the absence of superintendent, deputy may take his place, *People* v. *Hopkins*, 55 N. Y. 74, and be served with process, *Quinn* v. *Royal Ins. Co.*, 81 Hun, 207, 30 N. Y. Supp. 714, but service by mail is not good, *Farmer* v. *Nat. Life Assn.*, 138 N. Y. 265, 33 N. E. 1075. Service on Labor Day is valid, *Flynn* v. *Union Surety & G. Co.*, 170 N. Y. 145, 63 N. E. 61. Judgment valid founded upon service of process upon insurance commissioner, *Woodward* v. *Mut. Res. Fund Life Ins. Co.*, 178 N. Y. 485; 71 N. E. 10; *Biggs* v. *Mut. Res. Fund L. Assn.*, 128 N. C. 5, 37 S. E. 955. Designation of person to be served with process, *McClure* v. *Supreme Lodge*, 41 App. Div. 131, 59 N. Y. Supp. 764; *Milwaukee Trust Co.* v. *Germania Ins. Co.*, 106 La. 669, 31 So. 298, 299. Discontinuance of business does not revoke power of attorney to insurance commissioner, nor can company cancel while obligations remain, *Mutual Res. Fund Life Assn.* v. *Phelps*, 190 U. S. 147, 23 S. Ct. 707; *Collier* v. *Mut. Res. Fund Life Assn.*, 119 Fed. 617 (but see 184 N. Y. 136); *Johnston* v. *Mut. Res. Fund Life Assn.*, 104 App. Div. 544, 93 N. Y. Supp. 1048; *Hunter* v. *Life Assn.*, 97 App. Div. 222, 89 N. Y. Supp. 849; *Moore* v. *Life Assn.*, 129 N. C. 31, 39 S. E. 637.

[2] A state may penalize the soliciting by agents within its borders, of contracts of insurance in unlicensed foreign companies or declare such contracts void, *Nutting* v. *Massachusetts*, 183 U. S. 553, 22 S. Ct. 238, 46 L. Ed. 324; *List* v. *Commonwealth*, 118 Pa. 322, 12 Atl. 277, but cannot prevent its own citizens from making a valid contract outside the state with such a company though the property be located within the state, *Allgeyer* v. *Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832; *Hooper* v. *People*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297; *Commonwealth* v. *Biddle*, 139 Pa. 605, 21 Atl. 134, 11 L. R. A. 561; *French* v. *People*, 6 Colo. App. 311, 40 Pac. 463; *Pierce* v. *People*, 106 Ill. 11, 46 Am. Rep. 683, and see *Baker* v. *Spaulding*, 71 Vt. 169, 42 Atl. 982; and a state cannot subject to its laws and penalties the property of a foreign corporation situated outside the state, *Douglass* v. *Ins. Co.*, 138 N. Y. 209, 33 N. E. 938.

[3] Federal courts cannot by agreement be ousted of their jurisdiction, and a statute requiring such agreement from a foreign company as a prerequisite to a license is unconstitutional, *Home Ins. Co.* v. *Morse*, 20 Wall. 450, 22 L. Ed. 367; but removal of cause by foreign company in violation of its agreement with the state has been held sufficient ground for revocation of its license to do business within the state inasmuch as the state may revoke a license either with or without cause, *Security Mut. L. Ins. Co.* v. *Prewitt*, 202 U. S. 246, 26 S. Ct. 619. *Doyle* v. *Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148.

ness by the enactment of suitable statutory regulations.[1] It may make a compliance with these by a foreign company the condition of doing business within the state, or it may capriciously shut its doors to a foreign corporation without any reason at all.[2]

But under the federal constitution which secures to the citizens of each state the privileges of citizens in the several states it has been held unconstitutional to impose upon individual non-residents, such as unincorporated Lloyd associations, restrictions or conditions not imposed upon resident individuals.[3]

§ 7. **Contracts with Unlicensed Companies.**—Where a statute expressly declares the policy void if issued within the state by a foreign company which has not complied with statutory require-

[1] *Fidelity Mut. Life Ins. Co.* v. *Mettler*, 185 U. S. 308, 22 S. Ct. 662, 46 L. Ed. 922; *Hancock Mut. Life Ins. Co.* v. *Warren*, 181 U. S. 73, 21 S. Ct. 535; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832; *Commonwealth* v. *Vrooman*, 164 Pa. 306, 80 Atl. 217, 25 L. R. A. 250. A law making it a crime for an agent to allow a rebate on the premium is constitutional, *People* v. *Formosa*, 131 N. Y. 478, 30 N. E. 492. So is a law allowing a counsel fee or extra damages to the successful plaintiff if compelled to litigate the issue of total loss, *Farmers' & M. Ins. Co.* v. *Dabney*, 189 U. S. 301, 23 S. Ct. 565; *Ins. Co.* v. *Mettler*, 185 U. S. 308, 22 S. Ct. 662. Exchanges and associations of underwriters, needful to the systematic conduct of the business are not illegal as trusts or in restraint of trade, though incidentally they may establish a fixed tariff of premium rates, *Continental Ins. Co.* v. *Board*, 67 Fed. 310; *Queen Ins. Co.* v. *State*, 86 Tex. 250; but see *McCarter* v. *Firemen's Ins. Co.* (N. J. Eq. 1905), 61 Atl. 705, reargument granted, 66 Atl. 398. But such combinations may be forbidden by statute.

[2] *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Phil. Fire Asso.* v. *N. Y.*, 119 U. S. 110, 7 S. Ct. 108; *Barron* v. *Burnside*, 121 U. S. 186, 7 S. Ct. 931. And what a state may do with corporations of its own creation it may do with foreign corporations admitted into the state, *Orient Ins. Co.* v. *Dagge*, 172 U. S. 557, 19 S. Ct. 281; see also *McClain* v. *Provident Sav. L. Assn. Soc.*, 110 Fed. 80, 49 C. C. A. 31. While, however, state legislatures may impose such conditions and limitations upon a foreign company as they deem proper, yet, after its admission its property must be dealt with on terms of equality with the property of the citizen, *State* v. *Fleming* 70 Neb. 523, 97 N. W. 1063. Its vested rights must be respected, *Manchester F. Ins. Co.* v. *Herriott*, 91 Fed. 711. Insurance companies may be ousted for violating express statutes against pools, trusts, etc. *State* v. *Fireman's Fund Ins. Co.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363. Sending an unlicensed agent to adjust a loss is not "transacting the business of insurance" within the state, *People* v. *Gilbert*, 44 Hun, 322. Citizens of the state may obtain insurance by mail from foreign unauthorized corporation, the contract being made outside the state, *People* v. *Imlay*, 20 Barbour, 68.

[3] *State* v. *Board of Insurance Com'rs*, 37 Fla. 564, 20 So. 772, 33 L. R. A. 288; *Barnes* v. *People*, 168 Ill. 425, 48 N. E. 91; *State* v. *Stone*, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. R. 388; *Noble* v. *Mitchell*, 164 U. S. 367, 17 S. Ct. 110, 41 L. Ed. 472. But compare *State* v. *Ackerman*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298, in which it was held that non-resident individuals must, like corporations, at least secure a license, cited apparently with approval in *Hancock Mut. Life Ins. Co.* v. *Warren*, 181 U. S. 73, 74, 21 S. Ct. 535. A corporation is not a citizen within this clause of the federal constitution, *Barnes* v. *People*, 168 Ill. 425, 430, 48 N. E. 91. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 20 S. Ct. 518.

ments of the state, it cannot be enforced by either party.[1] But if, as is usual, the act merely prohibits and penalizes the transaction of business until certain prescribed conditions have been fulfilled by a company seeking admission to the state, many cases hold that the company cannot escape the obligations of its contract by reason of its own dereliction [2] though not in a position to enforce the collection of premiums, or assessments, from the insured.[3] If, however, the act merely imposes upon the insurer or its agent a penalty for conducting the business of insurance in violation of the terms prescribed, in some jurisdictions the contract is held enforceable by both parties, the specified penalty being held to be exclusive of any other.[4]

[1] *Wood* v. *Ins. Co.*, 8 Wash. 427, 36 Pac. 267, 40 Am. St. R. 917, holding also that if the contract is void where made it will not be enforced in another state. But see *Western Mass. F. Ins. Co.* v. *Hilton*, 42 App. Div. 52, holding that policy of non-admitted company will be enforced in New York if made in Massachusetts, and valid there. So also *Swing* v. *Brister*, 87 Miss. 516 (March, 1906), 40 So. 146, citing cases; and *Swine* v. *Hill*, 165 Ind. 411 (Oct., 1905), and see § 6. The state has the power to pass such a statute, *Pierce* v. *People*, 106 Ill. 11, 46 Am. Rep. 683.

[2] *Watertown Fire Ins. Co.* v. *Rust*, 141 Ill. 85, 30 N. E. 772, statute is for protection not injury of insured; *Phenix Ins. Co.* v. *Penn. R. Co.*, 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; *Ganser* v. *Firemen's Fund Ins. Co.*, 34 Minn. 372, 25 N. W. 943; *Marshall* v. *Reading Fire Ins. Co.*, 78 Hun, 83, 29 N. Y. Supp. 334, aff'd 149 N. Y. 617, policy of foreign company not void though agent failed to obtain statutory license; *Swan* v. *Watertown Fire Ins. Co.*, 96 Pa. 37. Mere mistake or neglect of state official will not render contract void, *American Ins. Co.* v. *Butler*, 70 Ind. 1; *American Ins. Co.* v. *Pressell*, 78 Ind. 442.

[3] *Cincinnati Mut. Health Assur. Co.* v. *Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Parker* v. *Lamb & Sons*, 99 Iowa, 265, 68 N. W. 686, 34 L. R. A. 704; *Williams* v. *Cheney*, 8 Gray (Mass.), 206; *Swing* v. *Cameron* (Mich.) (July, 1906), 108 N. W. 506, citing cases; *Seamans* v. *Temple Co.*, 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. R. 457; *Seamens* v. *Mill Co.*, 66 Minn. 205, 68 N. W. 1065 *Cowan* v. *London Assur. Corp.*, 73 Miss. 321, 19 So. 298, 55 Am. St. R. 535; *Commonwealth Mut. Fire Ins. Co.* v. *Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. R. 545; *Haverill Ins. Co.* v. *Prescott*, 42 N. H. 547, 80 Am. Dec. 123; (but see *Union Ins. Co.* v. *Smart*, 60 N. H. 458); *Swing* v. *Munson*, 191 Pa. 582, 43 Atl. 342, 58 L. R. A. 223, 71 Am. St. R. 772; *Rose* v. *Kimberly & C. Co.*, 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556, 46 Am. St. R. 855; but a premium paid cannot be recovered back, *Leonard* v. *Washburn*, 100 Mass. 251. An unlicensed insurer having paid a loss is entitled to subrogation, *St. Louis, etc., R. Co.* v. *Commercial Union Ins. Co.*, 139 U. S. 223, 11 S. Ct. 554, 35 L. Ed. 154; *St. Louis, etc., R. Co.* v. *Fire Assn.*, 55 Ark. 163; 18 S. W. 43, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83; *Lumbermen's Mut. Ins. Co.* v. *Kansas City, etc., R. Co.*, 149 Mo. 165, 50 S. W. 281; *Phenix Ins. Co.* v. *Penn. R. Co.*, 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405. And the better view is that it is also entitled to compel its own agent to account for premiums collected, though on business unauthorized by statute, *Rockford Ins. Co.* v. *Roger*, 9 Colo. App. 121, 47 Pac. 848; *Georgia Home Ins. Co.* v. *Boykin*, 137 Ala. 350, 34 So. 1012; *Penn. Mut. Ins. Co.* v. *Bradley*, 21 N. Y. Supp. 876, aff'd 142 N. Y. 660, 37 N. E. 569; *contra*, *People's Mut. Ben. Soc.* v. *Lester*, 105 Mich. 716, 63 N. W. 977, but the insurance company cannot recover on its agent's note for uncollected premiums on such business. *New Hampshire Ins. Co.* v. *Kennedy*, 96 Tenn. 711, 36 S. W. 709.

[4] *State Mut. Fire Ins. Assn.* v.

§ 8. **License to Procure from Non-admitted Companies.**—Many fire risks are so valuable or so hazardous that it is impossible to fully cover them in authorized companies. Statutes have been passed under which agents are licensed to protect the deficit with non-admitted companies.[1]

§ 9. **Origin of Insurance and Insurance Law.**—The origin of insurance is obscure. Loans on bottomry are of ancient date, and from this maritime usage the earliest form of insurance may have developed. The practice of marine underwriting probably started in connection with the revival of commerce in the twelfth or thirteenth century. At that time the ocean commerce of Christendom was largely undertaken by the Lombards, merchants of the north of Italy, who had established trading companies generally throughout Europe, and who appear to have carried the practice of marine insurance wherever they had mercantile dealings. The word "policy" is of Italian derivation.[2]

At its initial stage, the contract of insurance was underwritten by individuals and was regulated by mercantile custom, which became the foundation of all the laws and codes subsequently enacted upon the subject.

A recorded mention of insurance in England in 1548 indicates that the practice of insuring had been in vogue there for some time,[3] and somewhat later, on opening Queen Elizabeth's first parliament, Lord Bacon said: "Doth not the wise merchant in every adventure of danger give part to have the rest assured?" But for many years after its introduction into that country, the law of insurance was

Brinkley Stave & Heading Co., 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. R. 191; *Pennypacker* v. *Ins. Co.* 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. R. 395; *Union Mut. Life Ins. Co.* v. *McMillen*, 24 Ohio St. 67; *Toledo Tie & Lumber Co.* v. *Thomas*, 33 W. Va. 566, 11 S. E. 37, 35 Am. St. R. 925; and see *Fritts* v. *Palmer*, 132 U. S. 282, 10 S. Ct. 93, 33 L. Ed. 317.

[1] N. Y. Gen. Ins. L. § 137. Affidavits are filed showing the facts. Such companies often give brief stipulation in substance to follow action and adjustment of some prominent domestic company. If a broker improperly place order with non-authorized company he is personally responsible for loss, *Landusky* v. *Beirne*, 80 App. Div. 272, aff'd 178 N. Y. 551; *Shepard* v. *Davis*, 42 App. Div. 462; *Burges* v. *Jackson*, 18 App. Div. 296, aff'd 162 N. Y. 632, 57 N. E. 1105.

[2] From Latin *pollicitatio*, a promise, or possibly from *polypticum*, a folded writing. A "chamber of assurance" was established in the city of Bruges as early as A. D. 1310. A form of policy, supposed to be the oldest extant, will be found in the Appendix, ch. II, the original of which is in the Italian language, and was established by the statute of Florence, January 28, 1523. The earliest extant English policy is dated 1613 and for the most part accords with the present Lloyd's policy. See Martin's History Mar. Ins. 46.

[3] Perhaps introduced by representatives of the Hanseatic League.

unknown to the common-law courts, and insurance disputes were as a rule settled by the arbitration of mercantile men.[1]

The first reported insurance case belongs to the year 1589, and is mentioned by Sir Edward Coke,[2] in which it was held, "where as well the contract as the performance of it is wholly made or to be done beyond sea, it is not triable by our law, but if the promise be made in England it shall be tried."

In 1601 a special tribunal for the trial of marine insurance cases was established in England.[3] This court—which consisted of the judge of the Admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight grave and discreet merchants, or any five of them—fell into disuse within a century after its organization, and by degrees insurance disputes began to come within the jurisdiction of the common-law courts of England.

In 1756 Lord Mansfield was appointed Chief Justice of the Court of King's Bench, and during his long and illustrious career as a judge he was conspicuous in making the policy of insurance the subject of careful study. From foreign ordinances,[4] writings of jurists, and usages of trade, he drew and shaped the principles of insurance law.

§ 10. Lloyd's and Lloyd's Usages.—The body of rules or trade customs under which the business of insurance had grown up was known as "the usages of Lloyd's." To these usages and earlier maritime customs we must look to find an origin for such far-reaching and significant principles of insurance law as the following: namely,

[1] "The contract of marine insurance is an exotic in the common law," *Ins. Co.* v. *Dunham*, 11 Wall. (U. S.) 1, 31–34, 20 L. ed. 90, in which an instructive account is given of the early history of insurance and insurance law. On the continent of Europe maritime and mercantile cases are relegated to special commercial tribunals.

[2] *Dowdale's case*, 6 Coke R. 47*b*; and see *Crane* v. *Bell*, 4 Coke's Inst. 139 (1546).

[3] 43 Eliz. c. 12. "Whereas it ever hathe bene the policie of this realme by all good means to comforte and encourage the merchante, therebie to advance and increase the generall wealth of the realme, her Majestie's customes, and the Strength of Shippinge, which Consideracion is nowe the more requisite because trade and traffique is not at this present soe open as at other tymes it hathe bene. And, whereas it hathe bene *tyme out of mynde* an usage among the merchantes, both of this realme and of forraine nacyons, when they make any great adventure (especiallie into remote parts), to give some Consideracion of money to other persons (*which commonlie are in no small number*), to have from them assurance made for their goodes, merchandize, ships and things adventured, or some parts thereof, at such rates and in such sorte as the parties assurers and the parties assured can agree, which course of dealinge is commonlie termed a policie of assurance, etc."

[4] See, for example, Marine Ordinances of Louis XIV, published in 1681, Title Sixth (reprinted in 30 Fed. Cas., p. 1211), Guidon de la Mer (Rouen, about 1600).

that the contract is one *uberrimæ fidei*, demanding a disclosure of all material facts affecting the risk; that acts of the insured which materially change and enhance the character of the risk during the pendency of the policy will avoid the contract; that there must be no deviation from the usual voyage as prescribed by custom; that the vessel must be seaworthy at the commencement of the risk in a voyage policy; that any statement appearing on the face of a marine policy is a warranty and must be rigidly complied with and tnat goods stowed on deck are not protected by the policy in the absence of a general trade usage to the contrary.[1]

[1] Lloyd's was originally a coffee-house in London, a celebrated resort of merchants and underwriters. In 1688 it was located in Tower Street, but within three or four years from that date, the establishment was removed to the corner of Lombard Street and Abchurch Lane, where it became the world-renowned center for commercial intelligence and for the business of marine underwriting. After several other removals, it ultimately took possession of its apartments in the Royal Exchange. In 1769 the principal merchants and underwriters frequenting the coffee-house formed themselves into a society with rules and regulations. In 1779 the society adopted the form of policy thenceforward known as "Lloyd's Policy," which closely resembles the policies now in use in the United States, and which corresponds with the policy prescribed by the English marine insurance act or codification of 1906, except that the words "Be it known that" have been substituted for the introductory words "In the Name of God, Amen," appearing in the earlier form, a change effected in the year 1850. Justice Buller characterized this instrument as "absurd and incoherent" *Brough* v. *Whitmore*, 4 T. R. 206; Lord Mansfield called it "a very strange instrument," *Le Cheminant* v. *Pearson*, 4 Taunt. 380; Justice Lawrence said it was "drawn with much laxity," *Marsden* v. *Reid*, 3 East, 579. Nevertheless, almost every word of it has been judicially construed, and therein consists its value, *Simond* v. *Boydell*, Doug. 268. In its stability it is in striking contrast with the fire policy, which during its history has exhibited a series of shifting forms, which have given rise to much confusion and uncertainty both in the business and in the law of insurance. As the courts from time to time have adjudicated away by a strict construction the restrictions and exemptions from liability named in the fire policy, its phraseology has been altered by the insertion of a more and more explicit wording in favor of the insurers, until in many instances the legislatures of the several states have been provoked to interference by sweeping statutory enactments which govern the contents and legal effect of the fire insurance contract within those states, *Reilly* v. *Ins. Co.*, 43 Wis. 456, and see Appendix, ch. I. It was from early times the custom at Lloyd's rooms to pass around the proposed policy of the applicant among the members, and each member underwrote or subscribed his name for such portion of the required amount as he wished to undertake, together with the date of subscription, until in this way, by successive subscriptions by different persons on the same policy, the desired amount was covered. In 1871 the Society of Lloyd's was incorporated by special act of parliament (34 Vict. c. xxi), one of the express objects of incorporation being the "collection, publication, and diffusion of intelligence and information with respect to shipping." In the accomplishment of this object it has attained an unrivaled standard of perfection. Lloyd's members have developed a system of agency radiating everywhere throughout the maritime world, by which they are enabled to receive the promptest and most reliable information of all departures from and arrivals at ports, as well as of losses, casualties, and other useful shipping news. A standard London periodical has said: "Towering head and shoulders above the crowd of

§ 11. American Lloyds.—Modeled in a measure in imitation of the original society of English Lloyds, many unincorporated associations have been formed in this country, some with the object of transacting marine, and others with the object of transacting fire or other forms of insurance, and all known generally as American Lloyds. The basis of organization is a written agreement, resembling articles of copartnership of a limited liability, executed by the underwriters, who contribute to a common guaranty fund and who by a written power of attorney put the actual management in the hands of an agent, usually a broker or other expert. This agent or attorney, sometimes under the supervision of an executive committee, solicits and attends to the business, signs each policy on behalf of the underwriters, settles losses, and receives a flat commission on premiums to cover compensation and office expenses.[1] By this device the aim has been to evade in great measure the statutory requirements imposed upon insurance corporations, for instance, those relating to capital, reserve fund, and annual reports. With some notable exceptions the earlier American Lloyds proved to be a disappointment either to the underwriters or to the patrons, and such associations have now been largely brought within the reach of statutory regulations.[2]

institutions that have helped to win for England the maritime supremacy of the world, stands the corporation of Lloyd's. Its collapse would be more widely felt than that of any other commercial institution of the world." For history of marine insurance see Chalmers & Owen Ins. (1907), p. 170; Martin's History Lloyd's & Mar. Ins. (1876). For present Lloyd's customs and practice of English Asso. of Average Adjusters see Chalmers & Owen Ins. (1907), pp. 173–177; Arn. Ins. (7th ed.), pp. 1523–38. As to legal effect of these rules of practice see *Steamship C. Co.* v. *London, etc., Ins. Co.* (1901), 6 Com. Cas. 297.

[1] *States* v. *Ackerman*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

[2] For form of Lloyd's accident policy see *State* v. *Ackerman*, 51 Ohio St. 163, 37 N. E. 828. Each underwriter is liable, but only to the amount subscribed by him on each policy, not for any part of the liability of his associates, liability being several but not joint. *Barnes* v. *People*, 168 Ill. 425, 48 N. E. 91; *Imperial Shale Brick Co.* v. *Jewett*, 42 App. Div. 588, 60 N. Y. Supp. 35; *Straus* v. *Hoadley*, 23 App. Div. 360, 48 N. Y. Supp. 239. Estate of subscriber is liable after his death on policy issued before and the death does not revoke power of attorney, *Durbrow* v. *Eppens*, 65 N. J. L. 10, 46 Atl. 582. When the fund measured by the limited liability is exhausted there must be further contribution if the policy was issued after its impairment, *Burke* v. *Rhoades*, 82 App. Div. 325, 81 N. Y. Supp. 1045, *id.* 79 N. Y. Supp. 407, 39 Misc. 208. If the policy so provide, the insured must bring test suit against the agent before suing underwriters, *Enterprise Lumber Co.* v. *Mundy*, 62 N. J. L. 16, 42 Atl. 1063, 55 L. R. A. 193; *Ketchum* v. *Belding*, 58 App. Div. (N. Y.) 295, 68 N. Y. Supp. 1099; *Leiter* v. *Beecher*, 2 App. Div. 577, 37 N. Y. Supp. 114; *Lawrence* v. *Schaefer*, 20 App. Div. 80, 46 N. Y. Supp. 719, but not if there be no attorney, *American Lucol Co.* v. *Lowe*, 41 App. Div. 500, 58 N. Y. Supp. 687. Judgment in the test suit is conclusive upon the underwriters, *Conant* v. *Jones*, 50 App. Div. 336, 64 N. Y. Supp. 189, but not if fraudulently procured, *Cuff* v. *Heine*, 58 N. Y. Supp. 324, 27 Misc. 498. The one-year limitation in the

§ 12. **Fire Insurance.**—Fire insurance as an organized system has had an origin comparatively recent, and it was not until after the great London fire of 1666 that it took any very practical shape, though back in Anglo-Saxon times there is evidence of attempts among friendly guilds to guarantee protection against fire and other calamities by mutual contribution. In 1681 the first regular office for insuring against loss by fire was opened by a combination of persons at the rear of the Royal Exchange, and in 1710 the Sun Fire Office, the earliest mutual and stock company, was organized in London.

The first fire company established in the United States was "The Philadelphia Contributionship for Insuring Houses from Loss by Fire," incorporated on the mutual plan in 1752, one of its early directors having been Benjamin Franklin.

§ 13. **Life Insurance.**—The earliest practical embodiment in the direction of life insurance was the foundation in 1706 by royal charter in Great Britain of "The Amicable Society for a Perpetual Assurance Office." The scheme was simply to raise a fixed contribution from each member, and from the proceeds to distribute a certain sum each year among the representatives of those who had died during the year. No one was to be admitted under the age of twelve, nor above the age of fifty-five, but all were to pay the same rate of contribution.

In 1734 the society made arrangements for guaranteeing that the dividend for each deceased member should not be less than £100, which was the first approach to an assurance of a definite sum at death, whenever that might occur.

The Equitable Assurance Society of London, which was organized under a deed of settlement and commenced business in 1762, may be regarded as the pioneer of the modern system of life insurance. It issued policies for the assurance of fixed sums on single or joint

policy for bringing suit applies only to that suit and not to subsequent proceedings against the underwriters, *Lawrence* v. *Schaefer*, 20 App. Div. 80, 46 N. Y. Supp. 719. If plaintiff join all the underwriters in one suit instead of suing them separately, defendants must plead the misjoinder, *Isear* v. *Hoadley*, 44 App. Div. 161, 60 N. Y. Supp. 609. Liable for no greater proportion of loss than the policy bears to the whole insurance. *Cook* v. *Loew*, 69 N. Y. Supp. 614. 34 Misc. 276. A Lloyd's association organized merely to be sold is not an association "engaged in business" within N. Y. Laws, 1892, c. 690, *People* v. *Loew*, 23 Misc. 574, 52 N. Y. Supp. 799. Right of individual underwriter under contract of reinsurance. *Thompson* v. *Colonial Assur. Co.*, 68 N. Y. Supp. 143, 33 Misc. 37 aff'd 70 N. Y. Supp. 85, 60 App. Div. 325. For statutory provisions relating to Lloyds, see N. Y. Ins. L. §§ 57, 121, 138, 139, 162.

lives, or on survivorships, and for any terms. The premiums were regulated according to age. Lives were admitted with due regard to their state of health and other circumstances.

The creation of corporations in America with power to insure lives and grant annuities dates back beyond the Revolution, one of the earliest companies being chartered in the colony of Pennsylvania as early as 1769, for the benefit of the families of Presbyterian clergymen. But the business of life insurance did not assume conspicuous importance until within little more than a half century. The first reported life insurance case in the United States [1] shows the existence of a contract of life insurance as early as 1809. It was in that case contended by the defendant that no valid contract of life insurance could be made within the state of Massachusetts, inasmuch as the law of England in that regard, it was said, had never been adopted in this country; but the court sustained the contract on the ground that it was not repugnant to the general policy of the law or to good morals, and that no reason had been given for condemning such contracts, except by the French courts, which considered "that it is indecorous to set a price upon the life of a freeman which is above all price"—a reason which was pronounced insufficient.

In the United States, life insurance has attained a greater relative importance among financial institutions than in any other country. During the years which immediately followed the close of the Civil War, it grew with unparalleled rapidity; new companies were established in great numbers; new features of insurance contracts were devised, and soliciting agents canvassed the country from one end to the other. It is to be observed that fire policies on the average are for a much shorter term than life policies, and that a life company is ordinarily obliged to accumulate for the payment of future losses a much larger amount of assets than is required in the conduct of the business of marine or fire insurance, since, unlike the perils of shipwreck and fire, the peril of death is sure to occur sooner or later to the persons whose life is insured. Moreover, popular modern forms of life insurance policies have involved the payment of deferred dividends of indefinite amount at stated periods in the distant future to fortunate survivors of a class.[2] The result followed that large life companies in this country,[3] in a wild race for supremacy among themselves, amassed enormous amounts of assets

[1] *Lord* v. *Dall*, 12 Mass. 115.

[2] Tontine and similar forms, see § 21.

[3] Conspicuously the three great New York companies, the Mutual, the Equitable and the New York Life.

and surpluses which were not set aside for proposed betterments, or appropriated for present dividends, like the assets of a railroad or industrial corporation, or kept subject to call like the assets of a savings bank, but were retained for purposes which only the company's actuaries could fathom, a colossal trust fund which carried with it, especially to the officers and finance committees, temptations of an exceptional and subtle character. The machinery of the insurance departments proved ineffective to protect the policy holders from evil consequences of startling proportions, and after a notable investigation by a committee of the New York legislature, statutes of a drastic character were recently adopted in that state.[1]

§ 14. Accident Insurance.—Accident insurance, which is a branch of life insurance, is an important development of later growth. Ordinary life insurance protects against the stipulated pecuniary loss occasioned to a man's family or to creditors, or others, by his death, whether caused by old age or accident. But ordinary accident insurance protects only against losses caused by accident whether resulting in death or not.

§ 15. Classification of Risks.—In fire and marine insurance, risks are classified according to the degree of hazard, and the premiums graded accordingly. But in life insurance, as a rule, only healthy persons are accepted, and consequently the premiums are scaled according to age; sometimes, however, special risks are taken involving a hazardous occupation, or an unhealthy location of residence, for which an extra premium is paid. So also some companies, for an extra premium, insure persons of unsound health.[2] In all branches of insurance the amount of the premium is made to depend more or less upon average results which have been arrived at after

[1] N. Y. Law, 1906, c. 326. The Armstrong committee, the Hon. Chas. E. Hughes, counsel. The following results among others were accomplished by these laws affecting life insurance companies. 1. Policyholders given a more effective voice in the government of the companies. 2. Full publicity secured to policyholders in regard to management of companies' affairs. 3. Policies limited to four standard forms. 4. Policies safeguarded against forfeiture, warranties being converted into representations in absence of fraud. 5. Deferred dividend policies prohibited. 6. Companies obliged to make equitable distribution of surplus to policyholders at stated periods. 7. Investments regulated and control of subsidiary companies prohibited.—The New York court had decided substantially that upon maturity of his policy in a mutual company the policyholder could get for his share of the surplus only what the directors saw fit to divide, *Greeff* v. *Society*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. R. 659.

[2] *Security Trust Co.* v. *Tarpey*, 182 Ill. 52, 54 N. E. 1041, "substandard risks."

elaborate observations and careful collection of statistics bearing upon the subject.

In accepting or rejecting a proposed risk, the insurers are governed by their familiarity with these general rules of average. But it is also very important for them to gain a thorough acquaintance with the facts and circumstances relating to the particular case, to ascertain whether it falls within or outside the general rule.

Formerly much of this information was obtained from the insured by means of a written document called an application containing such interrogatories and answers as were appropriate to furnish the desired facts. But now in fire insurance the use of an application in detail is for the most part confined to certain farm properties and to exceptional instances. In the cities and towns generally the insurers have come to rely very much upon their own means of examination; and for use in the larger cities they have prepared elaborate and accurate insurance maps and surveys showing the character of the risk involved in every building.

In marine insurance the rating of ships and statistics regarding them are to a considerable extent a matter of record, but more or less information is often required by the insurers from the insured in relation to the proposed risk. They should be advised from some source of the ownership, quality, and nationality of the vessel, the course of the proposed voyage, the character of the captain, the nature of the commodity carried, the state of political relations, and in time of war whether the ship is to sail with convoy.

In marine insurance the scale of premiums varies very greatly according to circumstances, and may sometimes well nigh equal the value of the insured property. The subject of insurance is sometimes insured "lost or not lost," provided neither party knows whether the risk has already terminated.

§ 16. **Mortuary Tables.**—The premiums to be charged for life policies are based upon calculations made from mortality tables, which are tabulated exhibits of the number of survivors and the number of those dying each subsequent year among a given number of persons taken at various given ages respectively.[1] The tables

[1] A considerable number of such tables have been prepared at different times, the earliest of which are so rough and inaccurate that they possess only a historical interest. Of the more reliable tables which have been in use in recent times may be mentioned the Northampton Table, which was constructed by Dr. Thomas Price from the registers kept in the parish of All Saints, Northampton, England, for the forty-six years, 1735 to 1780. Another English table very extensively used by insurance companies was the Carlisle Table, constructed by Mr. Joshua Milne from materials furnished

which thus give the average duration of lives indicate the average amount which must be paid for losses. The assumption is made that the company will succeed in so investing its assets as to gain an average income therefrom of a certain per cent, say three and a half or four per cent annually in addition to receipts from premiums. The lower the specified estimated rate of future interest on assets the safer the standard of solvency, and the greater the amount of present assets required to satisfy that standard. The higher the estimated rate of future interest, the more danger that the company will fail to earn it and in order to meet its liabilities will be obliged to exhaust its surplus and impair its capital. A net premium is the rate at which, according to the table of mortality and interest, an insurance could be effected. But to this must be added in practice an important percentage which is called "loading," or "margin," in order to defray the expenses of the business, and to provide for a possible excess of mortality. A gross or office premium is the net premium increased by the loading.

§ 17. **Reserve.**—That portion of the premiums of a policy with the interest thereon which is required to be reserved or set aside as a fund for the payment of the policy when it becomes due is called the "reserve." [1] The mean or average duration of the life of an individual after any specified age, according to a given table of mortality, is called the "expectation of life." Statistical observations on the duration of human life point to the conclusion that, after the period of extreme youth is passed, the death rate among any given body of persons increases gradually with advancing age; and where the annual premium is fixed at a uniform rate during the life of the policy, as is customary in life insurance, it is evident that if the policy is surrendered by the insured before its expiration, the insurers can generally afford to make a return of a portion of the premiums which have been paid. Of the reserve value which the policy is estimated to have at the time of surrender, a part called "the surrender value," the company offers to pay to the insured

by the labors of Dr. John Heysham. These materials comprised two enumerations from the population of the parishes of Saint Mary and Saint Cuthbert Carlisle in 1780 and 1787, and the abridged bills of mortality of those two parishes for the nine years 1779 to 1787. Since then many mortuary tables have been prepared in England and the United States, based upon much more carefully collected statistics and giving more accurate results. Conspicuous among these are the American Experience Table and the Actuaries' or Combined Experience Table. The mathematics of the business, of great practical consequence are managed by actuaries.

[1] N. Y. Law, 1892, c. 690, §§ 205, 305, N. Y. Law, 1898, c. 85.

in return for the cancellation of the policy before its natural expiration.[1]

From these same considerations it appears, also, that in the event of the insolvency and winding up of a life insurance company, there is a basis for calculating the present value of unexpired policies, by which an equitable distribution of assets may be made to all the policy holders in accordance with the laws of priority.[2]

The test of solvency is the rule which the insurance department is required to apply to determine the ability of a company to pay all losses which, according to the standard table of mortality and rate of interest, may occur. The liabilities of a company consist of its actual unpaid losses, its expenses and contingent obligations, for the payment of which its assets are held liable. The whole amount insured is really a contingent obligation, but in testing the present solvency of a company, this is regarded as a liability only to the extent of the reserve on each policy.[3]

§ 18. Different Kinds of Policies.—The forms of printed policies of insurance in use are varied and numerous. They are filled up in writing to suit each particular case, and are often further modified by special clauses, which may be pasted or attached in the shape of printed riders to the more general form.

A valued policy is one which specifies an agreed value of the subject-matter insured; for example, a policy of $5,000, on "the ship *Argus*, valued at $10,000." In case of total loss of property such a valuation, if not dishonest, furnishes the basis of adjustment.

An unvalued, sometimes called an open policy, is one in which the value of the subject insured is not specified but is left to be ascertained in case of loss.

Policies on lives are valued. Policies on ships are usually valued. Fire policies on contents of buildings are usually unvalued and, in the absence of valued policy laws, so are fire policies on buildings.

§ 19. Same Subject: Marine.—A time policy is one in which the duration of the risk is defined at the beginning and at the end, by

[1] In case of lapse for non-payment of premium, company by statute must use reserve for benefit of assured to purchase paid-up insurance, etc. *Nielsin* v. *Society*, 139 Cal. 332, 73 Pac. 168. See Appendix of Statutes and *Haskell* v. *Society*, 181 Mass. 341, 63 N. E. 899.

[2] Reserve, how distributed on dissolution, *People* v. *Association*, 150 N. Y. 94, 45 N. E. 8; *People* v. *Ins. Co.*, 154 N. Y. 95, 47 N. E. 968. Claims valued as of date of beginning of action for dissolution, *Equitable Reserve Fund Assn.*, 131 N. Y. 354, 30 N. E. 114.

[3] As to statutory test of solvency, see N. Y. Ins. L. § 21.

fixed dates, as, for example, from noon of January 1, 1907, until noon of January 1, 1908.

A voyage policy is one in which, irrespective of time, the duration of the risk is established by geographical termini; as, for example, from New York to Liverpool.[1]

§ 20. **Same Subject: Fire.**—The term "open policy" or "running policy" is sometimes employed to indicate a general form of insurance frequently used where the insured is likely to effect many successive insurances from the same company. It covers such goods, at such amounts of insurance, in such storehouses and places, and at such rates of premiums, as from time to time shall be agreed upon and indorsed on the policy or in a book attached thereto, the purpose being to obviate the necessity of executing a fresh policy for every transaction.[2]

A floating policy also is a general form of insurance, but usually upon goods within a certain specified area of territory,[3] or otherwise designated, and is intended to cover property which cannot well be described specifically because of its fluctuating quantity and location; as, for example, merchandise in freight trains, warehouses, or lighters. The amount of goods covered by such a policy is ascertainable at the moment of loss only.[4] An excess policy, usually a floater, attaches only to property or to an excess of value not covered by the specific insurance.[5]

Insurance is said to be in the blanket form, as contrasted with specific, when different buildings or different classes of property are insured in an aggregate amount without apportionment; for example, a policy of $5,000 on a factory plant in its entirety, including buildings, machinery, and stock. While a policy of $5,000 on one of the buildings alone is called specific. A rent policy is an insurance

[1] *Cornfoot* v. *Royal Exch. Assn. Corp.* (1903), 2 K. B. 363. For description of "disbursement" marine policy, see *International Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 Fed. 304. Launch and trial trip policy, *Jackson* v. *Mumford* (1904), 9 Com. Cas. 114.

[2] *Imperial Shale Brick Co.* v. *Jewett*, 169 N. Y. 143, 62 N. E. 167; *Continental Ins. Co.* v. *Ætna Ins. Co.*, 138 N. Y. 16, 33 N. E. 724.

[3] So also in marine insurance the term "open policy" or "floating policy" is often used to indicate one in which the ships or other particulars are left to be defined by subsequent declaration, *Snowden* v. *Guion*, 101 N. Y. 458, 5 N. E. 322.

[4] *Golde* v. *Whipple*, 7 App. Div. (N. Y.) 48, 39 N. Y. Supp. 964; *Macon Fire Ins. Co.* v. *Powell*, 116 Ga. 703, 43 S. E. 73.

[5] An excess floater, *United Underwriters Ins. Co.* v. *Powell*, 94 Ga. 359, 21 S. E. 565; *Peabody* v. *L. & L. & G. Ins. Co.*, 171 Mass. 114 (1898), 50 N. E. 526; *Fairchild* v. *Ins. Co.*, 51 N. Y. 65, 69. As to blanket or compound policies and specific policies, see *Page* v. *Sun Ins. Office*, 64 Fed. 194.

on rents, usually, but not of necessity, in favor of the landlord.[1] A use and occupancy policy is adapted to indemnify one in occupation of mill, factory, hotel, store, or other business premises, for loss of commercial use or earning capacity during the period after a fire and before reinstatement. The phrase "use and occupancy" being somewhat indefinite and such a policy being almost always valued[2] it is difficult to ascertain or define with precision the subject-matter of this class of insurance.[3] The contract seems in general to be intended to furnish indemnity for loss of estimated earnings or some part thereof which would have accrued from the business except for the fire.[4] It is analogous to rent insurance or insurance on profits and must be carefully distinguished from insurance on the buildings themselves or on their contents.

§ 21. Same Subject: Life.—The regular old-style life policy is payable on the death of the person insured, and the payment of premiums continues annually throughout life. The limited payment policy is payable at the death of the person insured, but the payment of premiums ceases after a certain limited period, say ten, fifteen, or twenty years. An endowment policy[5] is payable at the expiration of the endowment period or upon the earlier decease of the insured.

A regular life policy is in the nature of an investment by the insured usually for the benefit of his family, or some member of it, while an endowment policy is intended as a contingent investment for his own benefit, being payable to himself if alive at the expiration of the period named. A term policy is one taken for a limited number of years, the policy being payable only in case of the death of the insured within that period. If he is alive at the end of the term, the insurance ceases altogether.[6] A joint-life policy is one payable on the earliest death of two or more persons insured. A survivorship policy is one payable on the death of the survivor of two or more persons.

[1] See Appendix of Forms. Generally by statute or by the lease a tenant is relieved from paying rent if premises are rendered untenable by fire.

[2] See Appendix of Forms.

[3] *Michael* v. *Prussian National Ins. Co.*, 171 N. Y. 25, 63 N. E 810.

[4] The aim is sometimes to cover expenses which continue in spite of fire.

[5] *Walker* v. *Giddings*, 103 Mich. 344, 61 N. W. 512. "An endowment policy combines generally in its plan an insurance of the life and an investment of the money paid." *Miller* v. *Campbell*, 140 N. Y. 457, 463, 35 N. E 651.

[6] These four are now the statutory forms for New York though the superintendent of insurance upon application is allowed to sanction other forms. General Ins. Law as amended 1906, § 101.

A tontine policy is one in which it is agreed that certain accumulations or profits of the business shall be apportioned among those of the insured of a certain class surviving, at certain intervals; for example, every ten, fifteen, or twenty years.[1] The lapsed policies of the class forfeit their reserve and dividends to the survivors. A tontine dividend is the distribution of such profits among the survivors who are entitled to it after the given period. A semi-tontine policy is one in which it is agreed that the dividends only shall be apportioned among the survivors of the class.[2]

§ 22. **Mixed Risks, Sea and Land.**—To meet modern demands of commerce a marine policy is sometimes altered to include all kinds of risks by land and by water between certain termini.[3]

§ 23. **Reinsurance.**—A feature of insurance business which has developed into great magnitude is the practice of reinsurance. Where a company finds itself in embarrassed circumstances, or for any reason desires to limit its liability, in certain classes of risks, or in certain localities, or under a particular policy, it secures, if possible, reinsurance from one or more other companies. The entire business of an insurance company is not infrequently absorbed in this way by some stronger competitor. The owner of an important risk, for example, a warehouseman or common carrier, often prefers to deal exclusively with one insurance company of high standing rather than with many companies. This course of procedure greatly simplifies for a railway company the serious business of adjusting numerous losses. Accordingly one policy is obtained by the assured from the company of his choice to the full amount required, sometimes millions of dollars. But every prudent insurance company must limit its liability upon any one risk.[4] The company issuing the original policy, called the straight or direct insurance, must

[1] *N. Y. Life Ins. Co.* v. *Miller*, 22 Ky. L. Rep. 230, 56 S. W. 975; *Columbia Bank* v. *Equitable L. Assn. Soc.*, 79 App. Div. (N. Y.) 601, 80 N. Y. Supp. 428; *Ellison* v. *Straw*, 119 Wis. 502, 97 N. W. 168.

[2] *Everson* v. *Eq. Life Assur. Co.*, 68 Fed. 258. Many life companies also in return for a present lump amount will guarantee a stated annuity running for the life of the annuitant, or other period, payable annually or at stated intervals.

[3] *Schloss Bros.* v. *Stevens* (1906), 2 K. B. 665 (goods); *Jacob* v. *Gaviller* (1902), 7 Com. Cas. 116 (prize fox terrier from London to Bombay thence by rail to Lahore); *Hyderabad D. Co.* v. *Willoughby* (1899), 2 Q. B. 530 (gold from mines in India to London); *Yuill* v. *Robson* (1907) 1 K. B. 695. The policy is also often made applicable to inland marine insurance, lake, river, or canal, *Quebec Nav. Ins. Co.* v. *Bank*, (1870), L. R. 3 P. C. 234; *Shelbourne* v. *Ins. Co.* (1898), 8 Asp. Mar. Cas. 445.

[4] Limits are also prescribed by statute.

therefore assume the burden of dividing up the excess of liability, if large, among many other companies, and this it does by taking out from them in its turn many policies of reinsurance, each for some share of this liability.[1]

[1] For form of reinsurance rider see Appendix of Forms.

CHAPTER II

General Principles of Insurance Law

Nature and Characteristics of the Contract

§ 24. Indemnity the Object—Pure Wagers Void.—From a consideration of the peculiar nature and varied application of insurance, as described in the foregoing introductory chapter, we come in this and the following chapters of Part First to the important study of certain general principles of insurance law, thorough familiarity with which is essential to a fair comprehension of the meaning and legal effect of numerous clauses and conditions, contained in policies and set forth in Part Second of this treatise. While all of these general principles serve as a guide to a sound interpretation of the purport of insurance contracts in their diversified forms, some of them peremptorily govern the rights of the parties, regardless of policy stipulations, as, for example, the rule requiring an insurable interest to support the contract, and the rule excluding a foreign enemy from the list of parties insurable; others form a supplement to the written contract, as effective as though expressed in the policy itself, as, for example, the implied warranties respecting seaworthiness, deviation and the legality of the adventure, annexed by inference of law to the contract of marine insurance.

At the very outset it must be noted that insurance is essentially a contract of indemnity,[1] and that from this cardinal principle arise

[1] By this proposition is meant that the object sought to be accomplished by the contract of insurance must be protection against a real loss to an insured interest, not that the measure of indemnity allowed must be exactly commensurate with the loss. Thus the English court in a leading case declares that the doctrine of indemnity "is really the basis and foundation of all insurance law," *Castellain* v. *Preston*, 11 Q. B. D. 380, 407, by Bowen, J. And the Minnesota court says, "The very essence of any definition of insurance is indemnity for loss in respect of a specified subject. . . . Casualty insurance . . . as applied to injuries resulting in death, is really but a contract of life insurance limited to specified risks; . . . it must contain the essential element of indemnity for loss," etc., *State* v. *Federal Investment Co.*, 48 Minn. 110, 111, by Mitchell, J. In a learned and thoughtful opinion a New York judge concludes that "a life insurance is made under our statute for the indemnity of the assured. That is the purpose and object which makes it a lawful contract," *Miller* v. *Eagle Life & H. Co.*, 2 E. D. Smith (N. Y.), 268, 295, by Woodruff, J. See also definition in Phillips, Ins., § 1.

many of its distinctive characteristics, such as the rule requiring an insurable interest, the doctrine of double insurance contribution, and the right of subrogation accruing on settlement of a loss.[1] Although the agreement is *aleatory* or speculative in one sense, that is,

But if regard is had not to the general nature and predominant purpose of the contract, but to the measure of recovery actually permitted under technical rules of law, some of them while convenient more or less arbitrary, some favorable to the assured, some to the underwriters, we may easily conclude that rarely is a marine policy a strict contract of indemnity, and a life policy never. Indeed human life is incapable of money valuation; therefore, in most instances, the life insurance company is held to the amount which it has agreed to pay, regardless of the actual value of the life insured, or of the amount of other insurance. Moreover, premium rates are estimated upon the hypothesis that upon the death of the insured or other event named the life company will pay the full amount specified in its policy, and therefore the rule of law is now settled that if the life policy is valid when issued, the assured, as for instance a creditor of the life insured, may lose all insurable interest, through payment of the debt, without invalidating his policy. See § 46. These considerations have induced some of the judges to declare that life insurance is not to be classified as a contract of indemnity, *Dalby* v. *Ins. Co.*, 15 C. B. 365 (creditor insurance in question, "in no way resembles a contract of indemnity"); *Emerick* v. *Coakley*, 35 Md. 188 ("in no way resembles a contract of indemnity"); *Mut. L. Ins. Co.* v. *Allen*, 138 Mass. 24 ("not a contract for indemnity for actual loss"); *Scott* v. *Dickson*, 108 Pa. St. 6 ("not a contract of indemnity"). But in these and similar instances the courts apparently were passing not so much upon the general nature of the contract as upon a narrower question, to wit, the relation in the particular instance between the measure of recovery allowed and the extent of insurable interest existing at the time of loss. In regard to this attempted exclusion of life insurance from the general rule, a recent author says, "Though the courts have seized upon this interpretation of the contract as a principle to conjure with, they have applied it to uphold such contradictory decisions that it is doubtful if there is any real ground for the distinction attempted to be made between life and other forms of insurance in this respect." Cooley Ins. (1905), p. 90. And May says: "A distinction has sometimes been taken between marine and other insurances, and life insurance, on the ground that while the former have for their object to indemnify for loss, the latter is an absolute engagement to pay a fixed sum on the happening of a certain event, without reference to any damage in fact suffered by the insured in consequence. But this distinction is superficial, and rests rather upon the mode of applying the principles and of determining the amount of indemnity, than upon any difference in the principles themselves." May, Ins., § 7. By the California Civil Code, §§ 2527, 2766, life insurance is a contract of indemnity. So of civil codes generally. Some civil codes go so far as to provide that, "the sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void," Cal. Civil Code, § 2551; Montana Civil Code (1895), § 3405; No. Dak. Civil Code (1905), § 5904; So. Dak. Civil Code (1903), § 1807.

[1] This doctrine, however, does not require that the insured should recover more than the face of his insurance when his loss exceeds that amount. "Indemnity is the prime object of insurance," *Deming* v. *Merchant's Cotton Press, etc., Co.*, 90 Tenn. 306, 347, 17 S. W. 89, 13 L. R. A. 518; *Carpenter* v. *Prov. Wash. Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Eager* v. *Atlas Ins. Co.*, 14 Pick. (Mass.) 141, 146, 25 Am. Dec. 363; *Cummings* v. *Ins. Co.*, 55 N. H. 458; *Castellain* v. *Preston*, 11 Q. B. Div. 380. The contracts of fire and marine insurance are much more rigidly governed by the doctrine of indemnity than is the contract of life insurance, *Holmes* v. *Gilman*, 138 N. Y. 369, 381, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. R. 463; *Crosswell* v. *Conn. Indem. Assn.*, 51 S. C. 112, 28 S. E. 200.

the parties may not know whether the event insured against will occur or not,[1] and in return for a comparatively small sum of money the one party assumes the risk of incurring liability to a much greater amount, nevertheless, compensation for a real loss, rather than a purely speculative venture, must be the aim and object, and consequently the party insured must be able to show an insurable interest in the subject of insurance, an interest of a material and valuable character, and not merely moral and sentimental, or else the contract will be altogether void. The doctrines of indemnity and of the necessity of an insurable interest are correlative and complementary in all branches of the law of insurance.[2]

It must be observed, however, that in life insurance [3] a sufficient insurable interest and for a policy to any amount is, under ordinary circumstances, presumed from certain near relationships. Thus, for this purpose the law takes it for granted that the life of a husband is valuable to his wife and the life of the wife to the husband; the

[1] This proposition is true even as applied to life insurance policies if we regard premature death as the peril insured against.

[2] *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S. 452, 462, 14 S. Ct. 379, 38 L. Ed. 231, "contracts of insurance are contracts of indemnity;" *Central National Bank* v. *Hume*, 128 U. S. 195, 205, 9 S. Ct. 41, 32 L. Ed. 370, "life insurance is also a contract of indemnity," court by Fuller, C. J.; *Life Ins. Co.* v. *O'Neill*, 106 Fed. 800, 803, 45 C. C. A. 641, 54 L. R. A. 225, "the tendency of the recent decisions is to insist upon an actual or presumed pecuniary interest in every case, although such interest may no doubt be contingent and to some extent undefined;" *Helmetag's Admr.* v. *Miller*, 76 Ala. 183, 187, 52 Am. Rep. 316, by weight of authority the "interest must be, in some sense, pecuniary;" *Lewis* v. *Phœnix Mut. Life Ins. Co.*, 39 Conn. 100, 104, "interest must be required of a pecuniary nature;" *Burton* v. *Conn. Mut. Life Ins. Co.*, 119 Ind. 207, 211, 21 N. E. 746, 12 Am. St. R. 405, expected benefit must be pecuniary and not sentimental; *Continental Life Ins. Co.* v. *Volger*, 89 Ind. 572, 575, 46 Am. Rep. 185, "the insurable interest must be a pecuniary interest;" *Guardian M. L. Ins. Co.* v. *Hogan*, 80 Ill. 35, 45, 22 Am. Rep. 180, there must be "reasonable expectation of some pecuniary advantage;" and reconciling *Ins. Co.* v. *Bailey*, 13 Wall. 619, supposed by some to be authority for a different view; *Society* v. *Dyon*, 79 Ill. App. 100; *Adams* v. *Reed* (Ky.), 36 S. W. 568, life insurance is a contract of indemnity; *Rombach* v. *Ins. Co.*, 35 La. Ann. 233, 234, 48 Am. Rep. 239, "the insurable interest in the life of another is a pecuniary interest;" *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24, 27, 52 Am. Rep. 245, "it is necessary that the insured should have some pecuniary interest in the continuance of the life insured;" *Morell* v. *Ins. Co.*, 64 Mass. 282, 57 Am. Dec. 92, note by Judge Field, annotator, showing that a pecuniary interest is really the test; *Whitmore* v. *Supreme Lodge*, 100 Mo. 36, 46, 13 S. W. 495, "the person who secures such policy must have a pecuniary interest;" *Currier* v. *Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134, pecuniary interest necessary. The word "interest" in the English statute is construed to mean "pecuniary interest," *Halford* v. *Kymer*, 10 Barn. & C. 724, 728; *Charter Oak Life Ins. Co.* v. *Brant*, 47 Mo. 419, 4 Am. Rep. 328; *Exchange Bank* v. *Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372 (life insurance for a creditor a contract of indemnity); *Healey* v. *Mut. Acc. Assn.*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. R. 637 (accident insurance a contract of indemnity).

[3] § 34.

life of a father to his minor child and the life of the minor child to the father.[1] Pecuniary dependence, personal service, natural affection, one or all, may be elements of this value. It is immaterial in certain jurisdictions whether all are present or whether all are absent. The fact that all are usually present is deemed justification for a convenient general rule.[2]

It must further be observed, most notably in life insurance,[3] but also in other classes of insurance as, for example, accident, and use and occupancy, that the interest of the insured in the subject insured may be incapable of exact pecuniary measurement, but none the less is essential as a prerequisite to the validity of the contract.

Consonant with the general doctrine of indemnity, it follows that the sum named in the fire or marine policy is not the measure but the extreme limit of recovery.[4] No matter how large the amount of insurance, the recovery is restricted to the loss actually sustained.

The principle that the contract of insurance is one of indemnity is subject to modifications which will presently be noticed.[5] Such modifications have been engrafted upon the general rule largely out of regard to convenience. Thus, the parties are permitted to agree in advance upon the value [6] of the subject of insurance by means of a valued policy, which in case of total loss is then, in the absence of fraud or intent to evade the law, conclusive evidence of the proper

[1] *Holmes* v. *Gilman*, 138 N. Y. 369, 381, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. R. 463; *Geoffroy* v. *Gilbert*, 5 App. Div. 98, 100, aff'd 154 N. Y. 741.

[2] *Life Ins. Clearing Co.* v. *O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225; *Warnock* v. *Davis*, 104 U. S. 755, 26 L. Ed. 924, parent in child or child in parent; *Conn. Mut. Ins. Co.* v. *Schaefer*, 94 U. S. 457, 24 L. Ed. 251. But see *Currier* v. *Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134, as to invalid, helpless wife; *People's Mut. Ben. Soc.* v. *Templeton*, 16 Ind. App. 126, 44 N. E. 809; *Mitchell* v. *Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529. Some authorities in seeking to explain the basis for the existence of an insurable interest as between husbands and wives and parents and children have been disposed to discard the theory of the pecuniary value of the life insured to the beneficiary and have laid all the stress upon the ties of natural affection. Nothing seems to be gained by such a narrow course of reasoning. Many a friend has more love for a friend and many an uncle has more love for his niece than some wives have for their husbands and some children for their fathers. An element of service or dependence or other pecuniary value is generally to be found in the case of the closest relationships, while love refuses to conform to legal presumptions and at best is an uncertain and variable factor. It may also be remarked that where the rule of insurable interest as between those thus closely allied by marriage or blood is established, the discussion of reasons for it is largely academic.

[3] *Nye* v. *Grand Lodge*, 9 Ind. App. 131, 36 N. E. 429.

[4] Exceptions will be recognized hereafter.

[5] That even the fire contract is not always construed as one of strict indemnity see, for example, *Foley* v. *Farragut F. Ins. Co.*, 152 N. Y. 131, 46 N. E. 318; *Michael* v. *Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810.

[6] *Michael* v. *Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810; *Irving* v. *Manning*, 6 C. B. 391, 1 H. L. Cas. 287, 307 (like liquidated damages), cited with approval in *Aitchison* v. *Lohre*, L. R. 4 App. Cas. 755, 761.

basis of adjustment, although in fact the estimated and specified value may be erroneous at the time when it was made and far from accurate at the time of the loss.[1]

And so also akin to a valued policy on property is the regular life insurance policy, which is also classified as a valued policy, but in which, however, the amount specified as payable on the death of the insured or other event is not construed to be a controlling estimate of the whole value of the subject, towards the payment of which any other subsisting insurance must contribute, but simply a measure of the engagement of the particular insurer.[2]

[1] *Snowden* v. *Guion*, 101 N. Y. 458, 5 N. E. 322; *Steamship Balmoral Co.* (1902), A. C. 511; *Woodside* v. *Globe Mar. Ins. Co.* (1896), 1 Q. B. D. 105; *The Main* (1894), Prob. 320. Valued policy conclusive unless fraudulent, *Patapsco Ins. Co.* v. *Biscoe*, 7 Gill. & J. 293, 28 Am. Dec. 219; *Sturm* v. *Atlantic Mut. Ins. Co.*, 63 N. Y. 77; *Voisin* v. *Commercial M. L. Ins. Co.*, 62 Hun (N. Y.), 10, 11; *Voisin* v. *Prov. Wash. Ins. Co.*, 51 App. Div. 553, 65 N. Y. Supp. 333. The amount written in the policy is also conclusive where the statute so provides, *Home Fire Ins. Co.* v. *Bean*, 42 Neb. 537, 60 N. W. 907, 47 Am. St. R. 711; *Reilly* v. *Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552. In the United States in order to recover upon a valued policy on profits it is not necessary to prove that there would have been profits, *Canada Sugar Ref. Co.* v. *Ins. Co.*, 175 U. S. 609, 621, 20 S. Ct. 239; *Patapsco* v. *Coulter*, 3 Pet. 222, 7 L. Ed. 659. Compare *Eyre* v. *Glover*, 3 Camp. 276, 16 East. 218; *Hodgson* v. *Glover*, 6 East, 316 (giving English rule to the contrary). These infringements upon the strict theory of indemnity, however, are of practical convenience, for often the casualty which destroys the insured property destroys with it the best evidence of its value, and the estimate of the adjuster often differs widely from that of the insured. Accordingly, some of the states have passed valued policy laws applicable to realty, which provide that in the absence of fraud the value of the building written in the policy shall be taken to be its true value and the amount of loss where the building is wholly destroyed. These laws are not to be commended, because they impose too arbitrary a standard of value and encourage fraudulent overvaluation and arson, although it is said that they are not intended to disturb the general doctrine of indemnity, *Ampleman* v. *Citizens' Ins. Co.*, 35 Mo. App. 308. Some courts say that if the companies exercise care which it is for the public interest they should use in making the valuation there will be no danger of overinsurance, *Reilly* v. *Franklin Ins. Co.*, 43 Wis. 449, 458, 28 Am. Rep. 552. The difficulty with this view is that in the case of most risks of small amount the premium does not warrant the expense of survey or examination. The local agent, especially in the country, is apt to write the value given and is often quite as friendly towards his neighbor, the insured, as towards the insurance company, his principal. A valued policy law is not unconstitutional as impairing right of contract, or depriving of life, liberty, or property without due process of law, etc. *Ætna Ins. Co.* v. *Brigham* 120 Ga. 925, 48 S. E. 348; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 19 S. Ct. 281. In the last case the Federal Supreme Court concluded that a valued policy law was not contrary to public policy. See also *Dugger* v. *Insurance Co.*, 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796 (three-fourths clause of the policy held superseded by the statute). Another modification of the doctrine of strict indemnity is the arbitrary rule of one-third off for repairs, new for old, in marine risks, *Aitchison* v. *Lohre*, L. R. 4 App. Cas. 755.

[2] *Bevin* v. *Conn. Mut. L. Ins. Co.*, 23 Conn. 244; *Chisholm* v. *Nat. Cap. Ins Co.*, 52 Mo. 213, 215, 14 Am. Rep. 414 *Trenton Mut. L., etc., Co.* v. *Johnson* 24 N. J. L. 576, 581; *Miller* v. *Eagle L. & H. Co.*, 2 E. D. Smith (N. Y.), 268, 295.

The rule requiring an insurable interest to give support to the contract exists in this country irrespective of statutory provisions,[1] and everywhere is grounded upon important considerations of public policy.[2] Without it the contract would be a wager, and a wager policy is more to be condemned than an ordinary wager, since it is not only at variance with sound business ethics, but it also offers peculiar inducements to the assured to bring about fraudulently the event insured against.[3]

§ 25. **Insurable Interest—Fire.**—The question, what constitutes an insurable interest, though important, is not of as much practical consequence as the amount of case law relating to it would indicate. As before shown, the contract of insurance is in general construed to be a contract of indemnity, therefore, in case of losses to property, recovery must usually be limited to damage actually sustained. Persons who have no real pecuniary interest in property to protect seldom go to the fruitless expense of taking insurance upon it.

It may be stated generally, that any legal or equitable estate, or any right which may be prejudicially affected, or any liability which may be brought into operation, by a fire, will confer an insurable

[1] *Rombach* v. *Ins. Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Lord* v. *Dall*, 12 Mass. 115, 7 Am. Dec. 38; *Rittler* v. *Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *Singleton* v. *St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321; *Ruse* v. *Mut. Ben. L. Ins. Co.*, 23 N. Y. 516. *Contra* as to life insurance in some states, *Vivar* v. *Supreme Lodge*, 52 N. J. L. 455, 20 Atl. 36. (But see *Meyers* v. *Schumann*, 54 N. J. Eq. 414, 417, 34 Atl. 1066); *Hurd* v. *Doty*, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746. And see *Abbott* v. *Sebor*, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139 (marine) and *Juhel* v. *Church*, 2 Johns. Cas. 333. New Jersey statute against wagers is not applied to insurance, *Flagg* v. *Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308.

[2] *Trinity College* v. *Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291.

[3] The policy of the law is to preserve life, health, and property and not to encourage their impairment or destruction, *Ruse* v. *Mut. Ben. Life Ins. Co.*, 23 N. Y. 516; and see § 34. Wager contracts of insurance, *Fuller* v. *Metropolitan L. Ins. Co.*, 70 Conn. 647, 675, 41 Atl. 4; *Gambs* v. *Covenant Mut. L. Ins. Co.*, 50 Mo. 44, 47; *Guardian M. L. Ins. Co.* v. *Hogan*, 80 Ill. 35, 44, 22 Am. Rep. 150. See also *Conn. Mut. L. Ins. Co.* v. *Schaefer*, 94 U. S. 457, 460, were at one time tolerated in England, *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457, 460, 24 L. Ed. 251, but subsequently were forbidden by two statutes, applicable to marine and life policies respectively. 19 Geo. II, c. 37; 14 Geo. III, c. 48. Although the Stat. 14 Geo. III, has never been part of the common law of Vermont its rule has generally been followed in this country as declaratory of the common law, *Cronin* v. *Vermont L. Ins. Co.*, 20 R. I. 570, 40 Atl. 497. The preamble of the earlier statute is as follows: "Whereas it hath been found by experience that the making of assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices whereby great numbers of ships with their cargoes have either been fraudulently lost and destroyed or taken by the enemy in time of war, and such assurances have encouraged the exportation of wool and the carrying on of many other prohibited and clandestine trades," etc. In most of the states of the Union there are statutes against wagering contracts.

interest.[1] Nor is an insurable interest disturbed by reason of the fact that sources of indemnification are available to the insured independent of his policy.[2] A defeasible interest is insurable,[3] as also is a contingent,[4] or inchoate,[5] or partial interest.[6] On the other hand, it has often been declared that a mere expectancy in property, for example, in favor of an heir apparent, during the closing days of the life of the ancestor, even though the ancestor be intestate and a lunatic, will afford no basis for an insurable interest in the ancestor's property.[7] But it is not easy to reconcile some of the modern decisions with such a restriction.[8]

While certain general principles relating to this subject are clear, numerous border-line decisions demand attention. Thus, in a

[1] Bunyon, Ins. (5th ed.), p. 42. The English court says: "To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction." *Lucena* v. *Craufurd*, 3 B. & P. 75. Similarly the N. Y. court says: "The rule is well settled that it is not necessary to support an insurance that the insured should have an interest, legal or equitable, in the property destroyed. It is enough if he is so situated with reference to it that he would be liable to loss if it be destroyed or injured by the peril insured against. The test of insurable interest is whether an injury to the property or its destruction by the peril insured against would involve the insured in pecuniary loss," *Berry* v. *Am. Cent. Ins. Co.*, 132 N. Y. 49, 56, 30 N. E. 254, 28 Am. St. Rep. 548. The Mass. court says: "We think that the tendency of the modern decisions is to relax the stringency of some of the earlier cases and to admit to the protection of the contract all property standing in such a relation to the person seeking insurance that its loss would probably directly affect his pecuniary condition," *Doyle* v. *American F. Ins. Co.*, 181 Mass. 139, 63 N. E. 394; *Moran* v. *Uzielli* (1905), 2 K. B. 555, 562, 563, in which the court says, "an interest to be insurable is not necessarily a right, legal or equitable, in or charge upon, or arising out of the ownership of the thing exposed to the risks insured against, and any interest may be insured which is dependent on the safety of the thing exposed to such risks, still it must in all cases at the time of the loss be an interest, legal or equitable, and not merely an expectation, however probable. . . . The definition of insurable interest has been continuously expanding."

[2] Owner of unused revenue stamps though redeemable from the government if lost, *United States* v. *American Tobacco Co.*, 166 U. S. 468, 17 S. Ct. 619, 41 L. Ed. 1081. Mortgagee regardless of amount of other security, *Excelsior Fire Ins. Co.* v. *Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271. Owner of buildings under construction though restorable without cost to him, *Foley* v. *Mfrs. & Builders Fire Ins. Co.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664.

[3] *McCutchen* v. *Ingraham*, 32 W. Va. 378, 9 S. E. 260; *Stirling* v. *Vaughan*, 11 East, 619, 629.

[4] *Fenn* v. *New Orleans Mut. Ins. Co.*, 53 Ga. 578. For example, reinsurance.

[5] *Hancox* v. *Fishing Ins. Co.*, 3 Sumn. (C. C.) 132. For example, anticipated commissions or profits, § 48; curtesy initiate, § 26; or expected future crops, *Sawyer* v. *Dodge Co.*, 37 Wis. 503; *Grant* v. *Parkinson*, 3 Bos. & P. 85, n.

[6] *Inglis* v. *Stock* (1885), 10 App. Cas. 263, 274. For example, partner, joint tenant, or tenant in common, *Page* v. *Fry*, 2 B. & P. 240; *Moitke* v. *Mil. Mich. Ins. Co.*, 113 Mich. 166, 71 N. W. 463.

[7] See leading case of *Lucena* v. *Craufurd*, 3 B. & P. 75, 2 B. & P. N. S. 269, 1 Taunt. 325; *Moran* v. *Uzielli* (1905), 2 K. B. 555; *Riggs* v. *Commercial Mut. Ins. Co.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. R. 716.

[8] *Home Ins. Co.* v. *Mendenhall*, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374, and authorities cited.

Pennsylvania case, a turnpike company owning and operating a toll highway, insured a county bridge, upon the integrity of which its patronage depended, and indeed to the construction of which it had voluntarily contributed. But unfortunately it took out the policy as though it were owner of the bridge. The court held that there could be no recovery since the plaintiff disclosed no insurable interest as owner of the bridge.[1] This decision has often been misunderstood. If the insured had procured a valued policy on the use of the bridge or for loss of toll earnings, or had otherwise correctly described his interest in the preservation of the bridge, the contract ought to have been declared valid, although the property of the assured was not immediately exposed to the peril.[2] This conclusion finds analogy in a South Carolina case in which an insured superintendent, having in charge a stock of goods belonging to another person, had contracted for a salary for a term of years. The court was of opinion that his pecuniary interest in the preservation of the goods furnished sufficient evidence of an insurable interest in them.[3] So also a stockholder has an insurable interest, though no title, in the corporate property, since its preservation is of pecuniary interest to him.[4]

§ 26. Same Subject—Legal Title.—That legal title affords a valid insurable interest in property is indisputable.[5]

[1] *Farmers' Mut. Ins. Co.* v. *New Holland Turnpike Co.*, 122 Pa. St. 37, 15 Atl. 563; and see 144 Pa. St. 543.

[2] *Cohn* v. *Virginia F. & M. Ins. Co.*, 3 Hughes, 272, Fed. Cas. No. 2,970; *Graham* v. *Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. R. 707. The United States Supreme Court says: "It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage or by the destruction of which he will suffer a loss whether he has or has not any title in, or lien upon or possession of the property itself," *Harrison* v. *Fortlage*, 161 U. S. 57, 65, 16 S. Ct. 488, 40 L. Ed. 616; so also *Lucena* v. *Craufurd*, 2 Bos. & P. N. R. 269, 302, by Lawrence, J.

[3] *Graham* v. *Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. R. 707. Similarly a railroad engineer, mechanic, or chauffeur should be allowed to take out a valued policy upon the use of another's machine if it appear that a continuance of his occupation is dependent upon its preservation, for instance, in case of a railroad in a distant colony where the engine could not be replaced for a considerable period. See authorities cited, § 25, note 1, *ante*, p. 33.

[4] *Riggs* v. *Commercial Mut. Ins. Co.*, 125 N. Y. 7, 25 S. E. 1058, 10 L. R. A. 684; *Warren* v. *Davenport Fire Ins. Co.*, 31 Ia. 464, 7 Am. Rep. 160. *Contra, dictum, Phillips* v. *Knox, etc., Ins. Co.*, 20 Ohio St. 174.

[5] Curtesy or dower consummate, *Kyte* v. *Commercial Union Assur. Co.*, 144 Mass. 43, 10 N. E. 518; *Louden* v. *Waddle*, 98 Pa. St. 242; or other life tenancy, *Beekman* v. *Fulton Assn.*, 66 App. Div. 72, 73 N. Y. Supp. 110. Tenants for years, *Phila. Tool Co.* v. *British Am. Ins. Co.*, 132 Pa. St. 236, 19 Atl. 77, 19 Am. St. Rep. 596. Subtenant for years, *Fowler* v. *Insurance Co.*, 122 Mass. 191. A tenant at will, *Schaeffer* v. *Ins. Co.*, 113 Iowa, 652, 85 N. W. 985. Trustees, *Howard Fire Ins. Co.* v. *Chase*, 5 Wall. (N. S.) 509; *Stevens* v. *Melcher*, 152 N. Y. 551, 578. 46 N. E. 965. Assignees for the benefit

§ 27. Same Subject—Equitable Title.—An equitable title to property constitutes a good insurable interest therein.[1]

Thus, a vendee in possession, or conditionally obligated to pay the purchase price, has such an interest from the date of an executory contract of purchase,[2] or from the receipt of a bond for title.[3]

In a New York case a bank made an executory contract of sale to the plaintiff, who took out insurance. The title to the property, however, was standing in the name of the president individually, owing to a statute which forbade the holding of real estate by the bank itself. Nevertheless, the bank having been the intended beneficiary, it was held that an insurable interest in the property could be transferred by it to the plaintiff.[4]

of creditors, *Sibley* v. *Prescott Ins. Co.*, 57 Mich. 14, 23 N. W. 473. Executors and administrators, *Sheppard* v. *Peabody Ins. Co.*, 21 W. Va. 368. Administrators of insolvent estate, *Herkimer* v. *Rice*, 27 N. Y. 163. Executor in property devised for trust purposes, *Savage* v. *Insurance Co.*, 52 N. Y. 502, 11 Am. Rep. 741. Tenancy by the entirety, in the whole premises, *Clawson* v. *Citizens Mut. Ins. Co.*, 121 Mich. 591, 80 N. W. 573, 80 Am. St. Rep. 538. Vendors and grantors under executory contract of sale, *Continental Ins. Co.* v. *Brooks*, 131 Ala. 614, 30 South. 876; *Merchants' Ins. Co.* v. *Nowlin* (Tex. Civ. App.), 56 S. W. 198. Curtesy initiate gives such an interest, *Doyle* v. *American Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 394; *Trade Ins. Co.* v. *Barracliff*, 45 N. J. L. 543, 46 Am. Rep. 792; *Harris* v. *York Ins. Co.*, 50 Pa. St. 341. But see, *contra*, *Traders' Ins. Co.* v. *Newman*, 120 Ind. 554, 22 N. E. 428; *Clark* v. *Dwelling House Ins. Co.*, 81 Me. 373, 17 Atl. 303, which also seem to hold that dower inchoate does not give an insurable interest. And see *Flynn* v. *Flynn*, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. R. 427. A bankrupt or insolvent, though estate is vested in trustee, has insurable interest, *Marks* v. *Hamilton*, 7 Exch. 323. Mortgagor's interest ceases after time for redemption expires, *Essex Sav. Bank* v. *Meriden F. Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 4 L. R. A. 759. So as to owner's interest in goods sold under execution, *Cone* v. *Niagara F. Ins. Co.*, 60 N. Y. 619.

[1] *Gerringer* v. *North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773.

[2] *Franklin F. Ins. Co.* v. *Martin*, 40 N. J. L. 568, 29 Am. Rep. 271; *Brooks* v. *Erie Fire Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748, aff'd 177 N. Y. 572; *Davis* v. *Phœnix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115; *Dunn* v. *Yakish*, 10 Okla. 388, 61 Pac. 926; *Gettelman* v. *Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. 627; *Gilman* v. *Dwelling House Ins. Co.*, 81 Me. 488, 17 Atl. 544.

[3] *Clapp* v. *Farmers' Mut. Fire Ins. Co.*, 126 N. C. 388, 35 S. E. 617.

[4] *Carpenter et al.* v. *Ger. Am. Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015. Purchasers of goods, title to pass at future time, *Tabbut* v. *American Ins. Co.*, 185 Mass. 419, 70 N. E. 430; *Bohn Mfg. Co.* v. *Sawyer*, 169 Mass. 477, 48 N. E. 620; *Sheridan* v. *Peninsular Sav. Bank*, 116 Mich. 545, 74 N. W. 874. Vendee under option, to extent of advances, *Wunderlich* v. *Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N. W. 471. Trust company under contract to buy a deed of trust and notes secured thereby, *International Trust Co.* v. *Norwich Fire Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608. Beneficiary under a trust deed, *Harvey* v. *Cherry*, 76 N. Y. 436; *Southern Bldg. and Loan Assn.* v. *Miller*, 110 Fed. 35, 49 C. C. A. 21; *Tilley* v. *Conn. Fire Ins. Co.*, 86 Va. 813, 11 S. E. 120. So in *Cone* v. *Niagara Ins. Co.*, 60 N. Y. 619, it was held that one whose premises had been sold on execution had an insurable interest therein after his own right to redeem had lapsed, while a right remained in judgment creditors. For, while that right continued, he could have procured a loan, confessed judgment as security therefor, and thereby created a right to redeem.

§ 28. Illegal or Defective Title.—One in possession under an illegal or defective title has in general an insurable interest.[1] But it has also been held that a conveyance absolutely illegal and void *ab initio* will not confer a sufficient interest.[2]

§ 29. Same Subject—Representative Capacity.—Where the insured is intrusted with the goods of other persons as in the case of a common carrier,[3] warehouseman,[4] commission merchant,[5] wharfinger,[6] agent,[7] or factor,[8] he may either insure his own interest or his own liability in respect to the property, or he may insure the property to its full value for the benefit of all concerned, provided the policy properly describes the interests intended to be covered.[9]

§ 30. Same Subject—Liens.—A lien upon property carries with it an insurable interest in that property.[10] The lien need not be specific. The general lien of a judgment creditor before levy or attachment upon his debtor's property has been held sufficient,[11]

[1] *Travis* v. *Continental Ins. Co.*, 32 Mo. App. 198. Deed of gift adjudged void as to creditors, *Steinmeyer* v. *Steinmeyer*, 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. R. 809. Deed good as between the parties, *Home Ins. Co.* v. *Allen*, 93 Ky. 270, 19 S. W. 743. Deed in fraud of grantor, *Phœnix Ins. Co.* v. *Mitchell*, 67 Ill. 43. Deed from executor without power, *Home Ins. Co.* v. *Gilman*, 112 Ind. 7, 13 N. E. 118. Transfer void because between husband and wife, *Wolfe* v. *Security Fire Ins. Co.*, 39 N. Y. 49. Deed improperly acknowledged, *Sanford* v. *Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. R. 358.

[2] *Perry* v. *Mechanics' Mut. Ins. Co.*, 11 Fed. 478 (parol agreement to convey land, husband not joining); and see *Sweeny* v. *Franklin Ins. Co.*, 20 Pa. St. 337; *Stockdale* v. *Dunlap*, 6 M. & W. 224.

[3] *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730; *Lancaster Mills* v. *Merchants', etc., Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. R. 586.

[4] *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

[5] *Wagner* v. *Westchester F. Ins. Co.*, 92 Tex. 549, 50 S. W. 569.

[6] *Waters* v. *Monarch Fire Office*, 5 Ell. & B. 870.

[7] *Hartford F. Ins. Co.* v. *Keating*, 86 Md. 130, 148, 38 Atl. 29, 63 Am. St. R. 499; *Ferguson* v. *Pekin Plow Co.*, 141 Mo. 161, 42 S. W. 711; *Roberts* v. *Fireman's Ins. Co.*, 165 Pa. St. 55, 30 Atl. 450, 44 Am. St. R. 642.

[8] *Phœnix Ins. Co.* v. *Hamilton*, 14 Wall. (U. S.) 504, 20 L. Ed. 721.

[9] *Carpenter* v. *Ins. Co.*, 16 Pet. (U. S.) 495. Consignees or persons holding property in trust or on commission, *Ebsworth* v. *Alliance Mar. Ins. Co.*, L. R. 8 C. P. 596, 42 L. J. C. P. 305, 29 L. T. N. S. 479 (and elaborate examination of authorities as to amount of interest); *Providence Washington Ins. Co.* v. *The Sidney* (D. C.), 23 Fed. 88; *Hamburg-Bremen Ins. Co.* v. *Lewis*, 4 App. D. C. 66. Bailees in general, *Home Ins. Co.* v. *Peoria, etc., R. Co.*, 178 Ill. 64, 52 N. E. 862; *Fire Assn. of Eng.* v. *Merchants' and Marine Trans. Co.*, 66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905. Hirers of chattels, *Oliver* v. *Greene*, 3 Mass. 133, 3 Am. Dec. 96; *Bartlet* v. *Walter*, 13 Mass. 267, 7 Am. Dec. 143. Receivers, *McLaughlin* v. *Park City Bank*, 22 Utah, 473, 63 Pac. 589; *In re Hamilton*, 102 Fed. 683.

[10] *Ins. Co.* v. *Stinson*, 103 U. S. 25, 26. L. Ed. 473; *Donnell* v. *Donnell*, 86 Me. 518, 30 Atl. 67; *McLaughlin* v. *Park City Bank*, 22 Utah, 473, 63 Pac. 589

[11] *Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Spare* v. *Home Mutual Ins. Co.*, 15 Fed. 707.

but one having no lien, as a simple contract creditor, has no such interest.[1]

§ 31. **Same Subject—Possession.**—Possession of property coupled with a claim of title gives an insurable interest,[2] which continues, it is said, until the title has been judicially declared to be invalid,[3] and where possession is coupled with a beneficial use there is likewise a sufficient interest.[4] But a mere trespasser or intruder, or one who has no color of title to property, has no insurable interest in it.[5] Illustrative of the efficacy of mere use or possession in this

708; but see, *contra*, *Grevemeyer* v. *Southern Mut. Fire Ins. Co.*, 62 Pa. St. 340, 1 Am. Rep. 420; *Light* v. *Ins. Co.*, 169 Pa. St. 310, 32 Atl. 439, 47 Am. St. R. 904.

[1] *Foster* v. *Van Reed*, 5 Hun (N. Y.), 321; *Creed* v. *Sun Fire Office*, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. R. 134; *Grevemeyer* v. *Southern Mut. Fire Ins. Co., supra; Bishop* v. *Clay Fire & Marine Ins. Co.*, 49 Conn. 167. But see where debtor died and insurable interest resulted, *Creed* v. *Sun Fire Office*, 101 Ala. 522, 46 Am. St. R. 134, 23 L. R. A. 177, 14 South. 323. Holder of mortgage to extent of his claim, *Sussex Co. Mut. Ins. Co.* v. *Woodruff*, 26 N. J. L. 541. Mortgagor after foreclosure, with any title or equitable right remaining, *Strong* v. *Mfgrs. Ins. Co.*, 27 Mass. 40, 20 Am. Dec. 507; *Essex Savings Bank* v. *Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759; *Pope* v. *Glen Falls Ins. Co.*, 136 Ala. 670, 34 South. 29; *Slobodisky* v. *Phœnix Ins. Co.*, 53 Neb. 816, 74 N. W. 270. Other lienors with insurable interest include, for example, agents *Shaw* v. *Ins. Co.*, 49 Mo. 578, 8 Am. Rep. 150. Carriers, *Savage* v. *Ins. Co.*, 36 N. Y. 655; *Hough* v. *Ins. Co.*, 36 Md. 398. Mechanics, *Harvey* v. *Cherry*, 76 N. Y. 436; *Stout* v. *Ins. Co.*, 12 Ia. 371, 79 Am. Dec. 539; *Edwards* v. *Arquette*, 88 Wis. 450, 60 N. W. 782. Landlord with statutory lien for rent, *Mut. Fire Ins. Co.* v. *Ward*, 95 Va. 231, 28 S. E. 209. Storage company with lien for charges on merchandise, *Pittsburgh Storage Co.* v. *Scottish Union & Nat. Ins. Co.*, 168 Pa. St. 522, 32 Atl. 58.

[2] *City of N. Y.* v. *Brooklyn Fire Ins. Co.*, 41 Barb. (N. Y.) 231, aff'd 3 Abb. Dec. 251, 4 Keyes, 465. Even though obtained by trespass, *Franklin Fire Ins. Co.* v. *Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469.

[3] *Helvetia* v. *Swiss Fire Ins. Co.*, 11 Colo. App. 264, 53 Pac. 242. In *Wainer* v. *Milford Mut. Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, the owner of an undivided half of a dwelling house bought the other half from his brother by an oral contract and paid him full price therefor under promise of a deed, and thereupon entered into *exclusive possession of the whole claiming title.* Five years later in an application for insurance he described himself as owner thereof and upon a subsequent loss under the policy the insurance company refused payment on the ground that he had no insurable interest in the entire house. A week after the fire his brother, who had never disputed his title or refused to give him a deed, gave him one in pursuance of his promise. Judge Allen, holding that he did have an insurable interest admits that he had no means either at law or in equity of compelling the execution of a deed, but says: "It is not necessary to show an insurable interest which may be called ownership. Insurance against loss by fire is a personal contract of indemnity. If a person has such an interest in property that he will suffer pecuniary loss by its destruction he has an insurable interest."

[4] *Holbrook* v. *St. Paul Fire and Marine Ins. Co.*, 25 Minn. 229; *Schaefer* v. *Anchor Mut. Ins. Co.*, 100 N. W. (Ia.) 857; *Jacobs* v. *Mutual Ins. Co.*, 52 S. C. 110, 29 S. E. 533. One in possession with reasonable expectation of becoming owner in fee, *Home Ins. Co.* v. *Mendenhall*, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374.

[5] *Sweeny* v. *Franklin Ins. Co.*, 20 Pa. St. 337. Whether a tenant at sufferance enjoying possession and usufruct

regard, is a recent decision in Nebraska, establishing, for that state at least, the important and practical proposition that a husband and a wife, either separately or jointly, have an insurable interest in the furniture and household effects in use in the maintenance of the domestic relation, regardless of whose money paid for the articles, or from what sources or by what means they were obtained, or to whom they may belong.[1]

§ 32. **Same Subject—Contract Rights.**—A contract right the value of which is dependent upon the preservation of property belonging to another gives an insurable interest in that property.[2]

§ 33. **Same Subject—Liability.**—Mere responsibility or liability to another will confer an insurable interest.[3] Therefore a mort-

has an insurable interest is not very definitely settled, *Birmingham* v. *Ins. Co.*, 42 Barb. (N. Y.) 457; Bunyon, Ins. (5th ed.), p. 56. Unless policy were valued it would be difficult to establish value of his interest. It has been held under married women's acts that husband has no insurable interest in wife's separate property if having no legal right of control or possession, *Planters' Mut. Ins. Co.* v. *Loyd*, 71 Ark. 292, 75 S. W. 725; *Traders' Ins. Co.* v. *Newman*, 120 Ind. 554, 22 N. E. 428; *German Ins. Co.* v. *Paul*, 2 Ind. Ter. 625, 53 S. W. 442; *Trott* v. *Woolwich Mut. F. Ins. Co.*, 83 Me. 362, 22 Atl. 245; *Agricultural Ins. Co.* v. *Montague*, 38 Mich. 548, 31 Am. Rep. 326. Although residing with her in the house insured, *Tyree* v. *Virginia F. & M. Ins. Co.*, 55 W. V. 63, 46 S. E. 706, 66 L. R. A. 657. On the contrary, it has been held that a husband occupying a homestead belonging to his wife has an insurable interest in it, *Carey* v. *Home Ins. Co.*, 97 Iowa, 619, 66 N. W. 920; *Reynold* v. *Iowa, etc., Ins. Co.*, 80 Iowa, 563, 46 N. W. 659. Especially if he has inchoate right of curtesy, *Traders' Ins. Co.* v. *Barracliff*, 45 N. J. L. 543, 46 Am. Rep. 792 (personal property); *Continental F. Assoc.* v. *Wingfield*, 7 Tex. Ct. Rep. 53, 73 S. W. 847; and see *American Cent. Ins. Co.* v. *McLanathan*, 11 Kan. 533; *Horsch* v. *Dwelling House Ins. Co.*, 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806. But under standard fire policy any limited interest must be set forth.

[1] *Lenogh* v. *Commercial Union Ass. Co.* (Neb., 1906), 110 N. W. 740.

[2] Thus, patentee with contract for royalties in property used in connection with patents, *Nat. Filtering Oil Co.* v. *Citizens' Ins. Co.*, 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473. Contractor in house he is moving, *Planters' & Merchants' Ins. Co.* v. *Thurston*, 93 Ala. 255, 9 South. 268. Building contractor in building in course of erection, *Sullivan* v. *Spring Garden Ins. Co.*, 34 App. Div. 128, 58 N. Y. Supp. 629; *Cushing* v. *Williamsburg City Fire Ins. Co.*, 4 Wash. 538, 30 Pac. 736. Superintendent in goods of another's establishment, *Graham* v. *Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. R. 707. One entitled to share of net profits of an insurance company may insure the property insured by it, *Hayes* v. *Milford Mut. Ins. Co.*, 170 Mass. 492, 49 N. E. 754. But it has been said that a person can have no insurable interest in property under a contract which cannot be enforced either in law or equity, *Pope* v. *Glen Falls Ins. Co.*, 136 Ala. 670, 34 South. 29; *Perry* v. *Mechanics' Mut. Ins. Co.*, 11 Fed. 478.

[3] As to common carriers, warehousemen, and bailees generally, see § 29. *Berry* v. *Am. Cent. Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. R. 548; Statutory liability of railroads for injury to property by their engines, *Railroad Co.* v. *Relief Fire Ins. Co.*, 98 Mass. 420, 105 Mass. 570; *Lumberman's Mut. Ins. Co.* v. *Kansas City R. R. Co.*, 149 Mo. 165, 50 S. W. 281. One agreeing for consideration to care for property and keep insured, *Cross* v. *Nat. Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390.

gagor retains an insurable interest, even though he has conveyed away the mortgaged premises to a vendee who also assumes payment of the mortgage debt, since the mortgagor also is still liable on his bond.[1] Upon the same principle, an insurance company may reinsure with another company the whole or any part of its liability as an insurer, whether existing under one or all of its policies.[2]

§ 34. **Insurable Interest—Life.**—While, as before shown, pure speculation in human life is not to be tolerated,[3] provident arrangements by means of life insurance in favor of dependents are of advantage to the beneficiaries and of benefit to the state and, therefore, to be encouraged.[4]

Few persons, however, would invest in life insurance if they knew in advance that the person insured was destined to fill out the average span of life. Such an investment must be considered pecuniarily unprofitable. The insurance company out of its receipts must meet its heavy expenses, also its obligations arising from the early deaths among its patrons. The conclusion cannot be escaped that the primary purpose of the insured, as well as the main utility of the contract, is to cover loss occasioned by premature rather than by normal death. But all insurance and notably life insurance is in some respects in the nature of an investment.[5] In

[1] *Hanover Fire Ins. Co.* v. *Bohn*, 48 Neb. 743, 67 N. W. 774, 58 Am. St. R. 719; *Waring* v. *Loder*, 53 N. Y. 581. Sureties, *Ins. Co.* v. *Thompson*, 95 U. S. 547, 24 L. Ed. 487. Indorsers, *Williams* v. *Roger Williams Ins. Co.*, 107 Mass. 377, 7 Am. Rep. 41. Sheriff in goods seized on execution, *White* v. *Madison*, 26 N. Y. 117, 26 How. Pr. 487; *Smith* v. *Huddleston*, 103 Ala. 223; 15 South. 521. Vendee under contract of conditional sale if liable for loss by fire has insurable interest to full value, and not simply to amount of his advancements, *Ryan* v. *Agricultural Ins. Co.*, 188 Mass. 11, 73 N. E. 849.

[2] *Ins. Co. of N. A.* v. *Hibernia Ins. Co.*, 140 U. S. 565, 11 S. Ct. 909, 35 L. Ed. 517; *Phœnix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 323, 6 S. Ct. 750; *Barnes* v. *Heckla F. Ins. Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. R. 438, note; *Hunt* v. *New Hamp., etc., Assoc.*, 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514, 73 Am. St. R. 602.

[3] *Crotty* v. *Ins. Co.*, 144 U. S. 621, 12 S. Ct. 749, 36 L. Ed. 566; *Gordon* v. *Ware Nat. Bank*, 132 Fed. 444, 65 C. C. A. 580 (contrary to public policy that policyholders should be interested to shorten human life); *Union Fraternal League* v. *Walton*, 109 Ga. 1, 34 S. E. 317, 77 Am. St. R. 350, 46 L. R. A. 424; *Bloomington Mut. Ben. Assn.* v. *Blue*, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; *Met. Life Ins. Co.* v. *Brown*, 159 Ind. 644, 65 N. E. 908; *Burbage* v. *Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409 (demoralizing, *contra bonos mores*). Other illustrations of wager policies, *Fuller* v. *Metro. Life Ins. Co.*, 70 Conn. 647, 41 Atl. 4; *Golden Rule* v. *People*, 118 Ill. 492, 9 N. E. 342; *People* v. *Golden Rule*, 114 Ill. 34, 28 N. E. 383; *Gilbert* v. *Moose*, 104 Pa. St. 74, 80, 49 Am. Rep. 570 ("life insurance gambling fraught with dishonesty and disaster"); *Wilton* v. *N. Y. Life Ins. Co.*, 34 Tex. Civ. App. 156, 78 S. W. 403.

[4] *Ulrich* v. *Reinochl*, 143 Pa. St. 238, 252, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. R. 534.

[5] *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24, 52 Am. Rep. 245. An endowment policy is said to have more

return for premiums paid, the insured expects to secure protection for himself or for others, or to collect insurance moneys, or both, and in the case of life insurance, since death is sure to occur sooner or later, he expects to reap both kinds of benefit.[1] To call the contract of life insurance a contract of strict indemnity, on the one hand, or, on the other, to isolate it from the general law of insurance and classify it as an investment, as many have done, is unwise. It partakes of the nature of both arrangements.[2]

By these and other considerations we are easily led to approve the better doctrine that the valid life insurance contract is in so far one of indemnity that the necessity of an insurable interest, and an interest actually or presumptively of a valuable character, lies at its foundation.[3] But every man's life is presumed to be valuable to himself;[4] therefore, whenever the insured takes out a policy on his own life, whether payable to himself, his estate or other beneficiaries of his own selection, until it is affirmatively shown that he entered into the contract with the purpose of hastening his death,[5] or evading the law, the usual love of life is held by the better authority to satisfy the legal demand for evidence of a sufficient insurable interest.[6] Accordingly, every man is said to have an insurable interest in his own life and to any amount.[7] But when the insurance is taken out by a person other than the life insured, the

of the character of an investment than has the regular life policy, *Talcott* v. *Field*, 34 Neb. 611, 615, 52 N. W. 400.

[1] *Trenton Mut. L. & F. Ins. Co.* v. *Johnson*, 24 N. J. L. 576.

[2] Any statute defining insurable interest controls, *Gillam* v. *Dale*, 69 Kan. 362 (1904), 76 Pac. 861; *Barnes* v. *London E. & G. L. Ins. Co.*, L. R. (1892) 1 Q. B. D. 864. Many states have statutes prohibiting wagers.

[3] If no insurable interest were required to give the contract a valid inception not only would beneficiaries be tempted to shorten the life insured, but unscrupulous persons would constantly be seeking to defraud insurance companies by taking out policies upon risks believed by the applicants, for reasons undisclosed, to be bad. The whole business would thus be thrown into confusion, *Burbage* v. *Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409; *Gilbert* v. *Moose*, 104 Pa. St. 74, 80, 49 Am. Rep. 570. Insurable interest must be shown in spite of incontestable clause, *Anctil* v. *Manufacturers' L. Ins. Co.*, L. R. (1899), App. Cas. 604. Court will not enforce policy void for lack of interest, though illegality be not pleaded, *Gedge* v. *Royal Exch.* (1900), 2 K. B. 214.

[4] *Fidelity Mut. Life Assn.* v. *Jeffords*, 107 Fed. 402, 410, 46 C. C. A. 377.

[5] *Ritter* v. *Ins. Co.*, 169 U. S. 139, 18 S. Ct. 300, 42 L. Ed. 693; *Schmidt* v. *Assoc.*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. R. 323.

[6] *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457, 460, 24 L. Ed. 251; *Union Fraternal League* v. *Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. R. 350; *Prudential Ins. Co.* v. *Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. R. 380; *Bloomington Mut. B. Assn.* v. *Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; *Campbell* v. *Ins. Co.*, 98 Mass. 381; *Albert* v. *Mut. L. Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. R. 693; *Northwestern Masonic Aid Assn.* v. *Jones*, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. R. 810.

[7] *Fidelity Mut. Life Assn.* v. *Jeffords*, 107 Fed. 402, 410, 46 C. C. A. 377; *Foster* v. *Preferred Acc. Ins. Co.*, 125 Fed. 536.

problems presented are not always so easy of solution and the rules relating to insurable interest become more or less arbitrary.[1]

It has been held, however, that, if the beneficiary has an insurable interest, the party taking out the insurance need have none.[2] And similarly it has been held that if only one of the beneficiaries has an insurable interest the policy will not be avoided.[3] The doctrine of the necessity of an insurable interest has not been adopted for the benefit of the insurance company, but out of regard to the public welfare.[4]

[1] "It is not easy to define with precision what will in all cases constitute an insurable interest so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of, or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of benefit from the continuance of his life," *Warnock* v. *Davis*, 104 U. S. 775, 779, 26 L. Ed. 924 (cited with approval in *Cisna* v. *Sheibley*, 88 Ill. App. 385, 390). In *Hinton* v. *Mutual Reserve F. & L. Assn.*, 135 N. C. 314, 47 S. E. 474, 476, 65 L. R. A. 161, 102 Am. St. R. 545, the following rule is relied on: "Except in cases where there are ties of blood or marriage the expectation of advantage from the continuance of the life of the insured in order to be reasonable as the law counts reasonableness, must be founded on the existence of some contract between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there will come some damage which can be estimated by some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract." But in *Carpenter* v. *U. S. Life Ins. Co.*, 161 Pa. St. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. R. 880, there was no contract and no kinship, and the plaintiff, a poor girl, was held to have an insurable interest in the life of her benefactor. *Keystone Mut. Ben. Assn.* v. *Norris*, 115 Pa. St. 446, 451, 8 Atl. 638, 2 Am. St. R. 572; *Appeal of Corson*, 113 Pa. St. 438, 445, 6 Atl. 213, 57 Am. Rep. 479; *Cronin* v. *Vermont L. Ins. Co.*, 20 R. I. 570, 572, 60 Atl. 497. The so-called test or definition of mere "good faith" or benevolent desire for the continuance of the life insured is practically worthless in determining the legal sufficiency of an insurable interest. A relative or friend or neighbor without the shadow of insurable interest might take out a policy, to the validity of which substantially all the authorities would refuse sanction, and yet it might be quite impossible to prove any bad faith or any desire for the early death of the insured, *U. B. Mut. Aid Soc.* v. *McDonald*, 122 Pa. St. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. R. 111. A question of good faith involves usually not a legal definition but an issue of fact for a jury. "Good faith" offers no criterion for testing the validity of a policy until the standard of good faith is first made clear. Life insurance often involves the payment of premiums for a long course of years. The validity of the policy should be removed as far as possible from the realm of uncertainty. If the policy is issued to the insured, the beneficiary, in most jurisdictions, need not allege nor prove insurable interest, *Northwestern Masonic Aid Assn.* v. *Jones*, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. R. 810, but such allegation and proof are required when the policy is taken out by a person other than the insured, *Continental Life Ins. Co.* v. *Volger*, 89 Ind. 572, 46 Am. Rep. 185.

[2] *McCann* v. *Met. Life Ins. Co.*, 177 Mass. 280, 58 N. E. 1026 (beneficiary a daughter). So also where the estate of the insured was beneficiary, *Prudential Ins. Co.* v. *Leyden*, 20 Ky. L. Rep. 881 (1898), 47 S. W. 767.

[3] *Beard* v. *Sharp*, 100 Ky. 606, 33 S. W. 1057.

[4] *Reed* v. *Prov. Savings L. Assn. Soc.*, 36 App. Div. 250, 55 N. Y. Supp. 292; *Forbes* v. *Am. Mut. Life Ins. Co.*, 15

§ 35. Ties of Affection, Blood, or Marriage.—Ties of affection do not in themselves constitute an insurable interest.[1] As to how far ties of marriage or near kinship raise a conclusive presumption of insurable interest, the courts are not in harmony.

A wife has a legal right to support from her husband,[2] and even under modern statutes relating to married women a husband has a right to expect valuable services from his wife.[3] For these reasons, coupled with the intimacy of the relationship, the sound rule seems to be that a wife should be conclusively presumed to have an insurable interest in the life of her husband and the husband in the life of the wife.[4] And when other relationships or kinships are accompanied by a reasonable expectation of pecuniary benefit to accrue from a continuance of the life insured, though not based upon

Gray (Mass.), 249, 254, 77 Am. Dec. 360. Some of the states have statutes providing that no one can take out insurance on another's life without his consent, for example, N. Y. Ins. L. § 55. *Am. Mut. Life Ins. Co.* v. *Bertram*, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935 (assessments can be recovered back), *Work* v. *Am. Mut. L. Ins. Co.*, 31 Ind. App. 153, 67 N. E. 458 (a felony in that state to procure a policy on life of another without his consent; and held that premiums could not be recovered back though company knew the facts). *Fulton* v. *Met. L. Ins. Co.*, 1 Misc. 478, 21 N. Y. Supp. 470, premiums may be recovered back [compare on this point the recent English case, *Harse* v. *Pearl Life Assur. Co.* (1904), 1 K. B. 558], and the Kentucky court has in numerous cases declared that a policy without such consent is void as against public policy, *Griffens* v. *Equitable Assur. Soc.*, 119 Ky. 856, 84 S. W. 1164 (held that premiums could be recovered); *Met. Life Ins. Co.* v. *Asmus*, 25 Ky. L. R. 1550, 78 S. W. 204 (the same holding); *Met. Life Ins. Co.* v. *Smith*, 22 Ky. L. R. 868, 59 S. W. 24, 53 L. R. A. 817; *Met. Life Ins. Co.* v. *Blesch*, 22 Ky. L. R. 530, 58 S. W. 436, and cases cited; *Met. L. Ins. Co.* v. *Monohan*, 102 Ky. 13, 42 S. W. 924. But it is difficult in the absence of statute or contract provision to sustain the proposition either on principle or authority. See *McCann* v. *Met. Life Ins. Co.*, 177 Mass. 280, 58 N. E. 1026; *Delouche* v. *Met. L. Ins. Co.*, 69 N. H. 587, 45 Atl. 414. The insurance company before accepting an application generally requires a medical examination of the person to be insured, involving his consent, but if the company acquiesces there is no approved doctrine of common law to prevent a person, with a good insurable interest in the life of another, from taking out insurance to protect that interest without consulting the latter, for instance, a creditor to secure his claim, or a father in the life of his infant son, or a large shareholder in the life of a promoter upon whom the success of the venture depends.

[1] *Mutual Benefit Assn.* v. *Hoyt*, 46 Mich. 473, 9 N. W. 497 (a friend); *Lanouette* v. *Laplante*, 67 N. H. 118, 36 Atl. 981; *Harse* v. *Pearl Life Assur. Co.* (1903), 2 K. B. 92, 72 L. J. K. B. 638, 89 Law T. 94, reversed on another point (1904), 1 K. B. 558.

[2] *Rombach* v. *Ins. Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; *Gambs* v. *Covenant Mut. Life Ins. Co.*, 50 Mo. 44; *Reed* v. *Assur. Co.*, Peake, Add. Cas., 70.

[3] *Goodrich* v. *Treat*, 3 Colo. 408; *Currier* v. *Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134.

[4] *Connecticut Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Crotty* v. *Ins. Co.*, 144 U. S. 621, 627, 12 S. Ct. 749, 36 L. Ed. 566; *Trenton Mut. L. & F. Ins. Co.* v. *Johnson*, 24 N. J. L. 576. But see *Currier* v. *Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134, in which there is the dictum; "cases may exist where the husband has no insurable interest whatever in his wife's life. She may be a burden—a hopeless maniac or invalid."

any legal right, an insurable interest is established.[1] Indeed in this country it has repeatedly been held that a woman has such a reasonable right to expect pecuniary advantage from the continu-

[1] *Life Ins. Clearing Co.* v. *O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225, and cases *supra*. As to who in New York can take out a policy on the life of a child and to what amount, see L. 1892, c. 690, sec. 55, and c. 437. But it has been held that an adult son has no insurable interest in the life of his father simply by virtue of the relationship, *Prudential Ins. Co.* v. *Hunn*, 21 Ind. App. 525, 52 N. E. 772; *Chi. G. F. & L. Soc.* v. *Dyon*, 79 Ill. App. 100; *Guardian Mut. L. Ins. Co.* v. *Hogan*, 80 Ill. 35, 22 Am. Rep. 180; and see *Rombach* v. *Ins. Co.*, 35 La. Ann. 233, 48 Am. Rep. 239. *Contra*, *Valley Mut. L. Assn.* v. *Teewalt*, 79 Va. 421, 423. Nor a daughter simply by virtue of the relationship, *Continental Life Ins. Co.* v. *Volger*, 89 Ind. 572, 46 Am. Rep. 185; but compare, *contra*, *Farmers' & Traders' Bk.* v. *Johnson*, 118 Iowa, 282, 91 N. W. 1074 and many cases cited. Nor a stepson in his stepfather's life when no dependence or responsibility for support exists, *U. B. Nat. Aid Soc.* v. *McDonald*, 122 Pa. St. 324, 15 Atl. 439, 1 L. R. A. 238. Relationship coupled with payments of money by the son, *Life Ins. Clearing Co.* v. *O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225. Again, a nephew has no insurable interest in the life of an uncle, *Reed* v. *Prov. S. Life Ins. Soc.*, 36 App. Div. (N. Y.) 250, 55 N. Y. Supp. 292; *Mowry* v. *Home Life Ins. Co.*, 9 R. I. 346. See *Singleton* v. *St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321; or of an aunt, *Appeal of Corson*, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; where he is in no way dependent upon her, *American Mut. L. Ins. Co.* v. *Bertram*, 163 Ind. 51 (1904), 70 N. E. 258; *Wilton* v. *New York L. Ins. Co.*, 34 Tex. Civ. App. 156 (1904), 78 S. W. 403 (a niece with a mere probability of occasional gifts); nor a son-in-law in the life of a mother-in-law, *Rombach* v. *Piedmont & A. Life Ins. Co.*, 35 La. Ann. 233, 48 Am. Rep. 239; or of a father-in-law, *Ramsey* v. *Meyers*, 6 Pa. Dist. R. 468, 54 Leg. Intell. 317. But see *Adams* v. *Reed*, 18 Ky. L. R. 858, 38 S. W. 420, 35 L. R. A. 692. A brother has no insurable interest in the life of a brother, *Lewis* v. *Phœnix Mut. Life Ins. Co.*, 39 Conn. 100. But as to rule at common law, see *Hosmer* v. *Welch*, 107 Mich. 470, 67 N. W. 504, 65 N. W. 280, merely a *dictum*. Nor a person in the life of his cousin, *Whitmore* v. *Supreme Lodge*, 100 Mo. 36, 13 S. W. 495; *Brett* v. *Warnick*, 44 Ore. 511, 75 Pac. 1061; *Sternberg* v. *Levy*, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438 (Rev. Stat. 1889, Mo., § 5853. Widowed sister had an insurable interest in brother's life). Again, certain relationships are so apt to involve a legal claim to services, support, or pecuniary obligation or advantage that their existence has been held in some jurisdictions to establish conclusively an insurable interest, *Rombach* v. *Piedmont & A. L. Ins. Co.*, 35 La. Ann. 233; *Trenton Mut. L. & F. Ins. Co.* v. *Johnson*, 24 N. J. L. 576; *Corson's Appeal*, 113 Pa. St. 438, 6 Atl. 213, 57 Am. St. R. 479. Interest by consanguinity is said to exist only in favor of husband, wife, parent, child, brother, or sister of insured, *Wilton* v. *New York L. Ins. Co.*, 34 Tex. Civ. App. 156 (1904), 78 S. W. 403. Thus, as already stated, a wife has an insurable interest in the life of her husband, and the validity of the policy will survive a divorce, *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 460, 24 L. Ed. 251; *Holmes* v. *Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. R. 463; *Baker* v. *Union Mut. L. Ins. Co.*, 43 N. Y. 283. Statutes in many states affect rights of wife and children, *Charter Oak L. Ins. Co.* v. *Brant*, 47 Mo. 419, 4 Am. Rep. 328. See *Gambs* v. *Covenant Mut. L. Ins. Co.*, 50 Mo. 44; *Ellison* v. *Straw*, 116 Wis. 207, 92 N. W. 1094. Wife has insurable interest in life of husband, *Washington Cent. Nat. Bk.* v. *Hume*, 128 U. S. 195, 205, 9 S. Ct. 41, 32 L. Ed. 370, 16 Wash. L. Rep. 777. At common law wife had insurable interest in her husband's life, so that policy taken out by him for her would be valid, and upon her death policy could be changed for second wife's benefit, *Gambs* v. *Covenant Mut. Ins. Co.*, 50 Mo. 44. As to wife's insurable interest and statutes see note 53 L. R. A. 817–826. Interest survives divorce, *Overhiser* v. *Overhiser*, 63 Ohio St. 77, 50 L. R. A. 552, 57 N. E. 965, 81 Am. St. R. 612

ance of the life of her fiancé as to confer upon her an insurable interest in his life.[1]

Any element of dependency coupled with relationship will furnish the basis for an insurable interest.[2] Thus, where the brother had supported and educated his sister, it was held that she had an insurable interest in his life.[3]

but compare *Hatch* v. *Hatch*, 35 Tex. Civ. App. 373 (1904), 80 S. W. 411. And the illegality of the marriage will not defeat it, *Equitable Life Assur. So.* v. *Paterson*, 41 Ga. 338, 5 Am. Rep. 535. Especially if she believes it to be legal, *Scott* v. *Scott*, 25 Ky. 1356 (1904), 77 S. W. 1122. See *Supreme Tent K. of M. of W.* v. *McAllister*, 132 Mich. 69, 92 N. W. 770, 102 Am. St. R. 386. Mistress may have insurable interest in life of paramour, *Lampkin* v. *Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040. See *Ruoff* v. *John Hancock Mut. L. Ins. Co.*, 83 N. Y. Supp. 758, 86 App. Div. 447. A woman may insure the life of her fiancé, *Chisholm* v. *National Capitol Life Ins. Co.*, 52 Mo. 213, 14 Am. Rep. 414; *Bograt* v. *Thompson*, 53 N. Y. Supp. 622, 24 Misc. 581; *Taylor* v. *Travelers' Ins. Co.*, 15 Tex. Civ. App. 254, 39 S. W. 185; *Opitz* v. *Karel*, 118 Wis. 527, 95 N. W. 948. A father has an insurable interest in the life of his minor son, *Loomis* v. *Ins. Co.*, 6 Gray (Mass.), 396; *Mitchell* v. *Union Life Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529; *Grattan* v. *National L. Ins. Co.*, 15 Hun (N. Y.), 74. Indeed, it has been held by some courts in this country that children generally, without regard to age or position, have such an interest in a father's life, *Reserve Mut. Ins. Co.* v. *Kane*, 81 Pa. St. 154, 22 Am. Rep. 741; *Valley Mut. L. Assn.* v. *Teewalt*, 79 Va. 421, 423. See also *Washington Cent. Nat. Bk.* v. *Hume*, 128 U. S. 195, 205, 9 S. Ct. 41, 32 L. Ed. 370, 16 Wash. L. Rep. 777; *Warnock* v. *Davis*, 104 U. S. 775, 26 L. Ed. 924 (parent in child or child in parent). *Holmes* v. *Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. R. 463 (parent in child or child in parent). Daughter has insurable interest in father's life, *Farmers' & Traders' Bk.* v. *Johnson*, 118 Iowa, 282, 91 N. W. 1074, citing many cases, but daughter's policy on father's life taken out without his knowledge or consent held void, *Metropolitan L. Ins. Co.* v. *Blesch*, 22 Ky. L. Rep. 530, 58 S. W. 436. That child has no insurable interest in life of mother where there is no liability for support, etc., see *People's Mut. Ben. Soc.* v. *Templeton*, 16 Ind. App. 126, 44 N. E. 809. Son must aver some reasonable expectation of pecuniary benefit in mother's life, *People's Mut. Ben. Soc.* v. *Templeton*, 16 Ind. App. 260, 44 N. E. 809, 811. *Held*, under English statute, that a son's mere relationship does not impose upon him such an expectation of having to pay his mother's funeral expenses as to give him an insurable interest in her life, *Harse* v. *Pearl L. Assur. Co.*, 72 L. J. K. B. 638, 89 Law T. 94 (1903), 2 K. B. 92, reversed on another point in (1904), 1 K. B. 558, court holding that premiums could not be recovered back if contract was illegal and parties *in pari delicto*. In this case the policy was worded "son for funeral expenses." A liability for support under the poor laws may, however, give an insurable interest in a parent's life, *Reserve Mut. Ins. Co.* v. *Kane*, 81 Pa. St. 155, 22 Am. Rep. 741. But see *Mut. Ben. Soc.* v. *Templeton*, 16 Ind. App. 260, 44 N. E. 809, 811; *Life Ins. Clearing Co.* v. *O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225.

[1] *Opitz* v. *Karel*, 118 Wis. 527, 95 N. W. 948 (an interesting case, deciding also, that a gift of the policy to the lady was complete without written assignment, and was effective without the company's consent).

[2] *Berdan* v. *Mil. Mut. Life Ins. Co.*, 136 Mich. 396, 99 N. W. 411.

[3] *Lord* v. *Dall*, 12 Mass. 115, 7 Am. Dec. 38; *Carpenter* v. *U. S. Life Ins. Co.*, 161 Pa. St. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. R. 880 (child in life of benefactor). *Cronin* v. *Vermont L. Ins. Co.*, 20 R. I. 570, 40 Atl. 497 (niece under moral obligations to support aunt). *Barnes* v. *London, Edinburgh & Glasgow L. Ins. Co.*, Law Rep. (1892), 1 Q. B. D. 864 (understanding that stepsister should be supported *held*, a sufficient pecuniary interest).

The interest which one has in his own life, being incapable of exact pecuniary estimate, may be valued at any amount which the parties agree upon, and so generally of all insurable interests which are founded upon relationship.[1]

§ 36. Creditor in Life of Debtor.—The rule is well settled that a creditor has an insurable interest in the life of his debtor[2] which is said to survive a discharge in bankruptcy[3] or general assignment for creditors.[4] And the rule applies whether the creditor is assignee or insures his debtor's life;[5] and although the debt is voidable,[6] or not enforceable on account of the statute of limitations.[7]

In a recent case a nephew, an agent for life insurance companies, agreed with his uncle and his uncle's children to take out and maintain $25,000 of insurance upon the uncle's life, the children to have any balance of insurance money after return to the nephew of the amount of premiums and interest thereon, together with a bonus to him of $5,000. The uncle joined in and signed the application and also gave to the nephew promissory notes under seal, not for a past

[1] *Bevin* v. *Conn. Mut. Life Ins. Co.*, 23 Conn. 244.

[2] *Walker* v. *Larkin*, 127 Ind. 100, 26 N. E. 684 (a judgment creditor). *Belknap* v. *Johnston*, 114 Iowa, 265, 86 N. W. 267; *Hale* v. *Life Ind. & Investment Co.*, 65 Minn. 548, 68 N. W. 182; *Goodwin* v. *Mass. Mut. Life Ins. Co.*, 73 N. Y. 480; *Mace* v. *Association*, 101 N. C. 122, 7 S. E. 674; *Ulrich* v. *Reinoehl*, 143 Pa. St. 238, 28 W. N. C. 419, 13 L. R. A. 433, 24 Am. St. R. 534, 22 Atl. 862; *Shaffer* v. *Spangler*, 144 Pa. St. 223, 22 Atl. 865.

[3] *Ferguson* v. *Mass. Mut. Life Ins. Co.*, 32 Hun, 306, aff'd 102 N. Y. 647; *Mutual Res. Fund L. Assn.* v. *Beatty*, 93 Fed. 747, 756, 35 C. C. A. 573, after discharge in bankruptcy and new promise to pay.

[4] *Manhattan Life Ins. Co.* v. *Hennessy*, 99 Fed. 64, 39 C. C. A. 625.

[5] *First Nat. Bk.* v. *Terry*, 99 Va. 194, 37 S. E. 843, 3 Va. Sup. Ct. Rep. 125. See *Morris* v. *Georgia Sav. & Bkg. Co.*, 109 Ga. 12, 34 S. E. 378; 46 L. R. A. 506; *Gordon* v. *Ware Nat. Bk.*, 132 Fed. 444, 446, 65 C. C. A. 580. Compare *Equitable L. Ins. Co.* v. *Hazlewood*, 75 Tex. 338, 16 Am. St. R. 893, 12 S. W. 621, 7 L. R. A. 217.

[6] *Rivers* v. *Gregg*, 5 Rich. Eq. (S. C.) 274.

[7] *Rawls* v. *Amer. Mut. Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280. Insurable interest must not be based upon a mere moral claim, *Guardian M. L. Ins. Co.* v. *Hogna*, 80 Ill. 35, 22 Am. Rep. 180. Nor has a community creditor such an interest in the life of his debtor's wife, where there is no personal liability against her, *Cameron* v. *Barcus*, 31 Tex. Civ. App. 46, 71 S. W. 423. See *Wheeland* v. *Atwood*, 192 Pa. St. 237, 44 W. N. C. 386, 73 Am. St. R. 803, 43 Atl. 946 (as to assignments by wife to husband and by him to his own creditor). A creditor of an infant, however, for necessaries sold to him has an insurable interest in his life, *Rivers* v. *Gregg*, 5 Rich. Eq. (S. C.) 274. So a voidable note given for a debt contracted during the minority of the debtor is sufficient to give an insurable interest, because the infant alone can avoid the note, *Dwyer* v. *Ears*, Park on Ins. 432. A creditor of a copartnership has also an insurable interest in the life of each copartner, *Morrell* v. *Trenton Mut. L. and F. Ins. Co.*, 10 Cush. (Mass.) 282, 57 Am. Dec. 92; *Kennedy* v. *N. Y. Life Ins. Co.*, 10 La. Ann. 809.

indebtedness, but apparently to evidence an insurable interest in the nephew. The policy sued upon, $10,000 in amount, was in terms payable to the nephew alone, and was taken out by him two years after execution of the agreement in order to replace policies of like amount in bankrupt companies payable to him and his cousins. By that time the nephew had actually paid out about $2,000 for premiums under the agreement, in part performance of which the new insurance was obtained. The court held that the policy was altogether valid and that the children, all of whom had intervened in the action brought by the nephew against the insurance company, were entitled to their share of the proceeds, and that the nephew was entitled to his share in pursuance of the family arrangement described.[1]

§ 37. **Same—To What Amount.**—As to the amount of insurance which shall be permitted in proportion to the amount of the debt, the views of different courts are not in harmony. Insurance limited to the face of the indebtedness, if such indebtedness remained unpaid, would fall short of indemnifying the creditor by the sum total of the premiums paid with interest thereon, and many courts have expressed the opinion that the creditor should be allowed to provide for an amount of insurance sufficient when collected to cover his debt, together with such expense as may be required to keep the policy in force and interest also.[2] But the practical embarrassment in applying this plausible test is twofold; first, the validity of the contract should be determined according to the motives of the parties and the prospect as viewed at its date rather than after the death of the insured;[3] and, second, the total amount of premiums as thus viewed with interest thereon will always exceed the whole face of the policy no matter how large or how small the amount of

[1] *Reed* v. *Prov. S. L. Assur. Soc.*, 36 App. Div. 250, 55 N. Y. Supp. 292. Compare a case in which a creditor, the sole payee named in policy, was regarded as trustee for wife of insured, *A. L. & H. Ins. Co.* v. *Robertshaw*, 26 Pa. St. 189. And compare two other cases in which there had been no promise by the insured to repay the premiums to the person who took out the insurance and in which the insurance was for the benefit in part of himself and in part of wife of the insured, *West* v. *Sanders*, 104 Ga. 727, 31 S. E. 619, held void; *Burbage* v. *Windley*, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409, held void.

[2] *Crotty* v. *Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 S. Ct. 749, 36 L. Ed. 566; *Wheeland* v. *Atwood*, 192 Pa. St. 237, 44 W. N. C. 386, 73 Am. St. R. 803, 43 Atl. 946; *Ulrich* v. *Reinoehl*, 143 Pa. St. 238, 28 W. N. C. 419, 13 L. R. A. 433, 24 Am. St. R. 534, 22 Atl. 862; *Equitable Life Ins. Co.* v. *Hazelwood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. R. 893; *First Nat. Bank* v. *Terry*, 99 Va. 194, 37 S. E. 843.

[3] *Conn. Mut. Life Ins. Co.* v. *Luchs*, 108 U. S. 498, 2 S. Ct. 949, 27 L. Ed. 800; *Curtiss* v. *Ætna Life Ins. Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. R. 114, further advances were contemplated, policy valid.

insurance, leaving to the creditor nothing at all to apply upon the debt.[1]

On the other hand, to permit the creditor to take out insurance, greatly in excess of the debt, offers a clear inducement to the creditor to shorten the debtor's life and, therefore, contravenes a recognized principle of public policy.[2]

Two inconsistent rules have been evolved from the considerations just mentioned. One may be called the Texas rule which allows the creditor to take out as much insurance as he pleases, but limits his interest in the recovery to the amount of debt, premiums, and interest upon premiums, any balance to inure to the benefit of the debtor, for whom he is looked upon as trustee to that extent.[3] This rule though simple is open to the grave objection that its application may deprive the creditor of the whole or a large portion of the insurance on which he alone has paid the premiums, and may turn it over to one who is altogether a stranger to the contract of insurance.

The other rule has been adopted by the United States Supreme Court. It provides, though more indefinitely, that the creditor's insurance must not so largely exceed the amount of the debt as to indicate a wagering contract rather than a *bona fide* effort to obtain security for the indebtedness.[4]

[1] *Exchange Bank* v. *Loh*, 104 Ga. 446, 471, 472, 31 S. E. 459, 44 L. R. A. 372, Little, J., exposes the fallacy of the doctrine that the insurable interest is limited to the amount of the debtor's liability. Where the policy is taken out by the debtor and assigned to the creditor as collateral, the interest of the assignee is limited to the debt, *Morris* v. *Georgia Sav. & Bkg. Co.*, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

[2] *Reg.* v. *Flanagan*, 15 Cox Cr. Cas. 411. Defendant, poisoned her debtors after insuring their lives.

[3] *Cheeves* v. *Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. R. 107; *Equitable Life Ins. Co.* v. *Hazlewood*, 75 Tex. 338, 16 Am. St. R. 893, 12 S. W. 621, 7 L. R. A. 217; *Schonfield* v. *Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Mut. Life Ins. Co.* v. *Blodgett*, 8 Tex. Civ. App. 45, 27 S. W. 286; *Morris* v. *Georgia L. S. & B. Co.*, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; *Strobe* v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S. W. 379; and see to similar effect, *Weigelman* v. *Bronger*, 96 Ky. 132, 28 S. W. 334; *Lanouette* v. *Laplante*, 67 N. H. 118, 36 Atl. 981; *Riner* v. *Riner*, 166 Pa. St. 617, 31 Atl. 437, 45 Am. St. R. 693.

[4] *Cammack* v. *Lewis*, 15 Wall. 643, 21 L. Ed. 244 (policy held void where debt was $70.00 and policy $3,000). *Rittler* v. *Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844 (insurance in mutuals $6,500, collection $2,124, debt $1,000, held valid). *Givens* v. *Veeder*, 9 N. M. 256, 50 Pac. 316; *Talbert* v. *Storum*, 7 App. Div. 456, 39 N. Y. Supp. 1047; *Appeal of Corson*, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479 (policy for $2,000 valid, debt $743). *Grant* v. *Kline*, 115 Pa. 618, 9 Atl. 150 (policy for $3,000 valid, debt $743). *Cooper* v. *Weaver's Adm.*, (Pa. St.) 11 Atl. 780, and *Cooper* v. *Shaeffer*, 20 W. N. C. (Pa.) 123, 11 Atl. 548 (policy for $3,000 void, debt $100). The Pennsylvania court has also formulated the rule that the creditor may insure his debtor's life in an amount equal to the debt together with all premiums according to Carlisle Tables of expectancy and interest on debt and premiums, *Wheeland* v. *Atwood*, 192 Pa. St. 237, 44 W. N. C. 386, 43 Atl. 946,

§ 38. Other Business Relations.—Any property or commercial relationship may lawfully be the subject of an insurable interest. Thus, one holding a property interest contingent upon another's arriving at a specified age may insure against the loss that he would suffer by the earlier termination of the other life.[1]

73 Am. St. R. 803; *McHale* v. *McDonnell*, 175 Pa. St. 632, 34 Atl. 966; *Shaffer* v. *Spangler*, 144 Pa. St. 223, 22 Atl. 865; *Ulrich* v. *Reinoehl*, 143 Pa. St. 238, 28 W. N. C. 419, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. R. 534; *Grant's Adm.* v. *Kline*, 115 Pa. St. 618, 9 Atl. 150. This rule is impracticable and would allow a policy no matter how large inasmuch as the amount of premiums and interest by the tables always exceeds the amount of the policy. Fallacy in Pennsylvania rule explained in *Exchange Bank* v. *Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, by Little, J.

[1] *Law* v. *Policy Co.*, 3 Eq. 338, 1 Kay & J. 223. For the same reason an employer may take out accident insurance to protect himself from loss by reason of his liability for the negligence of his employees in engines, cars, vehicles of any sort, elevators, and in the use of machinery and so forth, *Am. Employers' Liability Ins. Co.* v. *Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. R. 305; *Employers' Liability Assur. Corp.* v. *Merrill*, 155 Mass. 404, 29 N. E. 529. A tenant of a landlord who has only a life interest in the premises demised may insure the landlord's life, *Sides* v. *Knickerbocker Life Ins. Co.*, 16 Fed. 650. Some of those pecuniarily interested in the preparations for the coronation of the King of England insured his life. So also a partner has an insurable interest in the life of a copartner, *Conn. Mut. Life Ins. Co.* v. *Luchs*, 108 U. S. 498, 27 L. Ed. 800, 2 S. Ct. 949; *Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997; but the wife of a partner has no such interest *Met. Life Ins. Co.* v. *O'Brien*, 92 Mich. 584; 52 N. W. 1012; but compare *Powell* v. *Mut. Ben. L. Ins. Co.*, 123 N. C. 103, 105, 31 S. E. 381, 68 Am. St. R. 818. So in case of joint venture, *Miller* v. *Eagle Life & Health Ins. Co.*, 2 E. D. Smith (N. Y.), 268; *Bevin* v. *Conn. Mut. L. Ins. Co.*, 23 Conn. 244; *Mitchell* v. *Union Life Ins. Co.*, 45 Me. 104, 71 Am. Dec. 529; *Trenton Mut. L. & F. Ins. Co.* v. *Johnson*, 24 N. J. L. 576. A clerk in life of employer, master in life of servant, *Hebdon* v. *West*, 3 Best & Smith, 578; *Hilliard* v. *Sanford*, 6 Ohio Dec. 449, 4 Ohio N. P. 363. Master in life of his slave, *Summers* v. *United States Ins. Annuity & Tr. Co.*, 13 La. Ann. 504; *Woodfin* v. *Asheville Mut. Ins. Co.*, 51 N. C. 558. A surety on a bond in the life of the principal, though no breach of the bond occur, *Scott* v. *Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192; *Embry* v. *Harris*, 107 Ky. 61, 52 S. W. 958; *Hebdon* v. *West*, 3 Best & Smith, 579; *Branford* v. *Saunders*, 25 Weekly Reporter, 650; but the principal has no such interest in the life of the surety and therefore the fact that a member is surety for a building association does not give the corporation an insurable interest in his life if he is not indebted to it, *Tate* v. *Building Assn.* 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. R. 770. It cannot be held, however, as matter of law, that one who is furnishing funds to carry on the business of a corporation has no insurable interest in the life of its manager and promoter, *Mechanics' Nat. Bk.* v. *Comins*, 72 N. H. 12, 55 Atl. 191, 101 Am. St. R. 650. It is reported that some of the stockholders in companies financed by Mr. J. P. Morgan have taken out insurance upon his life. In North Carolina held that a denominational college sustained and controlled by the Methodist church has no insurable interest in the life of a member of that church, *Trinity College* v. *Travelers' Ins. Co.*, 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291 (the question arises whether the policy should not have been held valid inasmuch as the insured himself made the application for it. This point was considered but not passed upon in *Reed* v. *Prov. S. L. Assur. Soc.*, 36 App. Div. 250, 55 N. Y. Supp. 292). A policy taken out by one "as protector of the insured whenever he stood in need of protection" gives no insurable interest, *Anctil* v. *Manufacturers L. Ins. Co.*, L. R. (1899), App. Cas. 604; § 2590, Civ. Code Lower Can. An as-

§ 39. Insurable Interest—Marine.—The same general principles are applicable as in fire insurance. Thus, the owner of a vessel has in all cases an insurable interest in it, even when it has been chartered by one who covenants to pay him its value in case she is lost during the voyage.[1] So also the charterer has an insurable interest in the vessel,[2] and anyone interested in cargo[3] or in freight may insure his interest.[4]

signee in bankruptcy, Re *McKinney*, 15 Fed. 535, or under an assignment for creditors, *Barbour's Adm.* v. *Larue's Assignee*, 106 Ky. 546, 51 S. W. 5, has no insurable interest in the life of the insolvent.

[1] *Hobbs* v. *Hannam*, 3 Camp. 93. And though vessel is not enrolled in his own name, *McColdin* v. *Greenwich Ins. Co.*, 10 N. Y. St. R. 390; and see *Oliver* v. *Greene*, 3 Mass. 133, 3 Am. Dec. 96 (plaintiff owned one-half and was responsible for other half); *Kenny* v. *Clarkson*, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336, holding that the owner, though there be a bottomry bond, may insure his interest generally, but the holder of the bond must insure his interest *eo nomine*. *International Marine Ins. Co.* v. *Winsmore*, 124 Pa. St. 61, 23 W. N. C. 204, 16 Atl. 516 (owners in joint venture with lien for advances). The insurable interest of the owner of a ship hypothecated by bottomry is only the excess of its value over the amount secured by bottomry. The lender on bottomry may insure his interest in the ship to the amount of the loan, *Robertson* v. *United Ins. Co.*, 3 Johns. Cas. (N. Y.) 499; *Read* v. *Mut. Safety Ins. Co.*, 5 N. Y. Super. Ct. 54; *Smith* v. *Williams*, 2 Caine's Cas. (N. Y.) 110.

[2] *The Gulnare*, 42 Fed. 861. And a charterer agreeing to keep vessel insured, *Bartlett* v. *Walter*, 13 Mass. 267, 7 Am. Dec. 143.

[3] *Wiggin* v. *Mercantile Ins. Co.*, 7 Pick. (Mass.) 271; *Prov. Wash. Ins. Co.* v. *The Sidney*, 23 Fed. 88; *Pouverin* v. *La. State M. & F. Ins. Co.*, 4 Rob. (La.) 234.

[4] *Clark* v. *Ocean Ins. Co.*, 16 Pick. (Mass.) 289; *Adams* v. *Warren Ins. Co.*, 22 Pick. (Mass.) 163; *McGraw* v. *Ocean Ins. Co.*, 23 Pick. (Mass.) 405; *Gordon* v. *Am. Ins. Co.*, 4 Denio (N. Y.), 360 (though goods not yet laden aboard). *Williams* v. *Ins. Co.*, 1 Hilt. (N. Y.) 345; *Riley* v. *Delafield*, 7 Johns. (N. Y.) 522 (no insurable interest). The owners may insure freight though the vessel sail under a charter party, *Hodgson* v. *Mississippi Ins. Co.*, 2 La. 341; *Adams* v. *Warren Ins. Co.*, 22 Pick. (Mass.) 163. The charterer may also insure it, *Barber* v. *Fleming*, L. R. 5 Q. B. 59. The insured may hold either a legal or an equitable title or no title at all to the property insured, *Locke* v. *North Am. Ins. Co.*, 13 Mass. 61 (different interests may be insured and sometimes each to full value of property); and see *North Brit. & M. Ins. Co.* v. *L. & L. & G. Ins. Co.* (1877), 5 Ch. D. 569. Mortgagor may insure. *Wilkes* v. *People's Fire Ins. Co.*, 19 N. Y. 184 (though mortgage cover full value) *Higginson* v. *Dall*, 13 Mass. 96 (vessel) *Schultz* v. *Pacific Ins. Co.*, 14 Fla. 73 (freight pledged). Mortgagees may insure *Clark* v. *Washington Ins. Co.*, 100 Mass. 509, 1 Am. Rep. 135. Also vendor under executory contract, *Bell* v. *Western Mar. & F. Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *Gordon* v. *Mass. F. & M. Ins. Co.*, 2 Pick. (Mass.) 249; *Slocovich* v. *Oriental Mut. Ins. Co.*, 13 Daly (N. Y.), 264. Also vendee though title has not passed, *Rider* v. *Ocean Ins. Co.*, 20 Pick. (Mass.) 259; *Kenny* v. *Clarkson*, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336. And though contract is oral or voidable, *Amsinck* v. *Am. Ins. Co.*, 129 Mass. 185. Similarly vendees of goods who will get title to them, only on their delivery have an insurable interest in them, though contract be "no arrival no sale." *Harrison* v. *Fortlage*, 161 U. S. 57, 16 S. Ct. 488, 40 L. Ed. 616. A stockholder in the company has an insurable interest in its steamers, *Seaman* v. *Enterprise F. & M. Ins. Co.*, 18 Fed. 250, 21 Fed. 778. And even in shipments on its steamers, *Mannheim Ins. Co.* v. *Hollander*, 112 Fed. 549.

Any lien or interest in the nature of a lien for advances for repairs or for other purposes will give an insurable interest.[1]

A person may insure to protect his own property or he may insure in a representative capacity for the protection of the interests of others, as where a charterer takes out insurance for the benefit of himself and the owner,[2] or where an agent[3] or carrier insures his own interest or liability and for whom it may concern.[4]

§ 40. Payee of Life Policy Need Have no Insurable Interest.—By the weight of authority a person taking out insurance upon his own life may be trusted to designate in his discretion any person whatever as beneficiary, whether such beneficiary have an insurable interest or not,[5] provided the transaction is not a mere

[1] *Merchants' Mut. Mar. Ins. Co.* v. *Baring*, 20 Wall. (U. S.) 159, 22 L. Ed. 250; *Phœnix Ins. Co.* v. *Parsons*, 129 N. Y. 86, 29 N. E. 87. A surety liable to value of cargo in case of condemnation by court has an insurable interest therein, *Russell* v. *Union Ins. Co.*, 1 Wash. C. C. 409, 4 Dall. 421, Fed. Cas. No. 12,146, 1 L. Ed. 892. So also a person giving a bond for release of an attached vessel, *Firemen's Ins. Co.* v. *Powell*, 13 B. Mon. (Ky.) 311. But advances voluntarily made without authority may give no insurable interest, *China Mut. Ins. Co.* v. *Ward*, 59 Fed. 712, 8 C. C. A. 229, 20 U. S. App. 292; *Buchanan* v. *Ocean Ins. Co.*, 6 Cow. (N. Y.) 318; and see *Lee* v. *Barreda*, 16 Md. 190. Supercargo has an insurable interest to extent of his commissions, *N. Y. Ins. Co.* v. *Robinson*, 1 Johns. (N. Y.) 616. Master with commission on cargo, *Holbrook* v. *Brown*, 2 Mass. 280. Commission merchant consignee of cargo, *Putnam* v. *Mercantile Mar. Ins. Co.*, 5 Metc. (Mass.) 386. Assignee of commission, *Wells* v. *Phila. Ins. Co.*, 9 Serg. & R. (Pa.) 103.

[2] Compare § 29. *Murdock* v. *Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

[3] *Buck* v. *Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151, 7 L. Ed. 90. But agent without personal interest must not insure on his own account or as owner, *Sawyer* v. *Mayhew*, 51 Me. 398.

[4] *Van Natta* v. *Mut. Sec. Ins. Co.*, 2 Sandf. (N. Y.) 490; *Cunard S. Co.* v. *Marten* (1902), 2 K. B. 624; *The Sydney*, 23 Fed. 88. Independent insurable interests may exist at the same time in the same property. Thus, besides the owner of a cargo, a consignee with lien on it for advances, *Ebsworth* v. *Alliance Mar. Ins. Co.* (1873), L. R. 8 C. P. 596; the insurer of the cargo, § 33; the carrier who transports it, *Cunard S.S. Co.* v. *Marten* (1903), 2 K. B. 511, have each a separate insurable interest in the cargo.

[5] Where insurance is taken out by third parties, the insured person must almost always practically join in the application by submitting to a medical examination. The New York Supreme Court has raised the interesting and important query whether joining in the application of another is not legally equivalent to the voluntary appointment of a beneficiary in a policy taken out by the insured himself. The learned justice, now chief justice of the Court of Appeals, could find no substantial difference, *Reed* v. *Prov. Sav. Life Assur. Soc.*, 36 App. Div. 250, 55 N. Y. Supp. 292; *Conn. Ins. Co.* v. *Schaefer*, 94 U. S. 457, 460, 24 L. Ed. 251 (for benefit of a relative or friend). *Ætna L. Ins. Co.* v. *France*, 94 U. S. 561, 24 L. Ed. 287, for benefit of sister. *Foster* v. *Preferred Acc. Ins. Co.*, 125 Fed. 536, a brother. *U. S. Mut. Acc. Assn.* v. *Hodgskin*, 4 App. D. C. 516; *Merchants' L. Assn.* v. *Yoakum*, 98 Fed. 251, 39 C. C. A. 56; *Am. Life Ins. Co.* v. *Barr*, 68 Fed. 873, 32 U. S. App. 444, 16 C. C. A. 51 (accident policy). *Allen* v. *Hartford L. Ins. Co.*, 72 Conn. 693, 45 Atl. 955; *Union Fraternal League* v. *Walton*, 109 Ga. 1, 34 S. E. 317, 77 Am. St. R. 350, 46 L. R. A. 424; *Bloomington Mut. Ben. Assn.* v. *Blue*, 120 Ill. 121, 60 Am. St. R. 558, 11 N. E.

device to evade the law against wagering contracts. And the rule has been held applicable though the beneficiary pays the premiums.[1]

Other courts on grounds of supposed public policy have held that the insured must not appoint as beneficiary one having no insurable interest.[2] Indeed, the Federal Supreme Court has stated broadly: "It is the settled law of this court that a claimant under a life insurance policy must have an insurable interest in the life of the insured." [3]

§ 41. **Same Subject—Assignee.**—In like manner, under the prevailing rule, and in order not to impair the usefulness and commercial value of life insurance, many courts have held that a person taking out insurance upon his own life may subsequently assign the policy in good faith to anyone either for value or by way of gift, whether the assignee have an insurable interest or not.[4] This

331; *Met. Life Ins. Co.* v. *Brown*, 159 Ind. 644, 65 N. E. 908; *Heinlein* v. *Imperial L. Ins. Co.*, 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. R. 409 (mother for benefit of son who paid first premium). *Albert* v. *Mut. L. Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. R. 693; *Hill* v. *United L. Ins. Assn.*, 154 Pa. St. 29, 25 Atl. 771, 31 W. N. C. 483, 35 Am. St. R. 807 (tontine arrangement held valid). *Crosswell* v. *Connecticut Indem. Assn.*, 51 S. C. 103, 28 S. E. 200; *Clements* v. *N. Y. Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, and note, 70 Am. St. R. 650 (unlawful preexisting agreement). *Ashley* v. *Ashley*, 3 Sim. 149; *Vezina* v. *Ins. Co.*, 6 Can. Sup. Ct. 30.

[1] *Fidelity Mut. Life Assn.* v. *Jeffords*, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193 (brother the appointee but he had agreed to make some provision for children of insured). *Ancient Order* v. *Brown*, 112 Ga. 545 (1901), 37 S. E. 890; *Heinlein* v. *Imperial L. Ins. Co.*, 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. R. 409. Mother insured for benefit of son who paid first premium,

[2] *N. Y. Life Ins. Co.* v. *Brown*, 23 Ky. L. R. 2070, 66 S. W. 613; *Gilbert* v. *Moose*, 104 Pa. 74, 78, 49 Am. Rep. 570 ("If we admit that one man may insure his life for the benefit of another who is neither a relative nor a creditor our whole doctrine concerning wagering policies goes by the board; the very foundation of that doctrine is that no one shall have a beneficial interest of any kind in a life policy who is not presumed to be interested in the preservation of the life insured. . . . Moreover, if such a transaction were permitted the wager could always be concealed under the mere form of the policy," *held*, policy not void but insurance reverts to estate of insured). *Equitable Life Ins. Co.* v. *Hazlewood*, 75 Tex. 338, 16 Am. St. R. 893, 12 S. W. 621, 7 L. R. A. 217, insurance may be collected for benefit of the estate of insured.

[3] *Crotty* v. *Union Mut. Ins. Co.*, 144 U. S. 621, 623, 12 S. Ct. 749, 36 L. Ed. 566, citing also *Warnock* v. *Davis*, 104 U. S. 775, 26 L. Ed. 924; *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457, 24 L. Ed. 251, in which, however, there is a dictum that insured might appoint his friend, and in the federal supreme court any intimate relationship seems to import an insurable interest, *Cammack* v. *Lewis*, 15 Wall. 643, 21 L. Ed. 244; but see *Gordon* v. *Ware Nat. Bk.*, 132 Fed. 444, 65 C. C. A. 580, and cases cited.

[4] *Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997 (valid if valuable consideration). *Gordon* v. *Ware Nat. Bk.*, 132 Fed. 444, giving long lists of cases *pro* and *con* and holding that federal court would not be controlled by law of state where assignment was made (on last point compare *Miller* v. *Campbell*, 140 N. Y. 457, 35 N. E. 651, 55 N. Y. St. R. 787; *Groff* v. *Mut. Life Ins. Co.*, 92 Ill. App. 207); *Fitzgerald* v. *Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 17 Atl. 411,

doctrine has been further extended to allow to a creditor or to any lawful beneficiary holding a policy the right to assign it to one having no insurable interest, provided in each case the transaction is not a mere cloak to conceal a wager.[1] Other courts condemn such a rule, holding in effect that in such a case motive is immaterial,[2]

7 Am. St. R. 288 (owner of policy has the world for a market). *Union Fraternal League* v. *Walton*, 109 Ga. 1, 34 S. E. 317, 77 Am. St. R. 350, 46 L. R. A. 424; *Rylander* v. *Allen*, 125 Ga. 206, 53 S. E. 1032, giving long list of authorities; *Martin* v. *Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. R. 625; *Met. Life Ins. Co.* v. *Brown*, 159 Ind. 644, 65 N. E. 908; *Farmers' & T. Bk.* v. *Johnson*, 118 Iowa, 282, 91 N. W. 1074; *Re Hearing*, 26 La. Ann. 326 (but see *Hays* v. *Lapeyre*, 48 La. Ann. 749); 19 So. 821; 35 L. R. A. 647; *Rittler* v. *Smith*, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; *King* v. *Cram*, 185 Mass. 103, 69 N. E. 1049 (whether assignee is purchaser or donee); *Dixon* v. *Nat. L. Ins. Co.*, 168 Mass. 48, 46 N. E. 430; *Mut. L. Ins. Co.* v. *Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Prudential Ins. Co.* v. *Liersch*, 122 Mich. 436, 81 N. W. 258; *Murphy* v. *Red*, 64 Miss. 614, 1 So. 761, 60 Am. Rep. 68; *Chamberlain* v. *Butler*, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. R. 478 (commercial value and usefulness should be fostered rather than crippled). *Mechanics' Nat. Bk.* v. *Comins*, 72 N. H. 12, 55 Atl. 191; *Vivar* v. *Supreme Lodge*, 52 N. J. L. 455, 20 Atl. 36; *Steinback* v. *Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. R. 424; *Wright* v. *Mut. Ben. L. Assn.*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. R. 749; *Olmsted* v. *Keyes*, 85 N. Y. 593; *St. John* v. *Am. Mut. L. Ins. Co.*, 13 N. Y. 31, 64 Am. Dec. 529; *McDonough* v. *Ætna L. Ins. Co.*, 78 N. Y. Supp. 217, 38 Misc. 625 (endowment policy). *Eckel* v. *Renner*, 41 Ohio, 232; *Clark* v. *Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Crosswell* v. *Conn. Ind. Assn.*, 51 S. C. 103, 28 S. E. 200; *Clement* v. *N. Y. Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, and note, 70 Am. St. R. 650; *Fairchild* v. *Association*, 51 Vt. 613; *Bursinger* v. *Bank*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848; *Strike* v. *Ins. Co.*, 95 Wis. 583, 70 N. W. 819. *Contra*, that assignee must have insurable interest, *Warnock* v. *Davis*, 104 U. S. 775, 26 L. Ed. 924; *Alabama G. L. Ins. Co.* v. *Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 So. 561; *Stoelker* v. *Thornton*, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140; *Missouri Valley Life Ins. Co.* v. *Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Missouri Valley Life Ins. Co.* v. *McCrum*, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537; *Bromley* v. *Wash. L. Ins. Co.* (Ky. 1906), 33 S. W. 17, 35 Ins. L. J. 498; *N. Y. Life Ins. Co.* v. *Brown*, 23 Ky. L. R. 2070, 66 S. W. 613 (assignee cannot recover but estate of insured can). *Schlamp* v. *Berner*, 21 Ky. L. R. 324, 51 S. W. 312; *McDonald* v. *Birss*, 99 Mich. 329, 58 N. W. 359; *Heusner* v. *Mut. Life Ins. Co.*, 47 Mo. App. 336; *Mutual Life Ins. Co.* v. *Richards*, 99 Mo. App. 88, 72 S. W. 487 (valid only to extent of premiums paid by assignee). *Powell* v. *Dewey*, 123 N. C. 103, 31 S. E. 381, 68 Am. St. R. 818; *Carpenter* v. *U. S. Life Ins. Co.*, 161 Pa. St. 9, 15, 28 Atl. 943, 41 Am. St. R. 880, 23 L. R. A. 571; *Gilbert* v. *Moose*, 104 Pa. St. 74, 49 Am. Rep. 570; *Downey* v. *Hoffer*, 110 Pa. St. 109, 20 Atl. 655; *Ruth* v. *Katterman*, 112 Pa. St. 251, 3 Atl. 833 (good only to amount paid by assignee). *Hoffman* v. *Hoke*, 122 Pa. St. 377, 15 Atl. 437, 1 L. R. A. 229; *Equitable Life Ins. Co.* v. *Hazlewood*, 75 Tex. 338, 351, 12 S. W. 621, 16 Am. St. R. 893, 7 L. R. A. 217 (but proceeds may be collected for estate of insured). *Dugger* v. *Mut. L. Ins. Co.* (Tex. Civ. App.), 81 S. W. 335; *Roller* v. *Moore*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; *Tate* v. *Commercial Bldg. Assn.*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. R. 770.

[1] *Gordon* v. *Ware Nat. Bk.*, 132 Fed. 444, 65 C. C. A. 580, giving for many states the rule *pro* and *con*; *Farmers' & Traders' Bk.* v. *Johnson*, 118 Iowa, 282, 91 N. W. 1074; *Mechanics' Nat. Bk.* v. *Comins*, 72 N. H. 12, 55 Atl. 191, 101 Am. St. R. 650 (but the insured also joined in the assignment). *Steinback* v. *Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. R. 424, 48 Cent. L. J. 175, and note (if, in good faith, to be treated like any other chose in action).

[2] *U. B. Mut. Aid Soc.* v. *McDonald*,

inasmuch as the transaction inherently and necessarily contravenes what they consider to be sound public policy. They contend that to vest all title to the expected insurance moneys in a claimant who has no interest in the preservation of the life insured, and especially if without the knowledge and consent of the insured himself, is substantially to abrogate altogether the doctrine of the necessity of an insurable interest.[1]

§ 42. **Express Restrictions.**—It must be observed, however, that appointments of beneficiaries and assignments alike are subject to statutory or contract restrictions.[2]

§ 43. **Appointees—Assignees—United States Supreme Court.**—Exactly what view of this subject is entertained by the Federal Supreme Court cannot be stated with certainty. Certain expressions in their opinions would seem to require further explanation.[3] In

122 Pa. St. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. R. 111; *Downey* v. *Hoffer*, 110 Pa. St. 109, 20 Atl. 655.

[1] *Crotty* v. *Union Mut. L. Ins. Co.*, 144 U. S. 621, 623, 12 S. Ct. 749, 36 L. Ed. 566, *dictum; Warnock* v. *Davis*, 104 U. S. 775, 26 L. Ed. 924, *dictum; Alabama G. L. Ins. Co.* v. *Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 So. 561; *Missouri Valley L. Ins. Co.* v. *McCrum*, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537; *Gilbert* v. *Moose*, 104 Pa. St. 74, 78, 49 Am. Rep. 570; *Roller* v. *Moore*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136; and see *Mut. L. Assur. Co.* v. *Anderson* (Can.), 1 N. B. Eq. 466.

[2] *Ancient Order* v. *Brown*, 112 Ga. 545 (1901), 37 S. E. 890; *Nat. Exch. Bk.* v. *Bright*, 18 Ky. L. Rep. 588; 36 S. W. 10; *Prudential Ins. Co.* v. *Liersch*, 122 Mich. 436, 81 N. W. 258; *Supreme Conclave* v. *Dailey*, 61 N. J. Eq. 145, 47 Atl. 277; *McCord* v. *McCord*, 40 App. Div. (N. Y.) 275, 57 N. Y. Supp. 1049. Produce Exchange gratuity fund). *Kimball* v. *Lester*, 43 App. Div. 27, 59 N. Y. Supp. 540, aff'd 167 N. Y. 570, 60 N. E. 1117. But such statute cannot be retroactive, *Moore* v. *Chi. Guar. F. Life Soc.*, 178 Ill. 202, 52 N. E. 882. Claimant must show interest if policy so provide, *Page* v. *Burnstine*, 102 U. S. 664, 25 L. Ed. 268. But company may waive the clause, *Bank* v. *Comins*, 72 N. H. 12, 55 Atl. 191.

[3] Thus, the court says: "It is the settled law of this court that a claimant under a life insurance policy must have an insurable interest in the life of the insured," *Crotty* v. *Union Mut Ins. Co.*, 144 U. S. 621, 623, 12 S. Ct. 749, 36 L. Ed. 566. And in one of the cases cited in support occur the following statements: "If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other, so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life," *Warnock* v. *Davis*, 104 U. S. 775, 782, 26 L. Ed. 924. But the agreement in that case was clearly speculative and other courts have distinguished the case and endeavored on that ground to avoid the rule, for example, *Chamberlain* v. *Butler*, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. R. 478; *Steinback* v. *Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. R. 424; *Gordon* v. *Ware Nat. Bk.*, 132 Fed. 444, 65 C. C. A. 580. But in another case the United States Supreme Court has said, "there is no doubt that a man may effect an insurance on his own life

endeavoring to harmonize and apply the various statements quoted in the notes, lower federal courts have since concluded that if a policy is taken out in good faith an appointee or assignee without any insurable interest whatever may maintain claim;[1] while other courts have understood the Federal Supreme Court to mean that regardless of motive if the appointee or assignee is altogether devoid of insurable interest the transaction can only be interpreted as an evasion or violation of the law, a mere cover for a wager.[2] The question perhaps turns very much upon what is understood by the elastic phrase "insurable interest." The doctrine of the highest court seems in general to be this: Where a man effects insurance upon his own life for the benefit of another and pays the premiums, an insurable interest will readily be inferred from almost any kinship or intimate relationship, and where even a stranger buys the policy in good faith, his payment of a consideration will be regarded as creating an insurable interest, at all events to that extent, somewhat analogous to the insurable interest of a creditor.[3]

§ 44. **When Must Insurable Interest Exist—Marine Insurance.** In the law of marine insurance the rule must be considered well settled that if the insurance is taken out in good faith with intent to cover an expected interest, and if an interest exists at the time of the loss, it is not essential that any interest should have been actually acquired at the time of making the contract or at the time of the issuance of the policy.[4] The policy, of course, however,

for the benefit of a relative or friend, or two or more persons on their joint lives, for the benefit of the survivor or survivors," *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457, 460, 24 L. Ed. 251. Again, the same court held that the relationship between a party and another for whose benefit he effects an insurance upon his life, if a good and valid consideration in law for any gift or grant, furnishes no ground for the imputation that the transaction was by way of cover for a wager policy, *Ætna Life Ins. Co.* v. *France*, 94 U. S. 561, 364, 24 L. Ed. 287 (a brother appointed his sister). And again: "A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action when the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies, *N. Y. Mut. Life Ins. Co.* v. *Armsirong*, 117 U. S. 591, 597, 6 S. Ct. 877, 29 L. Ed. 997; and see *Merchants' Life Assn.* v. *Yoakum*, 98 Fed. 251, 39 C. C. A. 56. *Contra*, that assignee must have insurable interest, *Swick* v. *Home Ins. Co.*, 23 Fed. Cas. 550; *Langdon* v. *Union Mut. L. Ins. Co.*, 14 Fed. 272.

[1] *Foster* v. *Preferred Acc. Ins. Co.*, 125 Fed. 536; *Gordon* v. *Ware Nat. Bk.*, 132 Fed. 444, 65 C. C. A. 580, indubitably well decided on the facts.

[2] *Mut. L. Ins. Co.* v. *Lane*, 151 Fed. 276; *Roller* v. *Moore*, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136.

[3] *Mut. L. Ins. Co.* v. *Lane*, 151 Fed. 276.

[4] *Boston Ins. Co.* v. *Globe Fire Ins. Co.*, 174 Mass. 229, 54 N. E. 543, 75 Am. St. R. 303; *Barnes* v. *L. E. & G. L. Ins. Co.*, L. R. (1892), 1 Q. B. D. 864; Eng. Mar. Ins. Act, 1906, § 6. Thus, in an early English case it was held that an averment of insurable interest at the time of the commencement of the

will not attach to the risk until the assured has acquired his interest.[1]

§ 45. **Same Subject—Fire Insurance.**—Many declarations of a general character may be found in the opinions of courts and in text-books to the effect that in the law of fire insurance an insurable interest at the time of making the contract, as well as at the time of loss, is required.[2] But it would appear that the exigencies of business demand precisely the same rule in the case of policies against fire only, as in the case of policies against marine risks including fire.[3] This conclusion has received express adoption or approval

risk as well as at the time of loss, was sufficient and that no allegation or proof of insurable interest at the time of effecting the insurance was required. *Rhind* v. *Wilkinson*, 2 Taunt. 237 (the court also said: "It is every day's practice to insure goods on a return voyage before the goods are bought"). *Anderson* v. *Morice* (1876), 1 App. Cas. 713. So also the federal supreme court adopts the same rule as laid down by Arnould, 1 Mar. Ins., 238. *Hooper* v. *Robinson*, 98 U. S. 528, 537, 25 L. Ed. 219; *Haven* v. *Gray*, 12 Mass. 71 (return cargo, from proceeds of outward cargo). *Sutherland* v. *Pratt*, 11 Mees. & W. 296. "Lost or not lost."

[1] *Boston Ins. Co.* v. *Globe F. Ins. Co.*, 174 Mass. 229, 54 N. E. 543, 75 Am. St. R. 303 (marine fire risks, reinsurance). *Sawyer* v. *Dodge Co. Mut. Ins. Co.*, 37 Wis. 503, 545. But may insure in good faith "lost or not lost," *Sutherland* v. *Pratt* (1843), 11 M. & W. 296.

[2] Among these see, for example, *Sadler's Co.* v. *Babcock*, 2 Atk. 554, 556, Lord Hardwicke; *Carpenter* v. *Prov. Wash. Ins. Co.*, 16 Pet. (U. S.) 495, 503, 10 L. ed. 1044; *Ohio Farmers' Ins. Co.* v. *Vogel*, 30 Ind. App. 281 (1903), 65 N. E. 1056; *Clinton* v. *Norfolk Mut. F. Ins. Co.*, 176 Mass. 486, 489, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. R. 325; *Howard* v. *Albany Ins. Co.*, 3 Denio (N. Y.), 301; *Fowler* v. *Ins. Co.*, 26 N. Y. 422; *Lockhart* v. *Lundsford*, 87 N. C. 149, 151, 42 Am. Rep. 514; *Chrisman* v. *State Ins. Co.*, 16 Ore. 283, 288, 18 Pac. 466; *Dickerman* v. *Fire Ins. Co.*, 67 Vt. 99, 30 Atl. 808; *Sheppard* v. *Ins. Co.*, 21 W. Va. 368, 379 (stated only "as a general rule"). As a summing up of many authorities collected by them the editors of the Lawyers' Reports, Annotated, say: "The general rule is that the insured must at the time of insurance and also at the time of loss have an insurable interest in the property burned in order to recover on a fire policy." 52 L. R. A. 330–334. Whether the learned editors have based this conclusion upon the express warranties of the fire policy does not appear.

[3] The rule requiring an insurable interest should be invoked only to prevent the evils of wagering contracts, not to disturb the sane and orderly course of business. So far as the public welfare is concerned there is no adequate reason why a man intending next week to buy a stock of goods, whether to be put on ship board or in a warehouse, should not be allowed to take out his insurance to-day to guard against loss by fire or other peril after he shall have become owner. If he neglects insurance until he has acquired title it may be too late. If the goods are valuable it may require policies from many companies to protect them. To secure these may involve considerable expenditure of time. Meanwhile the loss may occur. It is not always practicable to make purchases and insurances simultaneously. No injustice is done to the insurance company by the adoption of the safe and convenient method of procedure since until the insurable interest is acquired the risk will not attach and the underwriters will not become liable. The doctrine of the text gains confirmation from the well-established rule that where the policy is valid at its inception it may be made to cover after-acquired property, *Hooper* v. *Ins. Co.*, 17 N. Y. 424; *Hoffman* v. *Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337; *Wolfe* v. *Security Fire Ins. Co.*,

in several more recent adjudications and text-books,[1] and must be considered as supported by the weight of authority, inasmuch as the declarations to the contrary though numerous are mostly mere dicta and of a general character.

§ 46. Same Subject—Life Insurance.—In the case of life insurance, the general rule is that the insurable interest must exist at the time the contract is made,[2] but that though it may chance to cease altogether before the maturity of the contract, the contract will not thereby be avoided.[3] Thus, a creditor who has taken a policy upon the life of his debtor, may, on the death of the insured, recover the full amount of the insurance, notwithstanding the debt may have been previously paid.[4] This rule when rightly regarded is not so much at variance with the doctrine of indemnity as in harmony with it. Premiums for marine and fire policies are in most instances trivial in amount compared with the face of the policy and are estimated upon a probability that the peril named will not occur, but not so in life insurance. The rate of premium for the life policy is large, since it is based upon the known fact that the event upon

39 N. Y. 49, and so also by the rule that in the absence of express provision to the contrary, temporary suspension of interest does not avoid § 47.

[1] *Sun Ins. Office* v. *Merz*, 64 N. J. L. 301, 45 Atl. 785, 52 L. R. A. 330 (reinsurance but the rule is the same). *Boston Ins. Co.* v. *Globe Fire Ins. Co.*, 174 Mass. 229, 54 N. E. 543, 75 Am. St. R. 303; *Davis* v. *New England F. Ins. Co.*, 70 Vt. 217, 39 Atl. 1095; and see *Mills* v. *Farmers' Ins. Co.*, 37 Iowa, 400; *Sawyer* v. *Dodge Co. Mut. Ins. Co.*, 37 Wis. 503; Bunyon (5th ed.), p. 52; Vance, § 48; Joyce, § 901; Elliott, § 45; May (4th ed.), § 100 A.

[2] *Barnes* v. *London E. & G. Life Ins. Co.*, L. R. (1892) 1 Q. B. D. 864.

[3] *Conn. Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Manhattan L. Ins. Co.* v. *Hennessy*, 99 Fed. 64, 39 C. C. A. 625 (sufficient if assignee has interest at time of assignment). *Overhiser* v. *Overhiser*, 63 Ohio St. 77, 57 N. E. 965 (policy survives divorce). *Appeal of Corson*, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479. *Contra*, *Cheeves* v. *Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. R. 107.

[4] *Dalby* v. *India & London & Life Assur. Co.*, 15 C. B. 365 (a leading case overruling *Godsall* v. *Boldero*, 9 East, 72), *Amick* v. *Butler*, 111 Ind. 578, 12 N. E. 518, 60 Am. St. R. 722; *Ferguson* v. *Mass. Mut. Life Ins. Co.*, 32 Hun, 306, aff'd 102 N. Y. 647. *Contra*, *Cheeves* v. *Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. R. 107 (recovery limited to debt and expense of insurance). As to Pennsylvania rule see § 37. If policy is taken out by debtor and assigned absolutely to creditor, the creditor in some jurisdictions may collect the whole, *Mut. Life Ins. Co.* v. *Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Wright* v. *Mut. Ben. Life Ass.*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. R. 749. In other jurisdictions the creditor is limited to the debt and expense of keeping up insurance, *Cheever* v. *Anders*, 87 Tex. 287, 28 S. W. 274, 47 Am. St. R. 107, and § 37. If, however, a policy taken out by the debtor is merely assigned or pledged conditionally as collateral security for the debt, the debtor paying the premiums, any balance over the debt will belong to the debtor, *Central Nat. Bk.* v. *Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. Ed. 370; *Exchange Bank* v. *Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372. The burden is then upon the creditor to show the continuance and amount of the debt, *Crotty* v. *Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 S. Ct. 749, 36 L. Ed. 566.

which payment is to be made to the insured will certainly occur, and if a creditor after paying premiums for a long term of years were likely at the end to lose all return from his insurance, it would practically prevent the use of this important kind of security. He would in such case receive no indemnity, but on the contrary, would be largely out of pocket for premiums which the company would retain without making fair return.[1]

§ 47. Temporary Suspension does not Avoid.—If there is no provision in the contract prohibiting a change of interest, a temporary suspension of the interest of the insured does not vitiate a policy of insurance, but only suspends its operation.[2]

§ 48. Insurance does not always Grant Full Indemnity.—Only such damages as are caused proximately by the specified perils are covered by the policy. This rule, also, is grounded upon considerations of utility, and ordinarily limits the scope of the contract because of the inconvenience of attempting to form an estimate after loss of the extent of remote, uncertain, and fluctuating elements of damage. Thus, the incidental loss of trade, or of the use of a building or ship while being repaired,[3] or of prospective profits,[4] or any *pretium affectionis* attaching to the property destroyed, is too remote, and is not supposed to enter into the calculation of the contracting parties. Where, however, the parties do in fact expressly take into their account these more remote items of damage, they may make them the subject of a valid insurance. Thus, the loss of use and occupation,[5] or of expected profits[6] may be specifically insured as such, and frequently is. In marine insurance profits are

[1] *Mut. Life Ins. Co.* v. *Allen*, 138 Mass. 24, 52 Am. Rep. 245.

[2] *Hancox* v. *Fishing Ins. Co.*, 3 Sumn. 132, 140; *Lane* v. *Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150; *Worthington* v. *Bearse*, 12 Allen (Mass.), 382, 90 Am. Dec. 152; *Clinton* v. *Norfolk Mut. F. Ins. Co.*, 176 Mass. 486, 57 N. E. 998, 79 Am. St. R. 325.

[3] Thus, a policy on a bridge does not cover incidental loss of tolls from the adjacent turnpike belonging to plaintiff. *Farmers' Ins. Co.* v. *New Holland Turnpike Co.*, 122 Pa. 37, 15 Atl. 563.

[4] *Niagara Fire Ins. Co.* v. *Heflin*, 22 Ky. L. Rep. 1212, 60 S. W. 393; *Hayes* v. *Ins. Co.*, 170 Mass. 492, 49 N. E. 754; *Niblo* v. *Ins. Co.*, 1 Sandf. (N. Y.) 551; *Re Wright & Pole*, 1 Adol. & E. 621; *Stock* v. *Inglis*, L. R. 9 Q. B. D. 708.

[5] *Michael* v. *Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810; *Tanenbaum* v. *Freundlich*, 81 N. Y. Supp. 292, 39 Misc. 819; *Same* v. *Simon*, 81 N. Y. Supp. 655, 40 Misc. 174, aff'd 84 App. Div. 642.

[6] *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. (U. S.) 222, 7 L. Ed. 659; *Barclay* v. *Cousins*, 2 East. 544; *Fosdick* v. *Norwich Mar. Ins. Co.*, 3 Day (Conn)., 108; *French* v. *Hope Ins. Co.*, 16 Pick. (Mass.) 397; *Tom* v. *Smith*, 3 Caines (N. Y.), 245; *Abbott* v. *Sebor*, 3 John. Cas. 39; *Re Hogan*, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. R. 759.

generally added in the shape of a percentage to the value of the goods.[1]

What results of fire, accident, and marine casualties are proximate, and what are remote, will be considered under the clauses of the policies.

§ 49. **Insurance Grants Indemnity for Results of Negligence.**—Where the loss is caused proximately by the peril insured against, the fact that the negligence of the insured or his agent contributed to the disaster will not deprive him of the protection of his policy; because it is of the nature and purpose of insurance to grant indemnity for the results of carelessness as well as of accident. This rule, as originally adopted by the courts, was arbitrary, but is also eminently just and sensible.[2]

In the case of fire insurance, for example, the security offered to the insured by his policy would be seriously impaired if it were open to the insurers to plead in defense contributory negligence on the part of the insured or his servants; since many if not most fires have their origin in some act of carelessness. Accordingly the insured has the right to look to the company for indemnity notwithstanding any amount of carelessness in occasioning the loss,[3] pro-

[1] A policy on profits is valued. *Mumford* v. *Hallett*, 1 John. R. (N. Y.) 433.

[2] *Union Ins. Co.* v. *Smith*, 124 U. S. 405, 8 S. Ct. 534; *Gove* v. *Farmers' Mut. Fire Ins. Co.*, 48 N. H. 41, 97 Am. Dec. 572; *Mathews* v. *Howard Ins. Co.*, 11 N. Y. 21. The rule is applicable as well to marine insurance; negligence of master and mariners, *Orient Ins. Co.* v. *Adams*, 123 U. S. 67, 8 S. Ct. 68; 31 L. Ed. 63 (also of owners); *Phœnix Ins. Co.* v. *Erie & W. Transp. Co.*, 117 U. S. 312, 6 S. Ct. 750, 29 L. Ed. 873; *Hutchins* v. *Ford*, 82 Me. 363, 19 Atl. 832; *Louisville Ins. Co.* v. *Monarch*, 99 Ky. 578, 36 S. W. 563, (river policy). Willful negligence or misconduct may fall within "barratry," *Trinder* v. *Thames, etc., Ins. Co.* (1898), 2 Q. B. 114, 67 L. J. Q. B. N. S. 666, 78 L. T. R. 485 (a loss of freight by stranding by negligent act of master or part owner). *Holdsworth* v. *Wise*, 7 B. & Cr. 794 (captain negligently sailed home in leaky ship); *Dixon* v. *Sadler*, 5 M. & W. 405, 8 *id.* 895 (captain negligently but not barratrously heaved ballast overboard causing wreck); *Busk* v. *Royal Exch. Assur. Co.*, 2 B. & Ald. 72 (negligence of mate in not extinguishing fire); *Walker* v. *Maitland*, 5 B. & Ald. 171 (seamen all asleep); *Bishop* v. *Pentland*, 7 B. & Cr. 219 (gross neglect of mate in not using rope strong enough to fasten boat to pier); *Redman* v. *Wilson*, 14 M. & W. 476 (unskillful loading on home voyage); *Davidson* v. *Burnand*, L. R. 4 C. P. 117 (damage by sea water from leaving machinery valves open). But it has been said that by wrongful act of owners directly causing the loss though falling short of fraud, the insurer is relieved, *Standard Mar. Ins. Co.* v. *Nome Beach, etc., Co.*, 133 Fed. 636, and cases cited p. 649.

[3] *Columbian Ins. Co.* v. *Lawrence*, 10 Pet. 507, 9 L. Ed. 512; *Des Moines Ice Co.* v. *Niagara Fire Ins. Co.*, 99 Iowa, 193, 68 N. W. 600; *St. Paul F. & M. Ins. Co.* v. *Owens*, 69 Kan. 602, 77 Pac. 544; *Gates* v. *Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360, *Pool* v. *Ins. Co.*, 91 Wis. 530, 65 N. W. 54, 51 Am. St. R. 919.

vided it does not involve an element of evil design,[1] or fraud,[2] or a violation of some contract obligation on his part, and provided the loss is the proximate result of the peril insured against.[3]

This consideration, however, will not avail to excuse a breach of warranty, imposed upon the insured by the contract, which has been brought about by the negligence of himself or his agent; as, for example, a violation of the implied or express warranty that the ship must be seaworthy at the commencement of the voyage.[4] Nor will it relieve the insured from the obligation of any other engagements of the contract; as where in the accident policy it is provided that the insurers shall be exempt for losses caused by voluntary exposure to unnecessary risk; or where in the fire policy it is stipulated that the company shall not be liable for loss caused by neglect of the insured to use reasonable means to save the property at and after a fire.[5]

§ 50. Rule of Indemnity Qualified in Marine—Insured When a Coinsurer.—The rules of recovery applicable to fire and marine insurance, respectively, differ in an important particular. In fire, in the absence of a coinsurance clause, or other express restriction, the assured recovers his damage up to the amount of the insurance, but in marine, where the assured is insured for an amount less than the insurable value, or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.[6] Except for this rule of marine insurance, in case of partial loss, although paying premiums only for part insurance, the assured might recover as much as though he had been paying premiums for full insurance.[7] Such a result, it

[1] *Schmidt* v. *N. Y. Union Mut. Fire Ins. Co.*, 1 Gray (Mass.), 529.

[2] *Huckins* v. *People's Mut. Fire Ins. Co.*, 31 N. H. 238.

[3] A contract to indemnify a common carrier against losses from injuries to its passengers, negligently caused by its servants, is not invalid as against public policy, though it may encourage a lax management, *Trenton Pass R. Co.* v. *Guarantors' etc., Indemnity Co.*, 60 N. J. L. 246, 37 Atl. 609; *Crescent Ins. Co.* v. *Packet Co.*, 69 Miss. 208, 13 So. 254. Nor a contract guaranteeing against dishonesty of employees, *Fidelity & Cas. Co.* v. *Eickhoff*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. R. 464.

[4] *Whitney* v. *Ocean Ins. Co.*, 14 La. 485, 33 Am. Dec. 595; *Richelieu & Ont. Navigation Co.* v. *Boston Marine Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934; *Gibson* v. *Small*, 4 H. L. Cas. 353.

[5] *Thornton* v. *Security Ins. Co.*, 117 Fed. 773.

[6] *Egan* v. *Ins. Co.*, 193 Ill. 295, 61 N. E. 1081; *Natchez, etc., Co.* v. *Louisville Underwriters*, 44 La. Ann. 714, 11 So. 54.

[7] "In cases of marine insurance where a partial loss is incurred the insurer pays only such a proportion of the actual loss as the sum insured bears to the value of the property at risk," *Western Ins. Co.* v. *Southwestern Transp. Co.*, 68 Fed. 923; *Nicolet* v. *Ins. Co.*, 3 La. 366, 23 Am. Dec. 458. This rule becomes stringent in the case of very valuable ships of modern times, to fully cover which the

is considered, would be inequitable. It would mean that other persons, fully insured, must pay more than their fair share of premiums. The great majority of losses are partial, not total. Underwriters usually have little knowledge until loss occur, as to the total amount of insurance, or as to the relation of that amount to the total value of the subject insured; therefore, rates of premiums are not, and cannot well be, graded according to the amounts of shortage in insurance. The insured alone is at fault if his insurance is inadequate.

Thus, if a man takes out fire insurance for $5,000 on furniture worth $10,000, and a loss of $2,500 occurs, he may recover his loss in full; but if he has marine insurance for $5,000 on his cargo worth $10,000, which sustains a loss of $2,500, he will recover only $1,250.

So also, if a ship worth $100,000 is insured for $10,000 only, by ten underwriters, each subscribing for $1,000, and a loss of $500 occurs, each underwriter will be liable only for $5.00. Nine-tenths of the loss will fall upon the insured, although his aggregate insurance largely exceeds the amount of loss.[1] Fire insurance underwriters, insisting that this rule of marine insurance is equitable, and in order to make the fire insurance policy either exactly or approximately similar to the marine policy in this respect, commonly insert in their policies upon commercial and other valuable properties, some special coinsurance clause. Such clauses, to be noticed hereafter in connection with the fire policy, are inconvenient to the insured, and are so unpopular that in some states they are prohibited by statute.[2]

§ 51. **Double Insurance Contribution.**—Growing out of the doctrine of indemnity is the rule that where the assured is over-

insurance market both at home and abroad may be scarcely adequate, inasmuch as each insurer is willing to incur only a comparatively small liability on any one risk. The desired result is sometimes approximated by taking out as much insurance as may be obtainable with general liability, but upon low agreed valuations of the subject, and then covering the balance of its actual value with insurance against total loss only and in the form of what is known as disbursement policies, *International Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 Fed. 304 (agreed value $1,350,000; actual value $2,100,000); *Lawther* v. *Black* (1900), 6 Com. Cas. 5; *Moran* v. *Uzielli* (1905), 2 K. B. 555, 74 L. J. K. B. 494. The compendious term "disbursements is used to describe any interest which is outside the ordinary interests on hull, machinery, cargo, and freight," *Buchanan* v. *Faber* (1899), 4 Com. Cas. 223. The term covers, for instance, coals, stores, expenses, etc., *Roddick* v. *Indemnity Mut. Mar. Ins. Co.* (1895), 2 Q. B. 380, 64 L. J. Q. B. 733. Similarly in fire insurance a co-insurance clause becomes rigorous when all the stock companies combined will not fully cover the risk.

[1] Thus it will be observed that, in practice, marine insurance often falls far short of being a contract of indemnity.

[2] See **Appendix, ch. I.**

insured by double insurance, each insurer is bound as between himself and the other insurers to contribute ratably to the loss in proportion to the amount for which he is liable under his contract.[1] Where two or more policies are effected on behalf of the assured on the same risk and interest, or any part thereof, and the sums insured exceed the indemnity allowed by law, the assured is said to be overinsured by double insurance.[2]

Except for the usual contract limitation called the contribution or *pro rata* clause, the insured might recover his loss in full against any of the coinsurers, but not exceeding the amount of the policy, leaving the insurers to apportion the loss by subsequent contribution among themselves.[3] Such circuity of action is prevented by the usual contribution clause of the fire policy.

The doctrine of double insurance contribution is not applicable to the ordinary life insurance policy, payable to the insured or his relatives. As before stated, the law has prescribed no method for ascertaining the value of a human life. Hence no matter how many policies, no matter how great the amount of insurance, existing at the time of the death of the assured, the fact of over-insurance cannot be established. Where, however, the value of the insured interest is ascertainable, as, within the views of some tribunals, is the case with creditor insurance, it has been held that other insurance must be brought into the account, and recovery limited to the loss actually sustained by the creditor.[4]

§ 52. **Subrogation, Fire and Marine.**—Another corollary incident to the doctrine of indemnity is the right of subrogation.[5] Upon paying the loss under a fire or marine policy, the insurer becomes subrogated *pro tanto*[6] to such rights and remedies as the insured may have against third persons who are primarily liable to him for

[1] *Deming* v. *Merchant's Cotton, etc., Co.*, 90 Tenn. 306, 350, 17 S. W. 89; *North Brit. Ins. Co.* v. *London & G. Ins. Co.* (1877), 5 Ch. D. 583; *Newby* v. *Reed*, 1 W. Bl. 416.

[2] "Double insurance exists only in the case of risks upon the same interest in property and in favor of the same person." *Cal. Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 420, 10 S. Ct. 365, 33 L. Ed. 730; *Lowell Mfg. Co.* v. *Safeguard F. Ins. Co.*, 88 N. Y. 591.

[3] *Wiggin* v. *Suffolk Ins. Co.*, 18 Pick. (Mass.) 145; *Lucas* v. *Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635. Note in 28 Am. Dec. 121; *Morgan* v. *Price* (1849), 4 Exch. 621.

[4] May, Ins., § 440; *Hebdon* v. *West*, 3 Best & Smith, 579. In England in estimating the amount of compensation recoverable under Lord Campbell's Act, insurance money received must be deducted, Mayne, Damages (7th ed.), p. 552. This rule has been criticised and some companies have waived it by the terms of their policies.

[5] Here considered apart from any express provisions of the policy.

[6] *The Livingston*, 130 Fed. 746 65 v. C. C. A. 610; *Cumberland Tel. Co.* *Dooley*, 110 Tenn. 104, 72 S. W 457.

his damage sustained.[1] The person who has caused the loss is said to be the one primarily liable.[2]

Thus, if a common carrier is responsible for a fire caused by the

[1] *Kennedy Bros.* v. *State Ins. Co.*, 119 Iowa, 129, 91 N. W. 831. Whether stipulated in the policy or not, *Pelzer Mfg. Co.* v. *Sun Fire Office*, 36 S. C. 213, 15 S. E. 562.

[2] *Hall* v. *Railroad Co.*, 13 Wall. 367, 20 L. Ed. 594. Burden of the loss ought ultimately to rest upon person who has caused it, *Stoughton* v. *Gas Co.*, 165 Pa. 428, 30 Atl. 1001. Except for rule of subrogation, insured on pursuing a double remedy might obtain double indemnity, *Liverpool, etc., S. Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; *King* v. *Victoria Ins. Co.* (1896), App. Cas. 250, 74 L. T. R. 206. The U. S. Supreme Court says: "In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured. In a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured, and if the assured has no right of action none passes to the insurer." *St. Louis, I. M. & S. Ry. Co.* v. *Commercial Union Ins. Co.*, 139 U. S. 223, 235, 11 S. Ct. 554, 35 L. Ed. 154. Subrogation has been likened to an equitable assignment, *Mobile & M. R. Co.* v. *Jurey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527; *Caledonia Ins. Co.* v. *No. Pac. R. Co.*, 32 Mont. 46, 79 Pac. 544. It has been declared that the equity is not so strong against a railroad company made liable by statute irrespective of negligence, *Home Ins. Co.* v. *Atch., etc., R. Co.*, 19 Colo. 46, 34 Pac. 281. But the prevailing rule seems to be that such a statute does not affect the question, *Crissey, etc., Co.* v. *Denver & R. G. R. Co.*, 17 Colo. App. 275, 68 Pac. 670; *Hart* v. *West. R. Corp.*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; *Mathews* v. *St. L., etc., R. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161. Such a statute makes the act of the railroad company, in causing the fire, presumptively negligent, and to support the right of subrogation the insurer need not allege or prove negligence, *Ætna Ins. Co.* v. *R. R. Co.* (S. C., 1907), 56 S. E. 788 (citing cases). The right of subrogation exists independent of contract or statute, *Hamburg-Brem. Fire Ins. Co.* v. 43 S. E. 548; *Leavite* v. *Canadian Pac. Atlantic Coast Line R. Co.*, 132 N. C. 75, *R. Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152, and applies also to marine insurance, *Nord-Deutscher Lloyd* v. *President, etc., Ins. Co. of N. A.*, 110 Fed. 420, 49 C. C. A. 1; *International Nav. Co.* v. *Atl. Mut. Ins. Co.*, 100 Fed. 304, aff'd 108 Fed. 987, 48 C. C. A. 181; *Mercantile Mar. Ins. Co.* v. *Clark*, 118 Mass. 288 (though company refused to conduct the action for tort). In marine the right exists independent of abandonment, but is subordinate to rights of damage claimants to the fund, *The St. Johns*, 101 Fed. 469; *The Catskill*, 95 Fed. 700. Marine insurers may intervene to present their claim before distribution of fund recovered by owners, *Mason* v. *Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700. The English rule in marine insurance is thus defined: "Where the insurer pays for a total loss either of the whole, or in the case of goods, of any apportionable part of the subject-matter insured he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect to that subject-matter as from the time of the casualty causing the loss. Subject to the foregoing provisions where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the

negligent emission of sparks from its locomotive, which burns the property of the insured, the insurer upon paying the loss under the policy becomes subrogated to the right of recourse which the insured had against the common carrier.[1]

Though usually referred to in this connection as the *tort feasor*, it is pertinent to observe that in order to lay the basis for a right of subrogation, it is not necessary for the insured to show that the party causing the loss was guilty of actual negligence. It is enough, if it appear that the insured has a right of action against him, created by statute or otherwise, for occasioning such a result. If so, then the insured, upon paying the loss, is subrogated to the same remedy for reimbursement.[2]

Except as varied by express agreement, the insurer has no rights against the wrongdoer other than those vested in the insured at the time of loss, and the company cannot enforce those without meeting its liability under the policy,[3] but a *bona fide* payment,

subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified according to this act, by such payment for the loss." Mar. Ins. Act (1906), § 79; *Simpson* v. *Thomson* (1877), 3 App. Cas. 292. See many illustrations, Chalmers & Owen Ins. (1907), pp. 120, 121. When the marine insurer settles for a total loss, "the assured," says Lord Cottenham, "must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather such property vests in the underwriters," *Stewart* v. *Greenock Mar. Ins. Co.* (1848), 2 H. L. C. at p. 183. According to this rule the insurer by virtue of the doctrine of subrogation may sometimes more than recoup himself for his payment to the insured, *Mobile & M. R. Co.* v. *Jersey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527; *contra*, *The Livingston*, 130 Fed. 746, 65 C. C. A. 610. If several insurers, they share in proportion to their several liabilities, De Hart & Simey, Ins. (1907), p. 89. And according to a recent decision a "disbursement" policy is entitled to share with the ordinary insurance, *Brown* v. *Merchants' Mar. Ins. Co.*, 152 Fed. 411.

[1] *Phœnix Ins. Co.* v. *Erie, etc., Transp. Co.*, 117 U. S. 312, 6 S. Ct. 750, 29 L. ed. 873; *Home Mut. Ins. Co.* v. *Oregon R. & Nav. Co.*, 20 Oreg. 569, 26 Pac. 857, 23 Am. St. R. 151; *Deming* v. *Storage Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518. Rule applies where railroad company is absolutely liable, under a statute, to the owner, *Crissey & Fowler L. Co.* v. *Denver & R. G. R. Co.*, 17 Colo. App. 275 (1902), 68 Pac. 670. See also *Lake Erie & W. R. R. Co.* v. *Falk*, 62 Ohio, 297, 56 N. E. 1020, 1023. If a carrier is one of the parties insured, for instance, under the phrase "for benefit of whom it may concern," the underwriter can have no right of subrogation against it, though the policy has been paid to the owner on the order of the carrier, *Wager* v. *Prov. Ins. Co.*, 150 U. S. 99, 109, 14 S. Ct. 55, 37 L. ed. 1013. And see *The Clintonia*, 104 Fed. 92. Subrogation applies whether a policy is open or valued and an agreed value is applicable for purposes of subrogation, *The St. Johns*, 101 Fed. 469; *North of Eng. Ins. Ass.* v. *Armstrong*, L. R. 5 Q. B. 244.

[2] *Ætna Ins. Co.* v. *R. R. Co.* (S. Car., 1907), 56 S. E. 788; and see *Lake Erie, etc., Co.* v. *Falk*, 62 Ohio St. 297, 56 N. E. 1020.

[3] *Phœnix Ins. Co.* v. *Erie & W. Tr. Co.*, 117 U. S. 312, 118 U. S. 210; *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561. Company must pay loss before it can enforce right of subrogation, *New Hampshire F. Ins. Co.* v. *National Life Ins. Co.*, 112 Fed. 199, 50 C. C. A. 188. Right of subrogation is not disturbed by reason of the fact that policy might have been successfully contested, nor

under the policy, by the insurer to the insured, carries with it a right of subrogation, although in fact the insurer be not legally liable to pay.[1] And the fact that the insurer is a member of a trust or combination of companies in violation of a statute will not bar its right of subrogation.[2]

In the absence of subrogation receipt or assignment transferring larger rights, it has been held in this country that the insurers can recover only what they have paid under the policy.[3]

It is well settled, however, in fire insurance, that in the absence of express stipulation the doctrine of subrogation must not be applied to prevent the insured from receiving a full indemnity.[4] But this rule ought not to be construed to mean that where the loss exceeds the insurance the underwriters cannot insist upon an enforcement of their right of subrogation against the tort feasor without first fully indemnifying the insured.[5] The doctrine will be better illustrated by assuming that, after a judgment for full damages has been obtained in proper form of action against the wrongdoer responsible

because the insurance company has failed to comply with statutory requirements, *St. L., A. & T. R. Co.* v. *Fire Assn.*, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83; *Phœnix Ins. Co.* v. *Penn. Co*, 134 Ind. 215, 33 N. E. 970; nor because insurer was negligent in assuming the risk, *U. S. Cas. Co.* v. *Bagley*, 129 Mich. 70, 87 N. W. 1044, 55 L. R. A. 616, 95 Am. St. R. 424.

[1] *King* v. *Victoria Ins. Co.* (1896), App. Cas. 250, 74 L. R. A. 206.

[2] *Freed* v. *Am. F. Ins. Co.* (Miss., 1907), 43 So. 947.

[3] *Cumberland Telegraph & Tel. Co.* v. *Dooley*, 110 Tenn. 104, 72 S. W. 457; *The Livingston*, 130 Fed. 746, 65 C. C. A. 610; *Holbrook* v. *United States*, 21 C. Cl. 434; and interest, *Railroad Co.* v. *Hartford F. Ins. Co.*, 17 Tex. Civ. App. 498, 44 S. W. 533; *Home Ins. Co.* v. *Railroad Co.*, 11 Hun, 182. As to marine rule where there has been abandonment or payment as for total loss, compare *Mobile & M. R. Co.* v. *Jurey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527, with *The Livingston*, 130 Fed. 746, 65 C. C. A. 610. Where an insurer pays more than his proper share of the loss under usual fire policy he cannot, under the doctrine of subrogation, claim contribution from the other insurers as to the excess, *Hanover F. Ins. Co.* v. *Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. R. 386.

[4] *Farmers', etc., Mut. Ins. Co.* v. *Vallie*, 83 Pac. 962 (Colo., Dec., 1905), 35 Ins. L. J. 278; *Phœnix Ins. Co.* v. *First Nat. Bank*, 85 Va. 767, 8 S. E. 720, 2 L. R. A. 667, 17 Am. St. R. 102. And see *Ins. Co.* v. *Stinson*, 103 U. S. 25, 28, 26 L. Ed. 473; *Commercial Union Assur. Co.* v. *Lister*, L. R. 9 Ch. App. 483, 43 L. J. Ch. 601; *Parry* v. *Smith* (1879), 4 C. P. D. 325; *Washington F. Ins. Co.* v. *Kelly*, 32 Md. 421, 444, 3 Am. Rep. 149, holding, "the equitable principle of subrogation cannot be applied where it conflicts with that of indemnity." But in case of under insurance in marine, the insured is treated as a coinsurer for amount of the deficiency and simply shares *pro rata* in any salvage, see § 50, and thus may fail of full indemnity. *Natchez, etc., Co.* v. *Louisville Underwriters*, 44 La. Ann. 714, 11 So. 54; *The Welsh Girl* (1907), K. B., affirming 22 Times L. R. 475.

[5] *Home Mut. Ins. Co.* v. *Oregon R., etc.*, 20 Oreg. 569, 26 Pac. 857, 23 Am. St. R. 151. *Contra, Farmers', etc., Mut. Ins. Co.* v. *Vallie*, 83 Pac. 962 (Colo., Dec., 1905), 35 Ins. L. J. 278; *Phœnix Ins. Co.* v. *First Nat. Bk.*, 85 Va. 767, *supra*. If underwriters pay loss in full they may sue the tort feasor in their own name in most jurisdictions, *Fairgrieve* v. *Marine Ins. Co.*, 94 Fed. 686, 37 C. C. A. 190, 112 Fed. 364, 50 C. C. A. 286.

for the fire, he is only able to pay a part by virtue of insolvency. Applying the principle here presented, in the absence of qualifying stipulation, the insured first receives out of the actual collection enough to meet the shortage of insurance and the underwriters take the balance, but not exceeding what they have paid.[1]

Two reasons may be assigned to explain why the life insurance company, upon making payment under its policy, is not subrogated to any right of action against the wrongdoer, responsible for the death of the insured. First, because at common law a personal action died with the person. The statutes creating a right of action for death by wrongful act bestow the right not upon the deceased but upon his representatives. It is only rights of the insured that are the subject of subrogation.[2] Second, the value of the life insured being indeterminate, the insurance money and the damages recovered from the tort feasor combined may amount to no more than a full indemnity.[3]

§ 53. **Subrogation—Mortgagee.**—Where a mortgagee has taken out a policy for his own benefit, and not for the benefit of the mortgagor, upon the property of the mortgagor covered by the mortgage, it is held by the weight of authority, that, even in the absence of an express provision to that effect in the policy, the insurer, upon paying the mortgagee the insurance money, becomes subrogated *pro tanto* to the mortgage security as against the mortgagor, but not so as to impair the right of the mortgagee to collect his debt in full.[4]

But where the mortgagor has any interest in the policy, either by payment of premiums or by agreement with the mortgagee, then

[1] *Atch., etc., R. Co.* v. *Neet*, 7 Kan. App. 495, 54 Pac. 134.

[2] *Ins. Co.* v. *Brame*, 95 U. S. 754, 24 L. Ed. 58; *Conn. Mut. Life Ins. Co.* v. *N. Y. & N. H. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *Rankin* v. *Potter* (1873), L. R. 6 H. L. 118, 119. No subrogation in accident insurance, *Ætna L. Ins. Co.* v. *Parker*, 96 Tex. 287, 72 S. W. 168, 621. See also *Bradburn* v. *Railway Co.*, L. R. 10 Exch. 1, but compare *Harding* v. *Townshend*, 43 Vt. 536, 5 Am. Rep. 304.

[3] *Ætna L. Ins. Co.* v. *Parker*, 30 Tex. Civ. App. 521, 725 W. 621 (accident policy "may not be full indemnity." The court also concluded that damages under policy and damages recovered from tort feasor are not identical in character).

[4] *Carpenter* v. *The Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495, 10 L. Ed. 1044; *Excelsior Ins. Co.* v. *Royal Ins. Co.*, 55 N. Y. 343, 359, 14 Am. Rep. 271; *Thomas* v. *Montauk Ins. Co.*, 43 Hun (N. Y.), 218; *Norwich F. Ins. Co.* v. *Boomer*, 52 Ill. 442, 4 Am. Rep. 618. But the Virginia court held that the insurance company cannot avail itself of its common-law right of subrogation without paying the debt in full, *Phœnix Ins. Co.* v. *First Nat. Bank*, 85 Va. 765, 8 S. E. 719, 2 L. R. A. 667, 17 Am. St. R. 102. And see *Ins. Co.* v. *Stinson*, 103 U. S. 25. 28, 26 L. Ed. 473. *Contra*, in Massachusetts, *International Trans. Co.* v. *Boardman*, 149 Mass. 158; 21 N. E. 239; *King* v. *State Mut. F. Ins. Co.*, 7 Cush. 1, 54 Am. Dec. 683; unless mortgagee has so stipulated, *Allen* v. *Ins. Co.*, 132 Mass. 480.

there will be no subrogation in favor of the insurers, for the latter take only such rights as the assured can give.[1]

§ 54. Subrogation—Other Contract Rights.—The doctrine of subrogation in favor of an insurer is easily applied where the claim for ultimate liability is directed against a tort feasor who ought equitably to be held responsible for a loss which he has caused, but where the underwriter, without express stipulation in the policy, asks to be subrogated to contract rights belonging to the insured against third parties, the questions presented are more embarrassing.

For instance, the insured has two contracts both for value paid, both intended to protect from the same loss, or tending to accomplish that result, one of these contracts with an insurance company, the other with a third party. Why, under the doctrine of subrogation, should the loss fall upon the third party, while the insurance company, though retaining its premiums, goes free? Why should the insurance company be subrogated to rights against the third party rather than the third party to the insurance?

In meeting this inquiry the English courts, largely out of deference to considerations of public policy,[2] have been disposed to construe the fire and marine contracts strictly as contracts of indemnity, and have regarded the underwriters, after payment or tender to the insured, as standing in the attitude of sureties with respect to all sorts of rights and remedies belonging to the assured and tending in any way to diminish the loss.[3]

Thus, in an English case a landlord held insurance covering injury by explosion, but he also had the benefit of a covenant by his tenant to make repairs. Loss by explosion occurred. The insurance company paid to the landlord £750, the amount of loss. Subsequently the tenant reinstated the premises. The insurance company then sued the insured to recover back the £750 and obtained judgment for that amount.[4]

[1] *Pearman* v. *Gould*, 42 N. J. Eq. 4, 5 Atl. 811; *Kernochan* v. *N. Y. Bowery Fire Ins. Co.*, 17 N. Y. 441; *Louden* v. *Waddle*, 98 Pa. St. 242. So also if the mortgagee is merely a payee in the mortgagor's policy. *Cone* v. *Niagara Ins. Co.*, 60 N. Y. 619. Sureties on a note secured by mortgage on paying the same are subrogated to mortgagee's right to insurance, *Ætna Ins. Co.* v. *Thompson*, 68 N. H. 20, 40 Atl. 396.

[2] The premium is small compared with the face of the policy. If assured can gain double indemnity, he is tempted to bring about the peril insured against.

[3] *West of Eng. F. Ins. Co.* v. *Isaacs*, 66 L. J. Q. B. N. S. 36 (1897), 1 Q. B. 226, right to all remedies on contract against third parties; Mar. Ins. Act (1906), § 79.

[4] *Darrell* v. *Tibbitts*, L. R. 5 Q. B. D. 560, 42 L. T. N. S. 797, 50 L. J. Q. B. 33. But take the familiar instance where a tenant rents a furnished house for the summer or winter months, stipulating to make good any loss or

Again, in a later English case, the insured made an executory contract to sell the insured premises without referring to insurance. Pending this contract, a loss by fire occurred for which the vendor was compensated by his insurers. Subsequently the vendee completed the purchase, as he was obligated to do by English law, paying the full purchase price to the vendor. The insurance company thereafter claimed the right to open its settlement with the insured and recover back from him the whole amount of insurance paid. This it was allowed to do under the doctrine of subrogation or upon the theory that the fire insurance contract is one of strict indemnity.[1]

injury to the property. If the house burns down without his fault, must he pay the entire loss, and the owner's insurers go free, subject not even to liability to contribute *pro rata* with the tenant to the payment of the loss? Such a rule is harsh.

[1] *Castellain* v. *Preston*, L. R. 11 Q. B. Div. 380, 52 L. J. Q. B. 366, 49 L. T. N. S. 29 (see elaborate and interesting opinions). Substantially same holding in *Phœnix Assur. Co.* v. *Spooner* (1905), 2 K. B. 753, in which Bigham, J., says in an analogous case: "The contract being one of mere indemnity, the plaintiffs, the assurers, upon payment of the loss became entitled to all the rights then vested in Mrs. Spooner in respect of the destroyed property," to wit, purchase price or value under condemnation. But compare American cases. *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Ins. Co.* v. *Updegraff*, 21 Pa. St. 513; *Skinner & Sons Co.* v. *Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. R. 485, and cases *infra*. Assume, however, that contract of sale is disadvantageous to vendor, why should value of property be measured for insurance by purchase price in pending contract of sale? Suppose both vendor and vendee are willing to call off their pending contract and take a fresh start, may they not do so? If they may, then the company's right of subrogation would seem to be valueless and wholly subject to defeat by joint action of vendor and vendee. The United States Supreme Court adopting the language of the English judges has apparently given its high sanction to the same doctrine, "the general rule of law (and it is obvious justice) is, that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped, by having that amount back," *Chi., etc., R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 88, 11 S. Ct. 490, citing *Burnand* v. *Rodocanachi*, 7 App. Cas. 333, 339; *Weber* v. *M. & E. R. Co.*, 35 N. J. L. 409, and other cases. See to same effect *Packham* v. *German F. Ins. Co.*, 91 Md. 515, 523, 46 Atl. 1066. If fire gives vendee the right to cancel the executory contract of sale, it would seem that the insurer takes no right of subrogation, *Phinizy* v. *Guernsey*, 111 Ga. 346, 36 S. E. 796, 78 Am. St. R. 207, 50 L. R. A. 680; *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454. Or if insurance exists in whole or in part for benefit of vendee, *Nelson* v. *Bound Brook Ins. Co.*, 43 N. J. Eq. 256, 11 Atl. 681. As to whether substantial loss by fire pending conveyance does give vendee option to cancel executory contract of sale in absence of specific provision, authorities do not agree. English rule followed by some other courts is in general that vendee is to be regarded as equitable owner liable meanwhile to all losses, *Raffety* v. *Schofield* (1897), 1 Ch. 937; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 338; *Marion* v. *Wolcott* (N. J. Eq.), 59 Atl. 242; *Pelton* v. *Westchester Ins Co.*, 77 N. Y. 605; *Wicks* v. *Bowman*, 5 Daly (N. Y.), 225, and to increments also if not in default under the terms of the executory contract, *Ridout* v. *Fowler* (1904), 1 Ch. 658 (1904), 2 Ch. 93 and

If an insurer after loss is a mere surety for some obligor primarily liable, this rule would seem to be indubitably sound,[1] but other courts in this country do not seem disposed to press to such an extreme either the doctrine of indemnity or that of subrogation when applied to the law of insurance. They seem rather inclined to look upon a contract of insurance upon property, if valid and unobjectionable when made, as an absolute promise by the insurer, subject to all the terms of the policy, to pay the damage sustained by the property as measured by its cash or market value[2] (of course, however, not exceeding the amount of insurance), and they declare that inasmuch as premiums are estimated upon that measure of liability any other basis of indemnity is inequitable in principle besides being inconvenient in practice.[3]

Thus, where the assured, a grain elevating company, joined with other elevators in a pooling arrangement whereby in spite of a fire totally incapacitating the elevator, it was to have its full percentage of the earnings of the pool, it has been held that the insurers of use and occupancy upon paying the loss are not subrogated to the rights of the assured against the pool, or to the money actually received from the pool during the period required for reinstatement.[4]

that destruction of building by fire meanwhile is no bar to action for specific performance of contract of sale, *Paine* v. *Meller*, 6 Ves. 349; *Harford* v. *Purrier*, 1 Madd. 532. But the tendency of other decisions lends support to the rule that the executory contract falls at vendee's option, if vendor cannot deliver the premises in substantially as good a condition as when contract was made, *Phinizy* v. *Guernsey*, 111 Ga. 346, 36 S. E. 796, 78 Am. St. R. 207, 50 L. R. A. 680, and cases cited; *Wells* v. *Calnan*, 107 Mass. 514; *Thompson* v. *Gould*, 20 Pick. (Mass) 134; *Goldman* v. *Rosenberg*, 116 N. Y. 78, 22 N. E. 259, and cases cited, approved in *Edwards* v. *McLean*, 122 N. Y. 302, 307, 25 N. E. 483; *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454, 465. As to judicial sale before date fixed for deed, see *Harrigan* v. *Golden*, 41 App. Div. 423, 58 N. Y. S. 726. Vendee clearly need not fulfill if subject is a chattel injured by fire meanwhile, *Tabbut* v. *Am. Ins. Co.*, 185 Mass. 419, 420, 70 N. E. 430.

[1] *Chi. & Al. R. Co.* v. *Glenny*, 175 Ill. 238, 51 N. E. 896; *Darrall* v. *Tibbitts*, L. R. 5 Q. B. 560, 42 L. T. N. S. 797, 50 L. J. Q. B. 33.

[2] Or agreed value in a valued policy.

[3] *King* v. *State Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683 (insurance an independent contract); *International Trust Co.* v. *Boardman*, 149 Mass. 158, 161, 21 N. E. 239; *Wall* v. *Platt*, 169 Mass. 398, 405, citing *Foley* and other cases; *Farmers' Fire Ins. Co.* v. *Johnston*, 113 Mich. 426, 71 N. W. 1074 (subrogation only against a party primarily liable for the loss); *Foley* v. *Ins. Co.*, 152 N. Y. 131, 134, 46 N. E. 318, 43 L. R. A. 664 ("damage to be ascertained according to the actual cash value;" "the measure of the insurer's liability", though double indemnity result); *Cont. Ins. Co.* v. *Ætna Ins. Co.*, 138 N. Y. 16, 24, 33 N. E. 724 ("contract cannot be construed one way for collecting premiums and another way for determining liability"). Compare *Heller* v. *Royal Ins Co.*, 177 Pa. St. 262, 35 Atl. 726, 34 L. R. A. 606.

[4] *Michael* v. *Prus. Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810 but "use and occupancy" was there held not to be synonymous with "earnings" or "profits;" and total value of subject did not clearly appear. As to further description of this pool, see *Kellogg* v. *Sowerby* 93 App. Div. 124, 87 N. Y. S. 412.

And in another case in the same court the owner insured certain dwelling houses in course of construction, which were destroyed by fire before completion. The contractors were obligated to complete the work before becoming entitled to any pay. No issue of subrogation was expressly raised, but the court said in substance that the insurance company was not concerned with the contract relations between the plaintiff and the contractors, though the result might be a double compensation to the plaintiff.[1]

The doctrine of subrogation received consideration by the United States Supreme Court under the following circumstances: The American Tobacco Company had been paid by its insurers for a large loss by fire. Among the items of total loss as adjusted with the companies were several thousand dollars worth of unused internal revenue stamps, the full value of which, under the provisions of the United States Revised Statutes, was recoverable or redeemable from the United States authorities. The underwriters having paid the loss claimed that they were subrogated to the remedy of the insured for reimbursement from the Government under the terms of the statute. To enforce this claim action was instituted, in the name of the insured, and a judgment of recovery was obtained in the Court of Claims, which, on appeal, was affirmed.[2]

§ 55. Same Subject—Stipulation in Bill of Lading for Benefit of Insurance.—Inasmuch as the insurers are only entitled to such rights as are vested in the insured at the time of loss,[3] there will be no subrogation in case the insured has stipulated in a bill of lading from the common carrier that the latter shall have the benefit of insurance.[4]

[1] *Foley* v. *Mfrs. Fire Ins. Co.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664 (and see 171 N. Y. 39), "the fact that improvements on land may have cost the owner nothing or that if destroyed by fire he may compel another person to replace them without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the liability of an insurer in the absence of any exemption in the policy." This case was without doubt rightly decided on its facts, since no claim of subrogation was presented, nor did it appear that the contractors had yet rebuilt. And see *Clover* v. *Greenwich Ins. Co.*, 101 N. Y. 277, 4 N. E. 724.

[2] *United States* v. *Am. Tobacco Co.*, 166 U. S. 468, 17 S. Ct. 619.

[3] *Hartford F. Ins. Co.* v. *Chi., etc., R. Co.*, 175 U. S. 91, 96, 20 S. Ct. 33, 44 L. Ed. 84.

[4] *Liverpool & Gt. West. Steamer Co.* v. *Phœnix Co.*, 129 U. S. 397, 9 S. Ct. 469; *Phœnix Ins. Co.* v. *Erie & W. Transp. Co.*, 117 U. S. 312, 6 S. Ct. 750; *Penn. R. Co.* v. *Burr*, 130 Fed. 847, 65 C. C. A. 331; *Platt* v. *Richmond, etc., R. Co.*, 108 N. Y. 358, 15 N. E. 393, 13 N. Y. St. R. 660; *North Brit. & M. Ins. Co.* v. *Cent. Vt. R. Co.*, 9 App. Div. 4, 75 N. Y. St. R. 427, 40 N. Y. Supp. 1115, aff'd 158 N. Y. 726; *Roos* v. *Phila., etc., R. Co.*, 13 Pa. Super. 563; *Brit. F. & M. Ins. Co.* v. *Gulf, etc., R. Co.*, 63 Tex. 475, 51 Am. Rep. 661. Such a stipulation is not void as against public policy in relieving a common carrier from the results of its negli-

§ 56. Special Clause in Policy to Preserve Subrogation.—To meet the doctrine set forth in the last section, the insurer sometimes inserts a special clause in his policy to the effect that any act or agreement by the assured tending to defeat subrogation shall avoid the insurance.

Under such a policy it is held that in case the insured has been so imprudent as to agree to give the insurers the benefit of subrogation and has also made an inconsistent stipulation with the common carrier, he will forfeit his insurance.[1]

But the United States Supreme Court has also adopted the following equitable doctrine: if the shipper in accepting from the carrier its bill of lading, with provision that the carrier shall have benefit of insurance, thereby violates the policy clause which warrants that any act or agreement by assured tending to defeat subrogation shall forfeit the insurance, the carrier nevertheless cannot successfully plead for defense in the shipper's action against it such provision in the bill of lading, since at the time of loss there is no valid insurance of which the carrier can have the benefit. Under this view, though the assured may lose his insurance, he retains his right of action against the carrier.[2]

In another case, where under similar facts the shipper's insurance had become forfeited for the same reason, the insurers nevertheless voluntarily made payment to the insured, but upon express condition that they should have an unqualified absolute right of resort over against the carrier, and the Minnesota court held that the carrier could not in defense avail itself of the clause in the bill of lading inasmuch as the insured had invalidated the policy in accepting the bill of lading.[3] Hence there was no insurance existing upon which the clause in the bill of lading could operate.

gence, *Hartford F. Ins. Co.* v. *Railroad Co.* (at p. 99), *supra.; Wager* v. *Prov. Washington Ins. Co.*, 150 U. S. 99, 14 S. Ct. 55. And amounts to an assignment of claims under policy, *Dundee Chemical Works* v *N. Y. Mut. Ins. Co.*, 67 N. Y. St. R. 333, 335, 33 N. Y. Supp. 629, 12 Misc. 353, but does not violate a clause in the policy against transferring or pledging the interest of the insured, *Jackson Co.* v. *Boylston Mut. Ins. Co.*, 139 Mass. 508, 52 Am. Rep. 728, 2 N. E. 103. To omit, without fraud, to disclose such a stipulation is not fatal concealment, *Phœnix Ins. Co.* v. *Erie & W. Transp. Co.*, 117 U. S. 312, 326, 6 S. Ct. 750, 1176. Insurance company being restricted to rights of the insured is bound by limit of time specified in bill of lading within which to bring suit, *No. Brit. & M. Ins. Co.* v. *Cent. Vt. R. Co.*, 9 App. Div. 4, 40 N. Y. Supp. 1113, aff'd 158 N. Y. 726.

[1] *Fayerweather* v. *Phœnix Ins. Co.*, 118 N. Y. 324, 28 N. Y. St. R. 689, 23 N. E. 192; *Kennedy Bros.* v. *Iowa State Ins. Co.*, 119 Iowa, 29, 91 N. W. 831.

[2] *Inman* v. *So. Carolina R. Co.*, 129 U. S. 128, 9 S. Ct. 249. Moreover, it was held unlawful for common carrier to decline to discharge its duty except upon condition of being furnished by shipper with indemnity against negligence.

[3] *Southard* v. *Minn., etc., R. Co.*, 60 Minn. 382, 62 N. W. 442.

§ 57. Release of Party Primarily Liable.—The insurer's right of subrogation does not accrue until after loss has occurred,[1] but from that date any act of the insured in releasing the party primarily liable, if without the insurer's consent, will discharge the insurer *pro tanto*.[2]

In like manner the party primarily liable must not knowingly do anything to defeat the insurer's right of subrogation. A release by the assured obtained by the tort feasor under such circumstances will furnish no defense against the insurer.[3] But if the insurers voluntarily pay the policy with full knowledge that the assured has also been indemnified by the wrongdoer they cannot maintain an action against the wrongdoer; and if the assured receive his damages from the party primarily liable before collecting his insurance, the amount so received will be applied *pro tanto* in discharge of the policy.[4]

§ 58. Right of Subrogation—How Prosecuted.—In general, the law contemplates that there shall be but one action and one recovery for a single wrong.[5] Therefore in those jurisdictions where the real parties in interest may sue in their own names, all the insurance companies entitled to right of subrogation should unite in one suit, and if the assured also has an interest he should be joined as a party.[6] And if the insured brings the action in such jurisdic-

[1] *Sussex Co. Mut. Ins. Co.* v. *Woodruff*, 26 N. J. L. 541.

[2] *Hall* v. *Railroad Co.*, 13 Wall. 367, 20 L. Ed. 594; *Packham* v. *German F. Ins. Co.*, 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. R. 461; *Phœnix Ins. Co.* v. *Parsons*, 129 N. Y. 86, 94, 29 N. E. 87; *Dilling* v. *Draemel*, 16 Daly (N. Y.), 104; *Newcomb* v. *Ins. Co.*, 22 Ohio St. 382, 10 Am. Rep. 746; *Carpenter* v. *Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044, mortgagee's insurance (but see Mass. rule, § 53, as to mortgagee); *Lett* v. *Guardian Ins. Co.*, 52 Hun, 570, aff'd 125 N. Y. 82 (mortgagee). Insured cannot repudiate the release for fraud while retaining the proceeds of settlement, *Highland* v. *Ins. Co.*, 203 Pa. St. 134, 52 Atl. 130. But the insured is not bound to take affirmative action for benefit of insurers, *Royal Ins. Co.* v. *Stinson*, 103 U. S. 25, 26 L. Ed. 473; *Excelsior Fire Ins. Co.* v. *Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Glover* v. *Greenwich Ins. Co.*, 101 N. Y. 277, 4 N. E. 724; *Foley* v. *Ins. Co.*, 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664.

[3] *Omaha & R. V. R. Co.* v. *Granite State Ins. Co.*, 53 Neb. 514, 73 N. W. 950; *Conn. Fire Ins. Co.* v. *Erie R. Co.*, 73 N. Y. 399, 29 Am. Rep. 171; *Hart* v. *Railroad Co.*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; *West of Eng. Fire Ins. Co.* v. *Isaacs*, 66 L. J. Q. B. N. S. 36 (1897), 1 Q. B. 226.

[4] *Conn. Fire Ins. Co.* v. *Erie R. Co.*, 73 N. Y. 399, 29 Am. Rep. 171, but payment of insurance is no defense to wrongdoer.

[5] *Fairgrieve* v. *Marine Ins. Co.*, 94 Fed. 686, 37 C. C. A. 190, 112 Fed. 364; *Munson* v. *N. Y. Cent. & H. R. R. Co.*, 32 Misc. 282, 285; *Rockingham Ins. Co.* v. *Bosher*, 39 Me. 253, 63 Am. Dec. 618.

[6] *Norwich Union F. Ins. Soc.* v. *Standard Oil Co.*, 59 Fed. 984, 19 U. S. App. 460, 8 C. C. A. 433, citing many cases, federal and state; *Continental Ins. Co.* v. *Loud Lumber Co.*, 93 Mich. 139, 53 N. W. 394, 32 Am. St. R. 494 (approved 138 Mich. 55); *Jacobs* v. *N. Y. C. & H. R. R. Co.*, 107 App. Div. 134, 94 N. Y. Supp. 954, and cases cited; *Mobile Ins. Co.* v. *Railroad Co.*,

tion for his own benefit he should join such insurers as parties.[1] In other jurisdictions the one action should be prosecuted in the name of the insured, but for the benefit of all those in interest;[2] the insured, if already indemnified by the insurance, holding the recovery as trustee for the insurer.[3]

§ 59. Insurable Interest as Related to Measure of Indemnity—Fire. In the law of fire insurance, the doctrine governing the amount, if any, to be recovered under the policy may be summed up generally, though not in all instances accurately, by the phrase, "indemnity to the insured, commensurate with his insurable interest as existing at the time of loss,"[4] and limited by the amount as well as by the terms of the policy.

If the insured is the owner of the property destroyed, he is entitled to recover its cash or market value[5] at the time of loss, without making any deduction for the amount of mortgage or other incumbrances upon it, for these incumbrances are held to be of no concern to the insurers.[6]

41 S. C. 408, 19 S. E. 858; *Wunderlich* v. *Chi. & N. W. R. Co.*, 93 Wis. 132, 66 N. W. 1144. And see *Whittemore* v. *Judd L. & S. Oil Co.*, 124 N. Y. 565, 27 N. E. 244, 21 Am. St. R. 708. Railroad company cannot object to splitting of cause of action if it has settled with insured and taken a release excepting the insurance, *Atch., etc., R. Co.* v. *Home Ins. Co.*, 59 Kan. 432, 53 Pac. 459.

[1] *Jacobs* v. *N. Y. Cent. & H. R. R. Co.*, 107 App. Div. 134, 137, 94 N. Y. Supp. 954; *Munson* v. *N. Y. Cent. & H. R. R. Co.*, 32 Misc. 282; *Firemen's Fund Ins. Co.* v. *Oreg. R. & Nav. Co.*, 45 Oreg. 53, 76 Pac. 1075; *Home Mut. Ins. Co.* v. *Oreg. R. & Nav. Co.*, 20 Oreg. 569, 26 Pac. 857, 23 Am. St. R. 151; *Marine Ins. Co.* v. *Railroad Co.*, 41 Fed. 645. If not made a party interested company may intervene, *Lake Erie, etc., R. Co.* v. *Falk*, 62 Ohio St. 297, 56 N. E. 1020. Insured should not bring suit in his own name if he has been fully indemnified by the insurance, *Sims* v. *Mut. Fire Ins. Co.*, 101 Wis. 586, 77 N. W. 908, the whole interest being vested in underwriters who may sue in their own name.

[2] *United States* v. *Am. Tobacco Co.*, 166 U. S. 468, 17 S. Ct. 619, 41 L. Ed. 1081; *Egan* v. *Brit. & F. Mar. Ins. Co.*, 193 Ill. 295, 61 N. W. 1081, 86 Am. St. R. 342. But a company that neglects to take any part or to share the expense may be bound by a settlement made in good faith, *Svea Assur. Co.* v. *Packham*, 92 Md. 464, 48 Atl. 359, 52 L. R. A. 95. Suit may be brought in name of assured without his consent, *Monmouth Co. Mut. Ins. Co.* v. *Hutchinson*, 21 N. J. Eq. 107.

[3] *Norwich Union F. Ins. Co.* v. *Standard Oil Co.*, 59 Fed. 984, 8 C. C. A. 433, 19 U. S. App. 460; *Weber* v. *M. & E. R. Co.*, 35 N. J. L. 409, 10 Am. Rep. 253; *Anderson* v. *Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. R. 812.

[4] *Monroe* v. *Southern Mut. Ins. Co.*, 63 Ga. 669; *Tabbut* v. *Am. Ins. Co.*, 185 Mass. 419, 70 N. E. 430, 102 Am. St. R. 353. There are many exceptions and qualifications including statutory and contract provisions and modifying rules of law. As to measure of indemnity in marine insurance, see ch. IX, *infra*.

[5] But in valued policy value is agreed upon. For this purpose a life insurance policy is considered valued, see § 24, *supra*.

[6] *Columbian Ins. Co.* v. *Lawrence*, 10 Pet. (U. S.) 507. But he cannot recover loss of rent, *Baroness of Pontalba* v. *Phœnix Assur. Co.*, 2 Rob. (La.) 131, 38 Am. Dec. 205, or use or profits unless specifically insured, *Niblo* v. *N. A. Fire Ins. Co.*, 3 N. Y. Super. Ct. 551; *Farmers' Mut. Ins. Co.*

A mortgagee insuring his own interest recovers the amount of the mortgage debt existing at the time of the loss without regard to the value of the mortgage or other security which he may hold on account of the same debt.[1]

In the absence of agreement the mortgagee has no interest in a policy taken out by the mortgagor upon his own interest unless it is assigned or made payable to the mortgagee.[2]

Where a common carrier,[3] warehouseman,[4] or other bailee,[5] or a commission merchant [6] or factor,[7] insures for his own benefit, he recovers the value of his interest as described in the policy,[8] whatever it may be, ownership, liability, commissions, advances, or other interest. If he has insured against his liability as bailee for the loss of the property, he will be entitled to recover its cash or market value at the time of loss, but measured by his liability; [9] and so, also, if he insures for the benefit of the owners of the goods intrusted to him as well as for his own benefit, he will be entitled to recover the full value of the property insured, to the extent of the insurance, holding any balance, above his own interest, as trustee for the owners.[10]

v. *New Holland Turnpike Co.*, 122 Pa. St. 37, 15 Atl. 563; § 25, *supra*.

[1] *Ætna Ins. Co.* v. *Baker*, 71 Ind. 102 (that mortgagor restores the building is immaterial); *Sussex Co. Mut. Ins. Co.* v. *Woodruff*, 26 N. J. L. 541; *Kernochan* v. *N. Y. Bowery Fire Ins. Co.*, 5 Duer (N. Y.), 1; *Cone* v. *Niagara F. Ins. Co.*, 60 N. Y. 619; *Rex* v. *Merchants' Ins. Co.*, 2 Phila. (Pa.) 357. The insurer must pay, no matter what the land or other collateral is worth, *Uhlfelder* v. *Palatine Ins. Co.*, 44 Misc. (N. Y.) 153, 89 N. Y. Supp. 792. This is true though mortgagee has foreclosed after partial loss, *Sun Ins. Office* v. *Bencke* (Tex. Civ. App.), 53 S. W. 98.

[2] *Carpenter* v. *Prov. Wash. Ins. Co.*, 16 Pet. 495. 10 L. Ed. 1044. In absence of agreement a lienor has no claim to insurance taken out for principal estate, *Rackley* v. *Scott*, 61 N. H. 140 (mechanic's lien). *Whitehouse* v. *Cargill*, 88 Me. 479, 34 Atl. 276 (legacy of legatee charged on real estate). *Lindley* v. *Orr*, 83 Ill. App. 70 (execution creditor). *McLaughlin* v. *Park City Bk.*, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343.

[3] *Home Ins. Co.* v. *Railroad Co.*, 71 Minn. 296, 74 N. W. 140.

[4] *Boyd* v. *McKee*, 99 Va. 72, 37 S. E. 810.

[5] *Snow* v. *Carr*, 61 Ala. 363, 32 Am. Rep. 3.

[6] *Johnson* v. *Campbell*, 120 Mass. 449; *Ferguson* v. *Plow Co.*, 141 Mo. 161, 42 S. W. 711.

[7] *Fish* v. *Seeberger*, 154 Ill. 30, 39 N. E. 982.

[8] *Home Ins. Co.* v. *Gwathmey*, 82 Va. 923, 1 S. E. 209.

[9] *Home Ins. Co.* v. *Railroad Co.*, 71 Minn. 296, 74 N. W. 140; *Allen* v. *Royal Ins. Co.* (Tex. Civ. App.), 49 S. W. 931.

[10] *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Souls* v. *Lowenthal*, 81 N. Y. Supp. 622, 40 Misc. 186. And see many cases cited on this subject, §§ 29, 39. Where the carrier insures the goods in a representative capacity and not simply his own interest or liability, he may recover in full without first showing that his liability is established, *Munich Assur. Co.* v. *Dodwell*, 128 Fed. 412, 63 C. C. A. 152. But if only liability to the owners is insured it is essential to establish its existence, *Savage* v. *Exch. F., etc., Ins. Co.*, 4 Bosw. (N. Y.) 1; *Burke* v. *Continental Ins. Co.*, 184 N. Y. 77, 76 N. E. 1086 (though words "in trust," etc., "sold but not delivered," were used). Thus tower's liability policy covers only

A lessee [1] or life tenant is entitled to recover only for the value of his term.[2]

A lessor under a rent policy is entitled to recover the value of his rent, which is generally agreed upon in advance by a valued policy, and such value in the absence of fraud is conclusive.[3]

A vendee under an executory contract of purchase is entitled to recover the full value of the property insured by him, if still obligated to pay the purchase price or if he takes title.[4]

A vendor under such a pending contract has a right to recover the full value of the property insured by him unless the policy limits his interest.[5] But the rule differs in different jurisdictions as to

liability and not costs of a successful defense by the tower in action against him, *Munson* v. *Standard M. Ins. Co.*, 145 Fed. 957; and see *Joyce* v. *Kennard* (1871), L. R. 7 Q. B. 78. And where policy is "to indemnify," against employer's liability, assured must first show that he has actually paid the judgment, *Allen* v. *Ins. Co.*, 145 Fed. 881, 76 C. C. A. 265. If broker or commission merchant insures only his own interest, or without specifying other interests, his recovery is limited to his advances and charges, but otherwise if on goods of his own, or held in trust, *Ebsworth* v. *Alliance Mar. Ins. Co.* (1873), 8 C. P. 596, 42 L. J. C. P. 305.

[1] *Niblo* v. *North Amer. Ins. Co.*, 1 Sandf. (N. Y.) 551 (not the whole value of the property). *Carey* v. *Provincial Fire Ins. Co.*, 33 Hun (N. Y.), 315; and see § 37.

[2] *Beekman* v. *Ins. Assn.*, 66 App. Div. 72, 73 N. Y. Supp. 110 (value of life interest as shown by tables). *Agricult. Ins. Co.* v. *Yates*, 10 Ky. L. R. 984 (not full value of property). *Sampson* v. *Grogan*, 21 R. I. 174, 42 Atl. 712, 44 L. R. A. 711; *Green* v. *Green*, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525; *Clyburn* v. *Reynolds*, 31 S. C. 91, 9 S. E. 973. *Contra*, *Andes Ins. Co.* v. *Fish*, 71 Ill. 624; *Merrett* v. *Farmers' Ins. Co.*, 42 Iowa, 11 (life tenant allowed full value). *Convis* v. *Ins. Co.*, 127 Mich. 616, 86 N. W. 994; *Home Ins. Co.* v. *Gibson*, 72 Miss. 58, 17 So. 13; and see *Schaefer* v. *Anchor Mut. Ins. Co.* (Iowa), 100 N. W. 857; § 37. As to dower interest see *Hartford F. Ins. Co.* v. *Haas*, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64. In the absence of agreement lessee can claim no benefit in lessor's insurance, *Roesch* v. *Johnson*, 69 Ark. 30, 62 S. W. 416. Nor lessor or remainder-man in lessee's insurance, for which the lessee pays the whole premium, *Harrison* v. *Pepper*, 166 Mass. 288, 44 N. E. 222, 33 L. R. A. 239, 55 Am. St. R. 404; *Addis* v. *Addis*, 14 N. Y. Supp. 657, 60 Hun, 581; *Hubbard* v. *Austin*, 6 Ohio N. P. 249; 8 Ohio Dec. 111; *Welsh* v. *London Assur. Corp.*, 151 Pa. St. 607, 25 Atl. 142; *Bennett* v. *Featherstone*, 110 Tenn. 27, 71 S. W. 589. But other courts have held that life tenant or lessee may recover the value of the fee but must either rebuild or will be held trustee for remainder-man or lessor for balance above his own interest, *Home Ins. Co.* v. *Gibson*, 72 Miss. 58, 17 So. 13; *Sampson* v. *Grogan*, 21 R. I. 174, 42 Atl. 712, 44 L. R. A. 711; *Green* v. *Green*, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525; and see *Convis* v. *Ins. Co.*, 127 Mich. 616, 86 N. W. 994; *Brough* v. *Higgins*, 2 Gratt. (Va.) 408 (policy here was taken out before estate was divided). Burden is on remainder-man to show what the excess is, *Grant* v. *Buchanan*, 36 Tex. Civ. App. 334, 81 S. W. 820.

[3] *Cushman* v. *Northwestern Ins. Co.*, 34 Me. 487; *Carey* v. *London Prov. Fire Ins. Co.*, 33 Hun (N. Y.), 315; *Kane* v. *Commercial Ins. Co.*, 8 Johns. (N. Y.) 229. Tenant may insure for loss for paying rent without use, *Heller* v. *Royal Ins. Co.*, 177 Pa. St. 262, 35 Atl. 726, 34 L. R. A. 600. Inchoate right of curtesy, *Doule* v. *Am. Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 394.

[4] *Marion* v. *Wolcott*, 68 N. J. Eq. 20, 59 Atl. 242; *Bartlett* v. *Looney*, 3 Vict. L. R. Eq. 15. If not so obligated he may be limited to actual loss, *Tabbut* v. *Am. Ins. Co.*, 185 Mass. 419, 70 N. E. 430, 102 Am. St. R. 353.

[5] *Grant* v. *Insurance Co.*, 76 Me. 514

whether he can retain the insurance money after collecting the purchase price from the vendee, and if not, to whom he must pay it. In England and elsewhere on fulfillment of the executory contract of sale the vendor must account to his insurers, applying strictly the doctrine of indemnity.[1] In other jurisdictions he must hold the insurance money as trustee for the vendee, and by other courts apparently the insurance contract is looked upon as altogether independent of the executory contract of sale.[2]

A reinsured is entitled to recover in proportion to the amount which he is obligated to pay by the original insurance, and this he may recover by reason of his liability before he has actually made payment thereof to the insured.[3] The measure of indemnity recoverable by an insured creditor is elsewhere dealt with.[4]

(real estate). *Boston, etc., Ice Co.* v. *Royal Ins. Co.*, 12 Allen (Mass.), 381, 90 Am. Dec. 951 (personalty). But this case was decided upon the ground that contract of sale was annulled by the fire, *Tiemann* v. *Citizens' Ins. Co.*, 78 N. Y. Supp. 620, 76 App. Div. 5 (real estate). *Insurance Co.* v. *Updegraff*, 21 Pa. St. 513; *Rayner* v. *Preston* (1881), 18 Ch. D. 1; *Phœnix Assur. Co.* v. *Spooner* (1905), 2 K. B. 753. At all events he may recover to the extent of the unpaid purchase price and interest, *Shotwell* v. *Jefferson Ins. Co.*, 18 N. Y. Super. Ct. 247.

[1] See cases, § 54. English courts hold more strictly to the doctrine that recoveries by different interests must not in the aggregate exceed the value of the whole fee, *North Brit. Ins. Co.* v. *London & G. Ins. Co.* (1877), 5 Ch. D. 583.

[2] See cases, § 54. *Held*, no trust for vendee, the insurance contract being personal, *Rayner* v. *Preston*, L. R. 18 Ch. D. 1 (leading case real estate). *Pool* v. *Adams*, 33 Law. Jour. Ch. 639; *Phœnix Assur. Co.* v. *Spooner* (1905), 2 K. B. 753; *Kortlander* v. *Elston*, 52 Fed. 180, 2 C. C. A. 657, 3 U. S. App. 283 (personal property). *Phinizy* v. *Guernsey*, 111 Ga. 346, 36 S. E. 796, 78 Am. St. R. 207, 50 L. R. A. 680, but decided on the ground that the fire loss is on the vendor and that vendee is not obliged to complete purchase (compare *Wright* v. *Continental Ins. Co.*, 117 Ga. 499, 43 S. E. 700). *King* v. *Preston*, 11 La Ann. 95; *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454, 465 (it seems that executory vendee is not entitled to insurance obtained by vendor for his own benefit). *Shotwell* v. *Jefferson Ins. Co.*, 5 Bosw. (N. Y.) 247, 261; *Gilbert* v. *Port*, 28 Ohio St. 276, 297 (insurance contract purely personal). *McDonald* v. *Admr. of Black*, 20 Ohio St. 192, 55 Am. Dec. 448; *Plimpton* v. *Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497, 499, 5 Am. Rep. 297, *dictum;* and see *Naquin* v. *Texas S. & R. Est. Assn.*, 95 Tex. 313, 67 S. W. 85, 58 L. R. A. 711, 93 Am. St. R. 855. *Contra*, held a trust for vendee, *Skinner & Sons Dry Dock Co.* v. *Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. R. 485 (but also held that policy was avoided for change of interest). *Ins. Co.* v. *Updegraff*, 21 Pa. St. 513; *Reed* v. *Lukens*, 44 Pa. St. 200, 84 Am. Dec. 425. However equitable it may appear it is difficult to find legal warrant for the doctrine that without consent of the company an executory vendee may become the real party in interest to insurance taken out by the vendor on his own account as absolute owner, since the rule is well settled that a contract of fire insurance is strictly personal. A new party in interest must not be substituted without consent of the insurers. If the executory vendee becomes a party in interest the insurance is altogether avoided by reason of the alienation clause of the standard policy, *Skinner & Sons Dry Dock Co.* v. *Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. R. 485; *Germania F. Ins. Co.* v. *Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591, 43 Am. St. R. 749.

[3] *Hone* v. *Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137.

[4] §§ 37, 73.

Under a policy for loss of use and occupation of a mill or other building, while undergoing repairs or while being rebuilt after the fire, the amount of recovery is usually defined by the policy as so much per day; and provision is often made for ascertaining by appraisal the amount of probable loss of time.[1]

§ 60. **Personal Contract.**—A contract of fire insurance is strictly personal; that is, it does not pass to the new owner by virtue of a transfer of the title of the property.[2] Hence, upon closing a sale or conveyance, it is of consequence to the vendee to see that new policies are taken out, or that the proper indorsements consenting to the transfer are made by the insurers upon the old policies.[3]

This rule is reasonable; for, as was explained in the introductory chapter, the moral risk assumed by the insurers depends upon the character and circumstances of the insured. They have a right to know with whom they are contracting, and no new party can be thrust upon them without their consent.[4] However important the policy of insurance may be to the owner, for the time being, of the property, it in no respects runs with the title to the buildings or contents specified in the policy.[5]

While, as shown hereafter, a marine policy is, in general, assignable without the insurer's consent,[6] nevertheless, where the insured sells or parts with his interest in the subject-matter insured, his rights under the policy do not, by virtue of such transfer alone, and without express or implied assignment of the policy, pass to the vendee or assignee of the property.[7]

§ 61. **Premium when Returnable.**—Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the pre-

[1] *Michael* v. *Prussian National F. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810; *Chatfield* v. *Ætna Ins. Co.*, 75 N. Y. Supp. 620, 71 App. Div. 164 (hotel). See Appendix, Forms.

[2] *Hunt* v. *Springfield F. & M. Ins. Co.*, 196 U. S. 47, 50, 25 S. Ct. 179; *City of Norwich*, 118 U. S. 468, 494, 6 S. Ct. 1150; *Shadgett* v. *Phillips & Crew Co.*, 131 Ala. 478, 483, 56 L. R. A. 461, 90 Am. St. R. 95, 31 So. 20; *Kase* v. *Hartford Ins. Co.*, 58 N. J. L. 34, 32 Atl. 1057; *Lett* v. *Guard. Fire Ins. Co.*, 125 N. Y. 82, 34 N. Y. St. R. 411, 25 N. E. 1088; *Raynor* v. *Preston*, 18 Ch. D. 1; *Powles* v. *Innes*, 11 M. & W. 10.

[3] See last section and note.

[4] *Germania F. Ins. Co.* v. *Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591, 43 Am. St. R. 749.

[5] *King* v. *Preston*, 11 La. Ann. 95; *Lahiff* v. *Ins. Co.*, 60 N. H. 75. As to the assignability of marine and life policies, see § 63.

[6] See § 63.

[7] *North of Eng., etc., Co.* v. *Archangel Mar. Ins. Co.* (1875), 10 Q. B. 249; *Powles* v. *Innes* (1843), 11 M. & W. 10.

mium is thereupon returnable to the assured,[1] but if the risk has once attached it may be said in general that the premium is not apportionable or returnable except by agreement.[2] A modification of the last proposition, however, is stated in the next section, applicable more especially to marine insurance.

§ 62. **Premium when Apportionable—Marine.**—In marine insurance where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is thereupon returnable to the assured provided there has been no fraud or illegality on his part.[3]

The values of buildings and contents are so uncertain, and contents are so fluctuating both in amount and in value, that rarely has this doctrine been recognized in fire insurance.[4] Indeed, such a rule, applicable as it is upon termination of every insurance regardless of whether a loss has happened, would be fruitful in disagree-

[1] *Dodge* v. *Boston Mar. Ins. Co.*, 85 Me. 215, 27 Atl. 105 (unseaworthiness). *Ins. Co.* v. *Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781 (innocent breach). *Jones* v. *Ins. Co.*, 90 Tenn. 604, 18 S. W. 260 (breach of clear-space clause without fraud). *Mut. L. Ins. Co.* v. *Elliott*, 93 Tex. 144, 53 S. W. 1014 (risk never attached). *Summers* v. *Mut. L. Ins. Co.*, 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812 (policy never delivered). *Gorsedd S. Co.* v. *Forbes* (1900), 5 Com. Cas. 413. So also if contract is rescinded for fraud or misrepresentation of insurer, *McKay* v. *N. Y. Life Ins. Co.*, 124 Cal. 270, 56 Pac. 1112; *Armstrong* v. *Mut. L. Ins. Co.*, 121 Iowa, 362, 96 N. W. 954; *McCann* v. *Met. L. Ins. Co.*, 177 Mass. 280, 58 N. E. 1026; *Anderson* v. *N. Y. Life Ins. Co.*, 34 Wash. 616, 76 Pac. 109; or by infant on coming of age, *Simpson* v. *Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673; *Johnson* v. *Northwestern, etc., Co.*, 56 Minn. 365, 57 N. W. 934. If contract is tainted by fraud of insured, premium is not returnable except by special agreement, though policy is avoided from inception, *Georgia Home Ins. Co.* v. *Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; *Prince of Wales, etc., Co.* v. *Palmer*, 25 Beav. 605. If contract is illegal premium is not returnable, *e. g.*, wager policies, *Wheeler* v. *Mut. R. F. L. Assn.*, 102 Ill. App. 48; *Harse* v. *Pearl L. Ins. Co.* (1904), 1 K. B. 558; but see *Am. Mut. L. Ins. Co.* v. *Bertram*, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935, innocent assignee.

[2] *Joshua Handy Works* v. *Am. Steam B. Ins. Co.*, 86 Cal. 248, 252, 24 Pac. 1018, 21 Am. St. R. 33; *McElwain* v. *Met. Life Ins. Co.*, 33 App. Div. 60, 53 N. Y. Supp. 253; *Hendricks* v. *Commercial Ins. Co.*, 8 Johns. (N. Y.) 1; *Steinback* v. *Rhinelander*, 3 Johns. Cas. 269; *Tyrie* v. *Fletcher* (1777), 2 Cowp. 666. Thus, where the assured has a defeasible interest which is terminated during currency of the risk, *Boehm* v. *Bell*, 8 T. R. 154. But see rule in marine, § 62. Or where the pending contract is ended by breach of warranty, *Hearne* v. *Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395 (deviation); *Home Fire Ins. Co.* v. *Kuhlman*, 58 Neb. 488, 78 N. W. 936 (vacancy).

[3] Eng. Mar. Ins. Act (1906), § 84. *Holmes* v. *United Ins. Co.*, 2 Johns. Cas. 329. Apportioned because one of the insured had no interest, *Finney* v. *Warren Ins. Co.*, 1 Metc. (Mass.) 16, 35 Am. Dec. 343; *Foster* v. *U. S. Ins. Co.*, 11 Pick. (Mass.) 85. Thus, where the policy is on a cargo of 1,000 barrels of sugar and only 500 barrels are shipped, one-half the premium is returnable.

[4] A bill embodying in part this principle in a clause of a new fire policy was unsuccessfully proposed to N. Y. Legislature in 1907.

ment and friction between fire insurance companies and their customers.[1] In most instances, the companies, although possessing little knowledge of the value of properties insured, freely and gratuitously, upon request, grant the privilege of other insurance, without limit of amount. Under such circumstances the duty rests plainly with the insured to keep the aggregate of his insurance within proper bounds.[2]

§ 63. **Assignment of Policies.**—Before loss a fire policy is not assignable without the consent of the insurer,[3] and after loss only to the extent of the claim therefor, since the contract is peculiarly personal, but unless expressly prohibited by the terms of the contract a marine or life policy may be assigned without permission of the underwriters.[4] Often, however, in the policy of life insurance an assignment is made ineffectual until after written notice thereof is given to the company.

The assignability of the marine policy was early established by custom, and grew out of the demands of mercantile business, which overrode the theory that the contract is strictly personal.[5] The value of a life policy, too, would often be seriously diminished unless the owner of it were able to make it the source of immediate benefit. Inasmuch as it is in general payable upon an event which sooner or later is certain to occur, it resembles in certain respects an ordinary *chose in action*,[6] and in most cases no sufficient reason can be given why it should not be assignable, provided vested rights of beneficiaries are not thereby disturbed.[7] It has been held, how-

[1] Moreover, the pernicious practice of overinsuring should not be fostered, but discouraged.

[2] A few states, however, have statutory provision, not expressly confined to marine insurance, that the premium is apportionable and returnable *pro rata*, where there is overinsurance *by several insurers*, Cal. Civ. Code, § 2620; Montana Civ. Code, § 3494; No. Dak. Civ. Code, § 5967; So. Dak. Civ. Code, § 1865.

[3] *Traders' Ins. Co.* v. *Newman*, 120 Ind. 54, 22 N. E. 428; *Lyford* v. *Conn. F. Ins. Co.*, 99 Me. 273, 58 Atl. 916.

[4] *Earl* v. *Shaw*, 1 Johns. Cas. (N. Y.) 314, 1 Am. Dec. 117 (marine). *Palmer* v. *Mut. Life Ins. Co.*, 77 N. Y. Supp. 869, 38 Misc. 318; *N. Y. Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997 (life). *Robinson* v. *Cator*, 78 Md. 72, 26 Atl. 959. The validity of the assignment depends upon the law of the state where the assignment is made, *Spencer* v. *Myers*, 150 N. Y. 269, 44 N. E. 942, 34 L. R. A. 175, 55 Am. St. R. 675. Claims for losses under a fire policy are assignable like other choses in action, *Roger Williams Ins. Co.* v. *Carrington*, 43 Mich. 252, 5 N. W. 303; *Nease* v. *Insurance Co.*, 32 W. Va. 283, 9 S. E. 283. As soon as loss occurs and even before adjustment the claim is assignable, *Greenwich Ins. Co.* v. *Columbian Mfg. Co.*, 73 Ill. App. 560.

[5] *Sparks* v. *Marshall*, 2 Bingham N. C. 761; *Earl* v. *Shaw*, 1 Johns. Cas. (N. Y.) 314, 1 Am. Dec. 117.

[6] *Mut. Life Ins. Co.* v. *Allen*, 138 Mass. 24, 52 Am. Rep. 245.

[7] *Robinson* v. *Duvall*, 79 Ky. 83, 42 Am. Rep. 208; *Griswold* v. *Sawyer*, 125 N. Y. 411, 416, 26 N. E. 464, in which the court said: "It is elementary law that where a policy is for the benefit

ever, that the executor or administrator of the insured may impeach the validity of an assignment of the policy, if founded upon an immoral and illegal consideration.[1]

§ 64. Vesting of Rights in Beneficiaries—Regular Life Policy. If a person, having an insurable interest in the life of another, takes out a valid policy on that life, but for his own benefit, and pays the premiums, it is evident that the policy is his own property.[2] The person whose life is insured has no right to the policy, nor has he any control over it, but very frequently it happens, that the insured in procuring a policy upon his own life has it made payable to others, for example, his wife and children, or near relatives or dependents, often without their knowledge and in most instances without any consideration moving from them. The question then arises, when and to what extent the interest of such beneficiaries or payees becomes a vested right.[3] Actual payment of insurance money, of course, must await the maturity of the policy and must also be subject to the continued observance on the part of the insured of all its conditions precedent, and warranties.[4] But when does the interest of the beneficiary thus gratuitously designated become so far a property right that neither the insured nor his creditors can destroy or impair it? The arrangement, though in certain of its aspects a chose in action,[5] in others is obviously in the nature of a gift or voluntary trust for the benefit of the person or persons named as payees,[6] and, as in the case of all gifts, the court will strive primarily to effectuate the probable intent of the donor.[7] It is a laudable

of persons named therein, to whom the sum insured is payable, it cannot be assigned without the consent of the persons named and all of them. The insured may destroy the policy by omitting to pay the premiums and thus failing to keep it in life, but he cannot impair the interests of the persons named as beneficiaries by a surrender or assignment thereof;" *Opitz* v. *Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. R. 1004.

[1] *Harrison* v. *Northwestern, etc., Co.* (Vt.), 66 Atl. 787 (married man assigned the policy to his mistress in consideration of illicit relations).

[2] *Rawls* v. *Am. Mut. L. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280.

[3] "An interesting question," *Mut. Life Ins. Co.* v. *Hill*, 178 U. S. 347, 20 S. Ct. 914, 44 L. Ed. 1097.

[4] *McCoy* v. *Relief Assoc.*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681 (warranty against suicide). *Behling* v. *N. W. L. Ins. Co.*, 117 Wis. 24, 93 N. W. 800 (default in paying a premium); compare *Union Cent. Life Ins. Co.* v. *Buxer*, 62 Ohio St. 385, 391, 57 N. E. 66, 49 L. R. A. 737.

[5] *Olmsted* v. *Keyes*, 85 N. Y. 598.

[6] *Small* v. *Jose*, 86 Me. 120, 29 Atl. 976; *Preston* v. *Conn. Mut. Life Ins. Co.*, 95 Md. 101, 51 Atl. 838; *Ryan* v. *Rothweiler*, 50 Ohio St. 595, 35 N. E. 681; *Cleaver* v. *Mut. Reserve Fund*, 1 (1892), Q. B. 153, 61 L. J. Q. B. 128, 66 L. T. 220.

[7] *Farleigh* v. *Cadman*, 159 N. Y. 169, 173, 53 N. E. 808 ("a gift, whether in the form of a trust, or otherwise, always involves the intention of the donor"). If a husband insures his life for his wife, and pays all the premiums with money embezzled from

thing for a person when solvent to make secure provision for the future necessities and comfort of those who are naturally and properly dependent upon him, and to obtain this result it would seem probable, that the donor would intend to relieve the objects of his bounty from any danger of interference by his possible future creditors.

It may be stated as the general rule that if no phraseology in the contract indicates a different intent, the right of the beneficiary becomes vested as soon as the contract is made,[1] though the policy

his firm, the proceeds of the policy will belong to it; but if the first premium is honestly paid by him, and subsequent premiums with money stolen from his firm, the proceeds of the policy will belong to the wife, charged with a lien to the firm for the amount of its money used for premiums, *Holmes* v. *Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. R. 463.

[1] Chief Justice Fuller says: "It is indeed the general rule that a policy, and the money to become due under it, belong the moment it is issued, to the person, or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will to transfer to any other person the interest of the person named." *Central Nat. Bank* v. *Hume*, 128 U. S. 195, 206, 9 S. Ct. 41, 44, 32 L. Ed. 370; *Franklin L. Ins. Co.* v. *Galligan*, 71 Ark. 295, 301, 73 S. W. 102, 100 Am. St. R. 73; *Lemon* v. *Phœnix Life Ins. Co.*, 38 Conn. 294; *Glanz* v. *Gloeckler*, 104 Ill. 573, 44 Am. Rep. 94; *Weatherbee* v. *N. Y. Life Ins. Co.*, 182 Mass. 342, 65 N. E. 383; *Laughlin* v. *Norcross*, 97 Me. 33, 53 Atl. 834; *Preston* v. *Connecticut Mut. L. Ins. Co.*, 95 Md. 101, 51 Atl. 838; *Ricker* v. *Charter Oak Life Ins. Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; *United States Casualty Co.* v. *Kacer*. 169 Mo. 301, 69 S. W. 370, 55 Cent. L. J. 127, 58 L. R. A. 436; *Shipman* v. *Home Circle*, 174 N. Y. 398, 67 N. E. 85, 63 L. R. A. 347; *Garner* v. *Germania Life Ins. Co.*, 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 256; *Butler* v. *State Mut. Life Assur. Co.*, 55 Hun (N. Y.), 296, 28 N. Y. St. R. 491, 8 N. Y. Supp. 411, aff'd 125 N. Y. 769, 36 N. Y. St. R. 1011, 27 N. E. 409; *Entwistle* v. *Travelers' Ins. Co.*, 202 Pa. St. 141, 51 Atl. 759; *D'Arcy* v. *Connecticut Mut L. Ins. Co.*, 108 Tenn. 567, 576, 69 S. W. 768; *Washington L. Ins. Co.* v. *Berwald*, 97 Tex. 111, 115, 76 S. W. 442; *Martin* v. *McAllister*, 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585 (not community but separate property); and see *Miles* v. *Connecticut Mut. Life Ins. Co.*, 147 U. S. 177, 13 S. Ct. 275, 37 L. Ed. 128. The general rule as to vested rights in third parties applies equally to endowment policies, *Pingrey* v. *Ins. Co.*, 144 Mass. 374, 382, 11 N. E. 562; *Lockwood* v. *Ins. Co.*, 108 Mich. 334, 66 N. W. 229; *McGlynn* v. *Curry*, 81 N. Y. Supp. 855, 82 App. Div. 431, 433; but see *Talcott* v. *Field*, 34 Neb. 611, 52 N. W. 400, 33 Am. St. R. 662. Thus, the rights of the beneficiary will not be affected by the suicide of the insured in the absence of a warranty against suicide, and provided the policy was not procured with the intent to commit suicide. See § 34. Nor will the divorce of a wife disturb her rights as beneficiary under such a policy, *Overhiser's Adm'x* v. *Overhiser*, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552, 81 Am. St. R. 612. The interest of the beneficiary being vested is also assignable, *N. Y. Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997; *Hewlett* v. *Home for Incurables*, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 445; *Wirgman* v. *Miller*, 98 Ky. 620, 33 S. W. 937. But he can assign only his interest and if that be contingent or conditional until it is perfected he cannot assign the policy itself or its surrender cash value, *Rathborne* v. *Hatch*, 90 App. Div. (N. Y.) 161, 85 N. Y. Supp. 775, aff'd 181 N. Y. 584, 73 N. E. 1131. By statute in New York L. 1896, c. 272, § 22, "a policy of insurance on the life of any person for the benefit of a married woman is also assignable . . . with the written consent of the assured." This Act known as the Domestic Relations Law supersedes prior

may not come into his possession and he may have no knowledge of its existence. The courts of England and Wisconsin, however, have not given their approval to this broad principle, and notably the Wisconsin court regards such a gift as revocable during the lifetime of the donor, or shorter pendency of the policy.[1]

It need hardly be stated that the beneficiary will not be permitted to recover if he intentionally brings about the death of the insured.[2] But in such an event, if the insured has committed no breach of contract, a resulting trust in the insurance money is inferred in favor of his estate, since it would be harsh indeed to adjudge the contract void when the contracting party himself has violated none of its terms.[3]

It is a familiar principle, however, that the insured is under an implied obligation to do nothing to wrongfully accelerate the maturity of the policy. Thus in a recent Massachusetts case, a member of a mutual benefit association had named the plaintiff, who was his wife, beneficiary in a certificate which was silent regarding suicide. As the appointment was revocable, she had no vested rights in the insurance. The insured committed suicide by shooting himself while he was of sound mind. The court declared it to be settled, upon sound principles, and by a great weight of authority, that, although a policy contains no suicide clause, there is no lia-

acts and applies to insurance existing before passage of the act, *Matter of Thompson*, 184 N. Y. 36; *Kittel* v. *Domeyer*, 175 N. Y. 205, 67 N. E. 433; but the clause of § 22 of said act authorizing a married woman by will or written acknowledged assignment to dispose of a policy on her husband's life for her benefit, refers to a policy taken out by herself in her own name or in the name of a trustee. It does not refer to a policy taken out by the husband in her favor in which she had only a contingent interest, *Bradshaw* v. *Mut. L. Ins. Co.*, 187 N. Y. 347, 80 N. E. 203. As to what is husband's consent, see *Sherman* v. *Allison*, 77 App. Div. 49, 80 N. Y. Supp. 148. As to when rights of beneficiary are liable for debts of beneficiary see *Amberg* v. *Ins. Co.*, 171 N. Y. 314, 63 N. E. 1111; *Ellison* v. *Straw*, 116 Wis. 207, 92 N. W. 1094.

[1] *Estate of Breitung*, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; *Ellison* v. *Straw*, 116 Wis. 207, 92 N. W. 1094; *Foster* v. *Gile*, 50 Wis. 603, 7 N. W. 555; *Re Policy of Scottish Eq. Life Assur. So.* (1902), 1 Ch. 282; and see *Gutterson* v. *Gutterson*, 50 Minn. 278; 52 N. W. 530; *Tompkins* v. *Levy*, 87 Ala. 263, 268, 6 So. 346, "to wife, her heirs, executors or assigns," *held*, that her interest ceased on her death.

[2] *N. Y. Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997; *Schmidt* v. *Life Assn.*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. R. 323; *Cleaver* v. *Mut. Reserve Fund Assn.* (1892), 1 Q. B. 147 (case of Mrs. Maybrick); *Prince of Wales, etc., Assoc.* v. *Palmer*, 25 Beav. 605; Quebec Official Rep., 9 Q. B. 499; and see *Conn. Mut. L. Ins. Co.* v. *Hillmon*, 188 U. S. 208, 23 S. Ct. 294. But rights of beneficiary will not be defeated by such acts if he was insane, *Holdom* v. *Ancient Order*, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. R. 183.

[3] *Schmidt* v. *Life Assn.*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. R. 323; *Ryan* v. *Rothweiler*, 50 Ohio St. 595, 35 N. E. 681; *Walsh* v. *M. L. Ins. Co.*, 133 N. Y. 408, 419; 31 N. E. 228; *Cleaver* v. *Reserve Fund L. Assn.* (1892), 1 Q. B. 147.

bility under it to the legal representatives of the insured, if his death is intentionally caused by himself when of sound mind. The court further concluded that the same result must follow where the insured had named the claimant as in that case by an appointment which was revocable.[1]

On the other hand, about three months earlier in the same year, the Nebraska court adopted the opposite view, and held broadly that, where a policy or certificate of life insurance is taken out in good faith, suicide will not defeat recovery by a third party beneficiary, unless the contract so provides in express terms.[2] The highest court of New Jersey also had previously come to the same conclusion, presenting opinions discussing both sides of the question, but holding by a majority vote, that it is immaterial whether the rights of the beneficiary are vested or revocable.[3] Indeed the opinions of the courts in the last two cases go further than this, and favor the view that a policy, payable to the estate of the insured, without a suicide clause, shall not be defeated by his intentional self-destruction, unless he took out the policy with the purpose of killing himself, since the proceeds do not profit the wrongdoer but pass to some innocent recipient. This view is opposed to the fundamental notion that insurance is a contract of the highest good faith, demanding the exercise of fair dealing between the parties during its continuance, as well as at its inception, and by many courts is deemed inconsistent with a sound regard to public welfare.

In an interesting case where the policy by its terms became payable to the insured, he committed the crime of murder for which he was convicted and hanged. After the commission of the crime he assigned the policy to the plaintiffs. The judgment of conviction not being *res adjudicata* as against them, they offered but were not allowed to prove that it was in fact unjust. The court held that the evidence was not admissible and that they could not recover, since it would be contrary to public policy to uphold an insurance indemnifying for loss occasioned by miscarriage of justice in the courts.[4]

§ 65. If all the Donee Beneficiaries Die Before Insured.—Where by extraneous evidence it is shown that the beneficiary has a prior

[1] *Davis* v. *Supreme Council* (Mass., 1907), 81 N. E. 294 (citing federal, state, and English cases).

[2] *Lange* v. *Royal Highlanders* (Neb., 1907), 110 N. W. 1110.

[3] *Campbell* v. *Supreme Conclave*, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576.

[4] *Burt* v. *Union Cent. Life Ins. Co.*, 187 U. S. 362, 23 S. Ct. 139, 47 L. Ed. 216. Compare *Box* v. *Lanier*, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458.

binding agreement with the insured to the effect that the policy shall be procured, the rights of the beneficiary under the policy are vested and will pass to his representatives if he dies before the insured.[1] Or where the beneficiary aids in maintaining the insurance or otherwise parts with value in connection with the transaction, it may the more easily be inferred that the intention was to give him a vested right as of the time of the issuance of the policy.[2] But usually beneficiaries are appointed gratuitously. If in that event the sole beneficiaries named in the policy die before the insured, their would-be donor, is it within his power in the absence of other evidence of intent and with the consent of the company to make a fresh appointment? Upon this point the courts are divided in their opinions. By the better reason as well as by the weight of authority he must be allowed to do so, on the ground that his proposed settlement or trust having failed his policy is still within reach of his power of disposal.[3] The fact that he originally planned to make provision for his wife or children, if surviving him, affords slender reason for the inference that he intended to deprive himself of control over his property in the event that he should himself be sole survivor.[4]

[1] *Cade* v. *Head Camp P. J. W. of W.*, 27 Wash. 218, 67 Pac. 603; *Pingrey* v. *Nat. Life Ins. Co.*, 144 Mass. 374, 11 N. E. 562; *Smith* v. *National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616.

[2] *Spengler* v. *Spengler*, 65 N. J. Eq. 176, 55 Atl. 285.

[3] Especially if policy is still in his possession. The difficulty has been met in New York by the following clause contained in its standard life policies. Ins. L. § 101, "Whenever the right of revocation has been reserved, or in case of the death of the beneficiary under either a revocable or irrevocable designation, the insured, if there be no existing assignment of the policy made as herein provided, may designate a new beneficiary with or without reserving right of revocation, by filing written notice thereof at the home office of the company, accompanied by the policy for suitable endorsement thereon, and if no beneficiary shall survive the insured the policy shall be payable to the legal representatives of the insured." The N. Y. Standard forms of life insurance policies are not applicable to industrial policies.

[4] *Tompkins* v. *Levy*, 87 Ala. 263, 268, 6 So. 346 (interest of wife ceased on her death). *Ryan* v. *Rothweiler*, 50 Ohio St. 595, 35 N. E. 679; *Shields* v. *Sharp*, 35 Mo. App. 178, 182; *Locomotive Eng. Ins. Assn.* v. *Winterstein*, 58 N. J. Eq. 189, 196, 44 Atl. 199 (interest reverts to insured). *Bickerton* v. *Jaques*, 28 Hun (N. Y.), 119, 12 Abb. N. C. 25; *Mut. Ben. Life Ins. Co.* v. *Atwood*, 24 Grat. (Va.) 497, 18 Am. Rep. 652; *Foster* v. *Gile*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217 (a gift revocable until death of insured). *Kerman* v. *Howard*, 23 Wis. 108 (same as last). *Re Policy Scottish Eq. Life Assur. Soc.* (1902), 1 Ch. 282 (all interest reverts to insured who has paid the premiums). *Godsal* v. *Webb*, 2 Keen (Eng. Ch.), 100. *Contra*, *Franklin Life Ins. Co.* v. *Galligan*, 71 Ark. 295, 73 S. W. 102, 100 Am. St. R. 73; *Harley* v. *Heist*, 86 Ind. 196, 45 Am. Rep. 285; *Preston* v. *Connecticut Mut. Life Ins. Co.*, 95 Md. 101, 51 Atl. 838 (insured wrote letter to company stating that he had no intent that interest should vest if the beneficiary, his mother, died; nevertheless by a mere legal fiction he was deprived of his policy and the money on his death was given to his mother's estate). The Massachusetts court noticed but did

Any rule depriving the insured of the right of disposal, in such a case, over a policy taken out and kept alive by him, would not only be inequitable but also in many cases ineffective, for when the next premium became due he might allow the policy to lapse.[1] While this doctrine may be open to criticism on the score of uncertainty in holding the title in abeyance for a time, it tends to the accomplishment of essential justice, and is, therefore, sounder than a rule which is likely to defeat the probable purpose of the donor. Nor is any satisfactory solution of the difficulty furnished by the Indiana court in its suggestion that if the insured desires to avoid the transfer of his money to a stranger, he can so expressly provide in the policy.[2] The insured has little opportunity to shape the phraseology of the policy and usually takes what the company gives him without thought of remote contingencies. If, however, the language of the policy or charter of the company or statute clearly indicates that the policy must be issued for the sole use of the beneficiary named and his representatives, such language will be taken as evidence of the intent of the parties.[3] But in case a new appointment is not made by the insured, the representatives of the deceased appointees and not the representatives of the insured, will be entitled to the proceeds of the insurance,[4] though not so, if the interest of the beneficiary is expressly conditioned upon survivorship.[5]

§ 66. If Some of Donee Beneficiaries Die Before Insured.—If without any condition of survivorship the policy is simply made payable to several beneficiaries, for example, to "wife and children"

not decide the point in *Millard* v. *Brayton*, 177 Mass. 533, 542, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. R. 294.

[1] *Clark* v. *Durand*, 12 Wis. 223. The doctrine of the text finds strong confirmation in those cases already cited which hold that where the interest of the beneficiary is defeated by his own fraudulent conduct the right to recover on the policy shall revert to the insured; also in the many saving bank trust deposit cases which hold that the trust heading alone unaccompanied by a delivery of the pass book to the beneficiary fails to establish an irrevocable trust, provided the depositor has furnished evidence of original purpose by subsequently withdrawing or dealing with the fund as though it were his own. For example, *Matter of Totten*, 179 N. Y. 112, 125, 71 N. E. 748 (a tentative trust merely, revocable at will until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration"). *P. S. Bank* v. *Webb*, 21 R. I. 218, 42 Atl. 874; *Sherman* v. *Savings Bank*, 138 Mass. 581.

[2] *Harley* v. *Heist*, 86 Ind. 196, 45 Am. Rep. 285.

[3] *Phœnix Mut. Life Ins. Co.* v. *Dunham*, 46 Conn. 79, 33 Am. Rep. 14; *Robinson* v. *Duvall*, 79 Ky. 83, 42 Am. Rep. 208; *Brown* v. *Grand Lodge A. O. U. W.*, 208 Pa. St. 101, 57 Atl. 176; *Waldum* v. *Homstad*, 119 Wis. 312, 96 N. W. 806.

[4] *Geoffroy* v. *Gilbert*, 5 App. Div. 98, 38 N. Y. Supp. 643, aff'd 154 N. Y. 741, 49 N. E. 1097, and cases *supra*; *Robinson* v. *Duvall*, 79 Ky. 83, 42 Am. Rep. 208.

[5] *Haskins* v. *Kendall*, 158 Mass. 224, 227, 33 N. E. 495; *Bradshaw* v. *Mut. L. Ins. Co.*, 187 N. Y. 347, 80 N. E. 203.

or "to children," how shall the interests vest in the event that one or more beneficiaries survive the insured while one or more do not survive him? Shall the gift be regarded as made to a class of beneficiaries jointly, only those taking who are alive at the death of the insured and they taking the whole, or shall the interests be construed to vest separately so as to pass to the representatives or assigns or creditors of those dying before the insured? Here again the views of the courts are irreconcilable.[1]

§ 67. Beneficiaries' Interests—Conditionally Vested or Contingent.—By a common phrase in the ordinary life policy or certificate the money is made payable to "the wife of the insured, if living, otherwise to their children." Here the children's interest is purely contingent,[2] but where the contingency occurs, that is, where the wife dies before the insured, in what children does the interest vest? In those alive at the time the policy issues or solely in those surviving their mother? Here again the courts divide.[3] The insured

[1] Some courts consider it more equitable and more in accordance with the probable intent of the donor to hold that the entire interest passes to the surviving beneficiary or beneficiaries, *In re Seyton*, 34 Ch. Div. 511; *Continental Life Ins. Co.* v. *Webb*, 54 Ala. 689; *Doty* v. *Dickey* (Ky.), 96 S. W. 544; *Bell* v. *Kinneer*, 101 Ky. 271, 40 S. W. 686, 72 Am. St. R. 410; *Fish* v. *Massachusetts L. Ins. Co.*, 186 Mass. 358, 71 N. E. 786, in which the point was alluded to but not definitely decided. *Andrus* v. *Ins. Assn.*, 168 Mo. 151, 167, 67 S. W. 582 (but the point was not passed upon). *Farr* v. *Grand Lodge*, 83 Wis. 446, 454, 53 N. W. 738, 35 Am. St. R. 73, 18 L. R. A. 249. Especially where the deceased child leaves no issue, *Robinson* v. *Duvall*, 79 Ky. 83, 42 Am. Rep. 208; and see *Amberg* v. *Manhattan Life Ins. Co.*, 171 N. Y. 314, 63 N. E. 1111, as to creditors of beneficiary before maturity of policy. See also the second or alternative decision of the New York court at page 158 in *U. S. Trust Co.* v. *Mut. Ben. Life Ins. Co.*, 115 N. Y. 152, 21 N. E. 1025. Other courts, perhaps unnecessarily assuming that the general rule as to vested interests must apply, have taken the opposing view, *Small* v. *Jose*, 86 Me. 120, 29 Atl. 976 (but cases cited are not in point). *Hooker* v. *Sugg*, 102 N. C. 115, 8 S. E. 919, 11 Am. St. R. 717, 3 L. R. A. 217; *Conigland* v. *Smith*, 79 N. C. 303; *Conn. Mut. Life Ins. Co.* v. *Baldwin*, 15 R. I. 106, 23 Atl. 105; and see *Fidelity Trust Co.* v. *Marshall*, 178 N. Y. 468, 71 N. E. 1130, in which judges stood four to three on an analogous point.

[2] *Chapin* v. *Fellowes*, 36 Conn. 132, 4 Am. Rep. 49. The wife's interest also is contingent and wholly dependent upon her survivorship, *Bradshaw* v. *Mut. L. Ins. Co.*, 187 N. Y. 347, 80 N. E. 203; *Herr* v. *Reinoehl*, 209 Pa. St. 483, 58 Atl. 862.

[3] The New York rule: Some courts hold that the children alive when their mother dies take vested several interests in the whole, *Mich. Mut. L. Ins. Co.* v. *Basler*, 140 Mich. 233, 103 N. W. 596, citing cases *pro* and *con*; *Smith* v. *Ætna Life Ins. Co.*, 68 N. H. 405, 44 Atl. 531, citing *Walsh* case below; *Bradshaw* v. *Mut. L. Ins. Co.*, 187 N. Y. 347, 80 N. E. 203; *Fidelity Trust Co.* v. *Marshall*, 178 N. Y. 468, 71 N. E. 8; *Walsh* v. *Mut. Life Ins. Co.*, 133 N. Y. 408, 31 N. E. 228, 28 Am. St. R. 651 (the court, however, concludes that the rule is sustained by precedent rather than principle). *U. S. Trust Co.* v. *Mut. Ben. Life Ins. Co.*, 115 N. Y. 152, 21 N. E. 1025; *Braddock* v. *Manhattan L. Ins. Co.* (Pa. Com. Pleas), 36 Ins. L. J. 372; and see *Helmken* v. *Meyer*, 118 Ga. 657, 45 S. E. 450 (1903); *Continental Life Ins. Co.* v. *Webb*, 54 Ala. 688. Both husband and wife cannot join in defeating the children's contingent right, *Entwistle*

cannot make himself the beneficial "survivor" by murdering his wife in whom all interest was vested, provided she survived him.[1]

§ 68. **Right to Change Beneficiary Expressly Reserved.**—The interest of a beneficiary under a certificate or policy of a fraternal order or mutual benefit or similar association is ordinarily revocable and not vested, the right to make a new appointment being expressly reserved by the constitution or by-laws to which each member is amenable.[2] But any restrictions as to the classes of permitted beneficiaries contained in the certificate, charter, or by-laws of the

v. *Ins. Co.*, 202 Pa. St. 141, 51 Atl. 759. Except as statutes permit, for instance, N. Y. Law, 1896, ch. 272, § 22. The Connecticut rule: Other courts hold that all the children alive when the policy issues take vested rights and the representatives take the interest of those dying before their mother, *Continental Life Ins. Co.* v. *Palmer*, 42 Conn. 60, 19 Am. Rep. 530; *Estate of Conrad*, 89 Iowa, 396, 56 N. W. 535, 48 Am. St. R. 396; *Voss* v. *Conn. Mut. L. Ins. Co.*, 119 Mich. 161, 77 N. W. 697; *Glenn* v. *Burns*, 100 Tenn. 295, 45 S. W. 784. A child born after issuance of the policy comes in for a share, *Roquemore* v. *Dent*, 135 Ala. 292, 33 So. 178; *Scull* v. *Ætna L. Ins. Co.*, 132 N. C. 30, 43 S. E. 504. As to the burden of proof where the insured and the primary beneficiary die in a common disaster see *Fuller* v. *Linzee*, 135 Mass. 468, holding that fact of survivorship is a condition precedent for representative of beneficiary to prove. But see following cases holding that the interest is conditionally vested in beneficiary and that burden is upon the representative of the insured to divest it, *U. S. Casualty Co.* v. *Kacer*, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. R. 641; *Cowman* v. *Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550. Last case cited in *Young Women's Christ. Home*, 187 U. S. 401, 23 S. Ct. 184. But under the certificate of fraternal and beneficiary associations the interest ordinarily is not vested until the death of the assured, *Supreme Council* v. *Kacer*, 96 Mo. App. 93, 69 S. W. 671; *Males* v. *Sovereign Camp*, 30 Tex. Civ. App. 184, 70 S. W. 108; *Screwmen's Ben. Assn.* v. *Whitridge*, 95 Tex. 539, 68 S. W. 501. Where policy is payable to wife and child but if not living to the executor of insured, executor takes nothing if either wife or child survives, *Fish* v. *Mass. Life Ins. Co.*, 186 Mass. 358, 71 N. E. 786.

[1] *Box* v. *Lanier*, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458, the representatives of the wife were allowed to recover under an oral assignment.

[2] *Hoeft* v. *Supreme Lodge*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174 (interest styled a mere expectancy). *Woodmen's Acc. Assn.* v. *Hamilton*, 70 Neb. 24, 97 N. W. 1017 (statute allowed change). *McGrew* v. *McGrew*, 190 Ill. 604, 607, 60 N. E. 861; *Martin* v. *Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. R. 620; *Bunyan* v. *Reed*, 34 Ind. App. 295, 70 N. E. 1002; *Schoenan* v. *Grand Lodge A. O. U. W.*, 85 Minn. 349, 88 N. W. 999; *Spengler* v. *Spengler*, 65 N. J. Eq. 176, 55 Atl. 285; *Supreme Council* v. *Adams*, 68 N. H. 236, 44 Atl. 380; *Shipman* v. *Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 (future by-laws are retroactive if contract so provides). *Sabin* v. *Phinney*, 134 N. Y. 428, 31 N. E. 1088, 30 Am. St. R. 681; *Fanning* v. *Supreme Council*, 84 App. Div. 205, 82 N. Y. Supp. 733, aff'd 178 N. Y. 629, 71 N. E. 1130 (first beneficiary not allowed to recover though she still held the certificate). *Leftwich* v. *Wells*, 101 Va. 255, 43 S. E. 364; *Stoll* v. *Mut. Ben. L. Ins. Co.*, 115 Wis. 558, 92 N. W. 277 (subject to change of appointment by last will and testament). In the ordinary life policy also a right to change beneficiary may be expressly reserved, *Mente* v. *Townsend*, 68 Ark. 391, 398, 59 S. W. 41; *Atlantic Mut. L. Ins. Co.* v. *Gannon*, 179 Mass. 291, 294, 60 N. E. 933; *Cellery* v. *John Hancock Mut. L. Ins. Co.*, 68 N. Y. Supp. 128, 57 App. Div. 227; *Canavan* v. *John Hancock Mut. L. Ins. Co.*, 39 Misc. 782, 81 N. Y. Supp. 304 (prescribed methods of substitution must

association,[1] or in any statute,[2] must be observed. And it has been held that the widow properly designated might contest a subsequent unlawful appointment.[3] Nor will the insured be allowed to designate a new beneficiary where the first appointment is made in pursuance of a binding contract with the first appointee.[4] Nor by the weight of reason and authority can he do so where no right is reserved by statute or by the contract or rules of the association, for there the general rule relating to vested interests should be applied.[5] It is often asserted that a third party named as beneficiary in the certificate or policy of a fraternal or beneficiary association has nothing in the nature of a property right, contingent or otherwise, until the death of the insured, but a mere expectancy of benefit. This proposition, however, is of very doubtful accuracy. Authority and reason oppose it.[6]

§ 69. Mode of Changing Beneficiary.—The appointment of a new beneficiary can be accomplished only in compliance with any prescribed formalities. The association may rely upon its regulations regardless of the intent of the insured.[7] But if it choose, the society

be observed unless waived). For statutes allowing change of beneficiary see Appendix, ch. I.

[1] *Alexander* v. *Parker*, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187, "dependents;" *Re Globe Mut. Ben. Assn.*, 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547, only adults (compare *Chi. Mut. L. Indemnity Ass'n* v. *Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549); *Tepper* v. *Supreme Council*, 59 N. J. Eq. 321, 45 Atl. 111; *Brown* v. *Grand Lodge*, 208 Pa. St. 101, 57 Atl. 176.

[2] *Waldum* v. *Homstad*, 119 Wis. 312, 96 N. W. 806.

[3] *Grand Lodge* v. *Connelly*, 58 N. J. Eq. 180, 43 Atl. 286.

[4] *Grimbley* v. *Harrold*, 125 Cal. 24, 57 Pac. 558, 73 Am. St. R. 19; *Jory* v. *Supreme Council*, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. R. 17; *Leaf* v. *Leaf*, 92 Ky. 166, 17 S. W. 354; *Smith* v. *Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *Cade* v. *Head Camp*, 27 Wash. 218, 67 Pac. 603. But voluntary payment of dues by the first beneficiary will not necessarily estop the insured from making a new appointment, *Spengler* v. *Spengler*, 65 N. J. Eq. 176, 55 Atl. 285.

[5] *Franklin L. Ins. Co.* v. *Galligan*, 71 Ark. 295, 301, 73 S. W. 102, 100 Am. St. R. 73; *Hill* v. *Groesbeck*, 29 Colo. 161, 67 Pac. 167; *Pittinger* v. *Pittinger*, 28 Colo. 308, 64 Pac. 195, 89 Am. St. R. 193; *Manning* v. *Ancient Order*, 86 Ky. 136, 5 S. W. 385, 9 Am. St. R. 270; *Weisert* v. *Muehl*, 81 Ky. 336; *Locomotive Engineers' Ins. Ass.* v. *Winterstein*, 58 N. J. Eq. 189, 44 Atl. 199; *Martin* v. *Mfrs. Acc. Co.*, 60 Hun, 535, 40 N. Y. St. R. 17, 15 N. Y. Supp. 309. *Contra*, *Carpenter* v. *Knapp*, 101 Iowa, 712, 70 N. W. 764, 38 L. R. A. 128.

[6] *Jarvis* v. *Binkley*, 206 Ill. 541, 69 N. E. 582, holding the interest to be contingent and assignable in equity. *Supreme Council* v. *Tracy*, 169 Ill. 123, 48 N. E. 401; *Hopkins* v. *Hopkins*, 92 Ky. 324, 327, 17 S. W. 864 (interest is vested conditionally); and see *Grand Lodge* v. *Connelly*, 58 N. J. Eq. 180, 43 Atl. 286 (first appointee may contest second appointment if unlawful). So also *Brown* v. *Grand Lodge*, 208 Pa. St. 101, 57 Atl. 176.

[7] *Conway* v. *Supreme Council C. K. A.*, 131 Cal. 437, 63 Pac. 727; *Masonic Mut. Ben. Soc.* v. *Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Modern Woodmen of Amer.* v. *Little*, 114 Iowa, 109, 86 N. W. 216; *McCarthy* v. *Supreme Lodge*, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. R. 637; *Grand Lodge A. O. U. W.* v. *Gandy*, 63 N. J. 692, 53 Atl. 142 (otherwise it will

may waive its regulations and the original beneficiary cannot complain of the lack of formality or regularity.[1] Statutory provisions permitting the insured to make a new appointment are not applicable where the interest of the first-named beneficiary has become vested for value paid.[2]

§ 70. **Relations between Insurer and Insured—Life.**—The policy holder is not a *cestui que trust* of the company and hence, in the absence of fraud, cannot call upon the company to disclose to him their affairs in general, or to render an account for his share of dividends or profits;[3] and he is not a partner in the company.[4] As

not take away the benefit from the beneficiary); *Fink* v. *Fink*, 171 N. Y. 616, 625, 64 N. E. 506; *Eagan* v. *Eagan*, 68 N. Y. Supp. 777, 58 App. Div. 253, 255, 256. See also *Brown* v. *Grand Lodge U. O. U. W.*, 208 Pa. St. 101, 104, 57 Atl. 176. So also any method of change prescribed in a regular life policy must be respected, *Leonard* v. *Harney*, 173 N. Y. 352, 66 N. E. 202.

[1] *Atlantic Mut. L. Ins. Co.* v. *Gannon*, 179 Mass. 291, 60 N. E. 933 (as to signature of the designated officer of the society). *Metropolitan L. Ins. Co.* v. *Anderson*, 79 Md. 375, 29 Atl. 606; *Supreme Court Order of Patricians* v. *Davis*, 129 Mich. 318, 88 N. W. 874; *Allgemeiner Arbester Bund* v. *Adamson*, 132 Mich. 86, 92 N. W. 786; *Schoenau* v. *Grand Lodge*, 85 Minn. 349, 88 N. W. 999; *Webster* v. *Wilcox*, 57 App. Div. (N. Y.) 558 (estoppel by oral agreement). *Kimball* v. *Lester*, 43 App. Div. 27, 59 N. Y. Supp. 540, aff'd 167 N. Y. 570, 60 N. E. 1113. But waiver must be made before rights attach under the rules, *Smith* v. *Harman*, 28 Misc. 681, 59 N. Y. Supp. 1044. When insured has done all within his power to effectuate substitution, equity may grant relief in proper cases, *Supreme Council* v. *Cappella*, 41 Fed. 1 (stating rules for granting relief). *Grand Lodge* v. *Noll*, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350, 30 Am. St. R. 419 (certificate was lost and could not be surrendered for substitution). *Heydorf* v. *Conrack*, 7 Kan. App. 202, 52 Pac. 700 (insured died before new certificate was actually issued). *Marsh* v. *Am. Legion of Honor*, 149 Mass. 512, 21 N. E. 1070 (first beneficiary acted in collusion with officer of society). *Lahey* v. *Lahey*, 174 N. Y. 146, 66 N. E. 670, 95 Am. St. R. 554 (insured could not surrender certificate for substitution for first beneficiary held it). The court will, so far as possible, give effect to the intention of the parties, and will consider an attempted change of beneficiary complete without undue regard to technicalities, *Luhrs* v. *Luhrs*, 123 N. Y. 367, 33 N. Y. St. R. 688, 25 N. E. 388. The change of appointment may be sustained without the issuance of a new certificate of insurance, *Bishop* v. *Grand Lodge*, 112 N. Y. 627, 21 N. Y. St. R. 811, 20 N. E. 562. But not so if the contract makes the issuance of the new certificate an essential to validity of the appointment, *Kemper* v. *Modern Woodmen*, 70 Kan. 119, 78 Pac. 452. Though beneficiary has no vested interest he may contest insured's mental capacity to make new appointment, but gratuitous payment of part of assessment by beneficiary gives no vested rights, *Grand Lodge A. O. U. W.* v. *McGrath*, 133 Mich. 626, 95 N. W. 739. A right vested by death of insured cannot subsequently be divested by legislative act or municipal charter, *Kavanagh* v. *Board of Police Pen. Fund*, 134 Cal. 50, 66 Pac. 36. Amendment to laws not retroactive unless contract provides for it, *Roberts* v. *Cohen*, 60 App. Div. 259, 70 N. Y. Supp. 57, aff'd 173 N. Y. 580, 65 N. E 1112.

[2] *Smith* v. *National Ben. Soc.*, 123 N. Y. 85, 33 N. Y. St. R. 67, 25 N. E. 197.

[3] *Gadd* v. *Eq. Life Assur. Soc.*, 97 Fed. 834; *Everson* v. *Eq. Life Assur. Soc.*, 71 Fed. 570, 18 C. C. A. 251; *Greeff* v. *Eq. L. Ass. Soc.*, 160 N. Y. 19, 30, 54 N. E. 712, 46 L. R. A. 288,

[4] *People* v. *Security Life Ins. etc., Co.*, 78 N. Y. 114.

soon as the risk attaches, the insured, under the usual form of policy, becomes debtor to the insurer for the first premium, if it has not been paid. But as to any future premiums payable in advance, the relation of debtor does not exist until the risk attaches for the corresponding period. The contract usually contains no promise on the part of the insured to pay the premium, but its payment is simply made a condition of the continuance of the contract.[1] If such premium is not paid the contract terminates.

§ 71. **The Contract is a Property Right—Life.**—A life insurance policy taken out by the insured upon his own life and payable to himself or his estate is his own property, subject to his control, and liable to the payment of his debts, unless exempt by statute.[2] But prior to payment of the insurance money the policy represents merely a chose in action, and is not subject to attachment or execution, except as in New York by statute.[3] It may, however, be reached

73 Am. St. R. 659, holding that assured was only entitled to a share of such portion of the surplus as the directors saw fit to distribute, and construing N. Y. Law, 1892, c. 690, § 56, which limited to attorney general the right to bring proceedings for accounting or injunction; but see *Pierce* v. *Eq. Assur. Soc.*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. R. 433. Same law applied to co-operative or assessment life insurance associations, *Swan* v. *Mut. Res. Fund L. Assn.*, 155 N. Y. 9, 49 N. E. 258. This law was repealed in the interest of policyholders by L. 1906, c. 326, providing policyholders may have right to attach a special fund, *Babcock P. P. Mfg. Co.* v. *Ranous*, 164 N. Y. 440, 58 N. E. 529. Unless directors abuse their discretion policyholders cannot demand a discovery and a decree for a dividend, *Hudson* v. *Knickerbocker Life Ins. Co.*, 28 N. J. Eq. 167. Under tontine plan the company need not keep the funds in each class separately invested, *Bogardus* v. *N. Y. Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522. Only on the expiration of tontine period does the relation of debtor and creditor arise between company and assured, *N. Y. Life Ins. Co.* v. *Miller*, 22 Ky. L. Rep. 230, 56 S. W. 975; *Romer* v. *Eq. Life Assur. Co.*, 102 Ill. App. 621; *Avery* v. *Eq. Life Assur. Soc.*, 117 N. Y. 459, 23 N. E. 3; *Columbia Bk.* v. *Eq. Life Assur. Soc.*, 79 App. Div. 601, 80 N. Y. Supp. 428; *Ellison* v. *Straw*, 119 Wis. 502, 97 N. W. 168.

[1] *Goodwin* v. *Mass. Mut. Life Ins. Co.*, 73 N. Y. 480; *Worthington* v. *Charter Oak Life Ins. Co.*, 41 Conn. 372, 19 Am. Rep. 495.

[2] *Washington Central Bk.* v. *Hume*, 128 U. S. 195, 208, 9 S. Ct. 41, 32 L. Ed. 370; *Kelley* v. *Mann*, 56 Iowa, 625, 10 N. W. 211; *Coates* v. *Worthy*, 72 Miss. 575, 17 So. 606; *McCutcheon's Appeal*, 99 Pa. St. 133, 137; *Dulaney* v. *Walsh* (Tex. Civ. App.), 37 S. W. 615, aff'd 90 Tex. 329, 38 S. W. 748 (cannot deprive creditors by his bequest). An assignment by way of gift to a son is in fraud of existing creditors. *Friedman Bros.* v. *Fennell*, 94 Ala. 570, 10 So. 649.

[3] Code Civ. Pro. § 648; *Trepagnier* v. *Rose*, 18 N. Y. App. Div. 393, aff'd 155 N. Y. 637, 49 N. E. 1105. Where policy is not matured it represents only a contingent obligation and cannot be reached by writ of *fi. fa.*, *Boisseau* v. *Bass*, 100 Va. 207, 40 S. E. 647, 57 L. R. A. 380. The interests of third parties as beneficiaries are not in general subject to claims of creditors of the insured unless the policy was taken out in fraud of creditors, *Central Bk.* v. *Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. Ed. 370; *Hendrie Mfg. Co.* v. *Platt*, 13 Colo. App. 15, 56 Pac. 209; *Schaefer's Est.*, 194 Pa. St. 420, 45 Atl. 311. A third party paying premiums upon bankrupt's policy is entitled to get back premiums from receiver, *Re Tyler* (1907), 1 K. B. 865.

by proper proceedings in equity, unless it is by statute exempted from the claims of creditors.[1] After the insurance money is paid to a beneficiary it becomes liable to levy and attachment for his debts like his other money.[2]

§ 72. Rights of Creditors to Life Insurance Premiums Paid by Insolvent Debtors.—Some of the courts hold that in the absence of actual fraud it is not presumptively in fraud of creditors even at common law for an insolvent, charged with the duty of supporting wife and children, to make moderate provision for their future by taking out or keeping up insurance in their favor as beneficiaries.[3]

[1] *Bassett* v. *Parsons*, 140 Mass. 169, 3 N. E. 547.

[2] *Martin* v. *Martin*, 187 Ill. 200, 58 N. E. 230; *Bull* v. *Case*, 165 N. Y. 578, 59 N. E. 301. Thus, money due upon a matured policy upon the life of a husband payable to his wife is subject to levy for wife's debt, *Amberg* v. *Man. Life Ins. Co.*, 171 N. Y. 314, 63 N. E. 1111. And where tontine accumulations have become payable to the insured they are subject to his debts though his wife is the ultimate beneficiary under the policy, *Ellison* v. *Straw*, 119 Wis. 502, 97 N. W. 168. Until assured elects which option under tontine policy he will select there is no debt from the company and nothing for creditor to attach, *Columbia Bk.* v. *Eq. L. Assur. Soc.*, 79 N. Y. App. Div. 601, 80 N. Y. Supp. 428; but see *Troy* v. *Sargent*, 132 Mass. 408.

[3] *Central Nat. Bk.* v. *Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. Ed. 370; *Masonic Mut. Life Assn.* v. *Paisley*, 111 Fed. 32; *Hendrie, etc., Mfg. Co.* v. *Platt*, 13 Colo. App. 15, 56 Pac. 211; *State* v. *Tomlinson*, 16 Ind. App. 662, 677, 45 N. E. 1116, 59 Am. St. R. 335; *Johnson* v. *Alexander*, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 660. Statutes in some states define a limit of insurance exempt as against creditors (for instance, see, Cooley, Ins., p. 3795, note), restricting annual premiums to $500. N. Y. Domestic Relations Law, 1896, c. 272, § 22, provides, "A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts." This clause refers not to insurance taken out by the husband in favor of his wife, but to insurance procured by her in the manner described, *Bradshaw* v. *Mut. Life Ins. Co.*, 187 N. Y. 347, 80 N. E. 203. The clause provides not that premiums shall be apportioned and part thereof turned over to the creditors of the insured, but that if there is the specified excess of insurance money above that purchased for $500, annually, that excess shall go to the creditors regardless of whether the premiums therefor were paid during solvency or insolvency of the insured. The exemption from claims of creditors rests not on contract, but upon legislative grant, affecting a remedy, and therefore is held to apply to proceeds of policies issued before the enactment, *Matter of Thompson*, 184 N. Y. 36, 40, 76 N. E. 870; 185 N. Y. 574, 78 N. E. 1113. The burden rests upon the creditors of the insured to establish the existence of such excess insurance over and above that purchased by $500, annually, *Kittel* v. *Domeyer*, 175 N. Y. 205, 67 N. E. 433. The proceeds of the insurance are not general assets of the estate of the insured, but constitute a special fund created by statute for a special purpose, to be applied on the claims of creditors only after decree obtained, establishing their right, *Matter of Thompson*, 185 N. Y. 574, 78 N. E 1113. And see

Other authorities take the opposite view.[1] Some of these holding that the creditors are entitled to receive from the insurance money an amount equal to the premiums paid subsequent to insolvency.[2] Others less satisfactorily holding that the creditors are entitled to share in the insurance money in the ratio which the amount of premiums paid after insolvency bears to the total premiums.[3]

Heilbron's Est., 14 Wash. 536, 45 Pac. 153; *Fearn* v. *Ward*, 80 Ala. 555, 2 So. 114; *Kittel* v. *Domeyer*, 175 N. Y. 205, 67 N. E. 433 (administrator must hold fund until it is ascertained whether other assets will pay creditors). *Stokes* v. *Amerman*, 121 N. Y. 337, 24 N. E. 819 (the excess is in fraud of creditors and it seems creditor may preserve insurance from forfeiture by paying future premiums). *Wyman* v. *Gay*, 90 Me. 36, 37 Atl. 325 (limit of annual premium $150). *Mahoney* v. *James*, 94 Va. 176, 26 S. E. 385 (premiums paid out of exempted earnings). *Held*, under California statute, that no part is exempt from creditors if annual premium exceed $500, *Estate of Brown*, 123 Cal. 399, 55 Pac. 1055, 69 Am. St. R. 74. Mississippi statute construed, *Cozine* v. *Grimes*, 76 Miss. 294, 24 So. 197 (limit $5,000 of insurance). Other decisions under exemption laws, *Cook* v. *Allen*, 119 Iowa, 226, 93 N. W. 93; *Donaldson's Estate*, 126 Iowa, 174, 101 N. W. 870; *O'Melia* v. *Hoffmeyer*, 119 Iowa, 444, 93 N. W. 497; *Murdy* v. *Skyles*, 101 Iowa, 549, 70 N. W. 714, 63 Am. St. R. 411; *Larrabee* v. *Palmer*, 101 Iowa, 132, 70 N. W. 100; *Cooper* v. *Wright*, 110 Tenn. 214, 75 S. W. 1049; *Roberts* v. *Winton*, 100 Tenn. 484, 45 S. W. 673, 41 L. R. A. 275; *Rose* v. *Worthan*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; *Harvey* v. *Harrison*, 89 Tenn. 470, 14 S. W. 1083. Right to exemption under constitution of the insurance company, *Carson* v. *Vicksburg Bank*, 75 Miss. 167, 22 So. 1, 37 L. R. A. 559; *Fisher* v. *Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; *Bishop* v. *Grand Lodge*, 112 N. Y. 627, 21 N. Y. St. R. 811, 20 N. E. 562, cited and explained in *Sulz* v. *Mutual Res. Fund L. Assn.*, 145 N. Y. 563, 575, 40 N. E. 242, 65 N. Y. St. R. 513, 28 L. R. A. 379; *Johnston* v. *Catholic Mut. Ben. Assoc.*, 24 Ont. App. 88. But compare *Jones* v. *Patty*, 73 Miss. 179, 18 So. 794 (rights of creditors not concluded by charter or contract of company). If statute does not allow designation of creditor as beneficiary he cannot recover, *Clarke* v. *Schwarzenberg*, 162 Mass. 98, 38 N. E. 17.

[1] Prof. Williston's review in 25 Am. Law Review, 185.

[2] *Bartram* v. *Hopkins*, 71 Conn. 505, 42 Atl. 645, also construing Connecticut statutes; *Houston* v. *Maddux*, 179 Ill. 377, 53 N. E. 599, also construing Illinois Statutes; *Stokes* v. *Coffey*, 8 Bush. (Ky.) 533; *Kiely* v. *Hickox*, 70 Mo. App. 617, also construing Missouri Statutes; *Shaver* v. *Shaver*, 35 App. Div. (N. Y.) 4 (intimation). *Stigler's Ex'x* v. *Stigler*, 77 Va. 163. But if wife pays premiums out of her separate estate creditors of insured can claim nothing. *Estate of Goss*, 71 Hun, 120, 24 N. Y. Supp. 623; *Weber, Loper & Co.* v. *Paxton*, 48 Ohio St. 266, 26 N. E. 1051.

[3] *Fearn* v. *Ward*, 80 Ala. 555, 2 So. 114; *Pullis* v. *Robison*, 73 Mo. 201, 39 Am. Rep. 497; *Merchants', etc., Trans. Co.* v. *Borland*, 53 N. J. Eq. 282, 31 Atl. 272, and English cases cited. The application of the last rule to the case where the insured was solvent at the date of the contract and pays later premiums to keep policy from lapsing is clearly unsound. *Re Harrison* (1900), 2 Q. B. 710; *Holmes* v. *Gilman*, 138 N. Y. 369, 383, 34 N. E. 205, 20 L. R. A. 572, 34 Am. St. R. 470. U. S. bankruptcy act allows bankrupt to own and carry a policy free of creditor's claims after turning over to the trustee its surrender cash value, R. S. §§ 4745, 4747. If the policy really has a surrender value payable to the bankrupt and enforceable by him the rule applies, though no surrender value be expressed in the policy, *Hiscock* v. *Mertens*, 205 U. S. 202, 27 S. Ct. 488. So also if the policy in fact has a cash value though technically no surrender value, *Gould* v. *N. Y. Life Ins. Co.*, 132 Fed. 927. So also a contingent interest passes to the trustee, *In re Coleman*, 136 Fed 818. But to give the trustee any right, the surrender value must be by the contract, not by mere act of grace or indulgence on the company's part, *Pulsifer* v. *Hussey*, 97 Me. 434, 54 Atl.

§ 73. Rights of Creditors as the Assured.—To secure his debt, the creditor sometimes takes out insurance, payable to himself, upon the life of his debtor. As before remarked, under the subject of insurable interest,[1] different views prevail regarding the amount of insurance money that he may be permitted to recover. Some courts, regarding the contract of insurance solely as an engagement between the insured and the insurer, enforce it according to its terms. If the contract is valid when entered into and its conditions have been complied with by the insured, they allow to him on its maturity the entire amount of insurance money, no matter how largely the fund may exceed the indebtedness then subsisting, no matter though the debt may be altogether paid, or satisfied,[2] or barred by the statute of limitations.[3] Other courts, adhering more closely to the doctrine that the insurance contract must not needlessly be made a source of profit, limit the creditor to the debt, including interest thereon, together with all expenses of keeping up the insurance. As to any balance of insurance money, since the insurance company ought not to retain it, they hold that the creditor is trustee for the debtor or his estate.[4]

1076. The bankrupt may retain the policy if it has no surrender value, *In re Josephson*, 121 Fed. 142, aff'd 124 Fed. 734; *In re Welling*, 113 Fed. 189 (semi-tontine held to have no surrender value); *In re Buelow*, 98 Fed. 86. Hence trustee must allege in his complaint a cash surrender value, *Haskell* v. *Equitable Life Ins. Soc.*, 181 Mass. 341, 63 N. E. 899. But the trustee takes nothing if the proceeds of insurance are exempt by state statute, *Holden* v. *Stratton*, 198 U. S. 202, 49 L. Ed. 1018; or if the bankrupt is a third party beneficiary not entitled to the surrender value, *In re McDonnell*, 101 Fed. 239. Nor can the trustee disturb the contingent interest of a third party in the bankrupt's policy, *Haskell* v. *Equitable Life Ins. Soc.*, 181 Mass. 341, 63 N. E. 899. Premiums paid by wife, *In re Diack*, 100 Fed. 770. A fire policy does not pass to trustee without consent of insurance company, but claim for fire loss occurring before appointment of trustee passes to trustee, *Fuller* v. *N. Y. Fire Ins. Co.*, 184 Mass. 12; *Fuller* v. *Jameson*, 184 N. Y. 605, 186 N. Y. 60.

[1] § 37, and cases cited.

[2] *Dalby* v. *Assurance Co.*, 15 C. B. 365; *Central Nat. Bk.* v. *Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. Ed. 370; *Amick* v. *Butler*, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; *Ferguson* v. *Ins. Co.*, 32 Hun, 306, aff'd 102 N. Y. 647; *Shaffer* v. *Spangler*, 144 Pa. St. 223, 22 Atl. 865.

[3] *Townsend* v. *Tyndale*, 165 Mass. 293, 43 N. E. 107, 52 Am. St. R. 513; *Rawls* v. *Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280; *Conn. Mut. Life Ins. Co.* v. *Dunscomb*, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. R. 769.

[4] *Goldbaum* v. *Blum*, 79 Tex. 638, 15 S. W. 564, there was an assignment of the policy to creditor. *Exch. Bank* v. *Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, there was an assignment of the policy to the creditor. *Tate* v. *Commercial Bldg. Assn.*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. R. 770, here also there was an assignment. And see *dictum* in *Warnock* v. *Davis*, 104 U. S. 775, 26 L. Ed. 924. If a policy is assigned conditionally by the debtor to the creditor as collateral, or maintained by the debtor with like purpose, by all the authorities the creditor can only retain enough of the proceeds to indemnify himself, *Amick* v. *Butler*, 111 Ind. 578, 12 N. E. 518; *Met. L. Ins. Co.* v. *O'Brien*, 92 Mich. 584, 52 N. W. 1012; *Coon* v. *Swan*, 30 Vt. 6. And if assigned for existing debts it will not cover subsequent debts, *Levy* v. *Taylor*, 66 Tex. 652, 1 S. W. 900.

CHAPTER III

GENERAL PRINCIPLES—CONTINUED

Closing of Contract—General Rules of Construction

§ 74. Introductory.—The course of business in closing insurance contracts is in a measure *sui generis*. Many important classes of contracts have no validity at all unless evidenced by writing; and whenever parties see fit to reduce their engagements to the form of a written instrument whether required by law to do so or not, it is in general to be presumed that the contents of the formal document correctly and conclusively record the final results of their negotiations, and that its execution and delivery precisely define the time when the agreement is to go into operation. But, in the actual conduct of their affairs, men do not always take the trouble to conform to any such legal presumptions when convenience or exigencies of business suggest a different course. Often a man wants to insure his house, or goods, or ship without delay. In most of the states of the Union there is no law preventing a valid oral contract of insurance, or contract by written binding slip, and thus it frequently happens that an insurance is closed before the insured has seen his policy, or has become familiar with its conditions. In fact, the policy may never be delivered to him at all, or not until after the loss has occurred, for which it is intended to grant indemnity.[1]

[1] *Thompson* v. *Adams*, L. R. 23 Q. B. D. 361 (1889). A contract of insurance must be distinguished from a contract to procure insurance as by a broker. For breach of the latter engagement an action for damages will lie, *Jacksonville, etc., Nav. Co.* v. *Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515; *Brant* v. *Gallup*, 111 Ill. 487, 53 Am. Rep. 638; *Backus* v. *Ames*, 79 Minn. 145, 81 N. W. 766 (if such insurance cannot be procured, owner should be promptly notified so as to have opportunity to effect insurance himself); *Threshing Mach. Co.* v. *Darnall*, 13 S. D. 279, 83 N. W. 266. As to measure of damages for breach see *City of Detroit* v. *Grummond*, 121 Fed. 963, 58 C. C. A. 301; *Landusky* v. *Beirne*, 80 App. Div. 272, 80 N. Y. Supp. 238, aff'd 178 N. Y. 551, 70 N. E. 1101; *Miner* v. *Tagert*, 3 Bin. (Pa.) 204; *Wunderlich* v. *Palatine F. Ins. Co.*, 104 Wis. 395, 80 N. W. 471; *McAlpine* v. *Trustees*, 101 Wis. 468, 78 N. W. 173. If the agreement to procure insurance is absolute the party neglecting to fulfill becomes liable himself as insurer, *De Tastett* v. *Crousillat*, 7 Fed. Cas. 542, 2 Wash. C. C. 132; *Soule* v. *Union Bk.*, 45 Barb. (N. Y.) 111. So also party refusing to

§ 75. **Fire Insurance Contract—How Closed.**—Important fire risks, whether on mercantile or other properties, and whether located in city or country, are apt to be put in charge of city brokers.[1]

take the insurance is liable in damages, *Tanenbaum* v. *Greenwald*, 67 App. Div. 473, 73 N. Y. Supp. 873, See also 81 N. Y. Supp. 292, 82 N. Y. Supp. 1116; *Tanenbaum* v. *Federal Match Co.*, 189 N. Y. 75.

[1] An insurance broker as such is agent for the insured, *Sellers* v. *Ins. Co.*, 105 Ala. 282, 16 So. 798; *Parish* v. *Rosebud M. & M. Co.*, 140 Cal. 635, 74 Pac. 312; *Commonwealth Mut. Fire Ins. Co.* v. *Knabe*, 171 Mass. 265, 50 N. E. 516; *Am. Fire Ins. Co.*, v *Brooks*, 83 Md. 22, 34 Atl. 373; *Northrop* v. *Piza*, 43 App. Div. 284, 60 N. Y. Supp. 363, aff'd 167 N. Y. 578, 60 N. E. 1117; *Allen* v. *German Am. Ins. Co.*, 123 N. Y. 6, 25 N. E. 309; *Crown Point Iron Co.* v. *Ætna Ins. Co.*, 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147; *Fire Assn.* v. *Hogwood*, 82 Va. 342, 4 S. E. 617; *Davis Lumber Co.* v. *Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84; 37 L. R. A. 131 (construing Wisconsin statutes); *United Firemen's Ins. Co.* v. *Thomas*, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450. But see *Indiana Ins. Co.* v. *Hartwell*, 123 Ind. 177, 24 N. E. 100. He is, however, a middleman between the insured and the company, *Arff* v. *Ins. Co.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. R. 721. Payment of premium to broker is not payment to the company, *Pottsville Mut. Fire Ins. Co.* v. *Improvement Co.*, 100 Pa. St. 137; unless made so by statute or custom (§ 76), and whether the broker is also agent for the company may be a question of fact, *Sun Mut. Ins. Co.* v. *Saginaw Barrel Co.*, 114 Ill. 99, 29 N. E. 477. Many states have statutes affecting this question, for example, see *Welch* v. *Fire Assn. of Phila.*, 120 Wis. 456, 98 N. W. 227, and appendix of statutes. The broker receives a commission in the shape of a percentage out of the premium, *Devens* v. *Mechanics' & Traders' Ins. Co.*, 83 N. Y. 171; *McGrath* v. *Home Ins. Co.*, 88 App. Div. 153, 84 N. Y. Supp. 374. He earns full commission though policy be canceled before expiration, *Am. Steam Boiler Co.* v. *Anderson*, 130 N. Y. 134, 29 N. E. 231. *Contra, dictum, Devereux* v. *Ins. Co.*, 98 N. C. 6, 3 S. E. 639. But by custom in order to keep on good terms with the company the broker makes return of his commission to the company *pro rata*, inasmuch as the company is obliged on cancellation to pay back to the insured the unearned premium without credit for its payment to broker. The broker may be generally in charge of his customer's insurance with continued authority, *Standard Oil Co.* v. *Ins. Co.*, 64 N. Y. 85. Or he may be employed to fill a specific order, his authority then terminating on procuring and transmitting the policies, *Hermann* v. *Ins. Co.*, 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; *Green* v. *Star Fire Ins. Co.*, 190 Mass. 586, 77 N. E. 649. If in charge, generally, he keeps track of the policies with the aid of his expiration sheets which are checked every day. If he undertakes to procure insurance or to renew on expiration and does not, he is personally responsible for the omission, and is entitled to the premium as an insurer, *De Tastett* v. *Crousillat*, 7 Fed. Cas. 542, 2 Wash. C. C. 132. He owes to the insured, his principal, the duty of an expert, *Milliken* v. *Woodward*, 64 N. J. L. 444, 450, 45 Atl. 796, and must furnish insurance in authorized and solvent companies, *Landusky* v. *Beirne*, 80 App. Div. 272, 80 N. Y. Supp. 238, aff'd 178 N. Y. 551, 70 N. E. 1101; *Burges* v. *Jackson*, 18 App. Div. 296, 46 N. Y. Supp. 326, aff'd 162 N. Y. 632, 57 N. E. 1105; *Shepard* v. *Davis*, 42 App. Div. 462, 59 N. Y. Supp. 456, but is not responsible for subsequent insolvency, *Minneapolis, etc.*, v. *Home Ins. Co.*, 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390. But often at the same time the broker is also local agent for one or more companies and then it frequently happens that as broker he will place the insurance with his own companies and as underwriter will execute the policies, thus representing both parties to the transaction. This anomalous situation has not yet been very thoroughly defined and sifted by the courts in connection with insurance contracts. The general rule is that an agent acting for both parties cannot make a valid contract, *Phœnix Ins. Co.* v. *Hamilton*, 110 Ga. 14, 35 S. E. 305; *Manchester F. Assur. Co.* v. *Ins. Co.*, 91 Ill. App. 609;

To procure insurance the broker or a clerk from his placing department, having prepared a binder,[1] presents it to the application clerk of an insurance company together with a brief application slip, which the broker fills up in pencil at the counter of the company, giving certain essentials of the contract, name of the insured, location of the property, amount of insurance wanted, and indicating whether the property is building, or contents,[2] or other insurable interest.

The counter clerk turns to his insurance map, and, if he accepts

Empire State Ins. Co. v. *Am. Cent. Ins. Co.*, 138 N. Y. 446, 34 N. E. 200; *N. Y. Cent. Ins. Co.* v. *Nat. Protection Ins. Co.*, 14 N. Y. 85; *Utica Ins. Co.* v. *Toledo Ins. Co.*, 17 Barb. (N. Y.) 132, except with their consent, *No. Brit. & M. Ins. Co.* v. *Lambert*, 26 Ore. 199, 37 Pac. 909, or by ratification, *Huggins, etc., Co.* v. *People's Ins. Co.*, 41 Mo. App. 530. He cannot issue a valid policy to himself, *Wildberger* v. *Hartford Fire Ins. Co.*, 72 Miss. 338, 17 So. 282, 28 L. R. A. 220, 48 Am. St. R. 558, but for one purpose he may be agent for the insured, for another purpose he may represent the company, *Wood* v. *Firemen's Ins. Co.*, 126 Mass. 316, 319; *Gaysville Mfg. Co.* v. *Ins. Co.*, 67 N. H. 457, 36 Atl. 357; *Northrup* v. *Germania Ins. Co.*, 48 Wis. 420, 4 N. W. 350, 33 Am. Rep. 815, 19 Am. L. Reg. N. S. 291, note. And see *Fiske* v. *Royal Exch. Assur. Co.*, 100 Mo. App. 545, 75 S. W. 382; *East Texas Fire Ins. Co.* v. *Blum*, 76 Tex. 653, 13 S. W. 572; *East Texas Fire Ins. Co.* v. *Brown*, 82 Tex. 631, 18 S. W. 713. So also as to one of the companies on the risk, he may be agent for it and as to other companies he may be agent for the assured, *Smith* v. *Prussian Nat. Ins. Co.*, 68 N. J. L. 674, 54 Atl. 458. Policies and permits proposed by brokers are so far in stereotyped printed forms, and rates of premium are likewise so far fixed either by tariff associations or by practice that the courts would doubtless be reluctant to hold the insurance void because the agent in good faith represented both parties in the same transaction, unless it appeared that he could not be loyal to both. See *Schuessler* v. *Ins. Co. of the Co. of Phila.*, 103 App. Div. 12, 15, 92 N. Y. Supp. 649, aff'd, 185 N. Y. 578, 78 N. E. 1112, in which the brokerage and underwriting departments of a prominent insurance office closed a contract held enforceable, but the dual relationship was not pleaded as a defense. If, however, an exercise of discretion is called for so that fulfillment of duty towards one principal is incompatible with full loyalty towards the other the contract made for both may be avoided by either non-assenting party, *Brit.-Am. Assur. Co.* v. *Cooper*, 6 Colo. App. 25, 40 Pac. 147; *Empire State Ins. Co.* v. *Am. Cent. Ins. Co.*, 138 N. Y. 446, 34 N. E. 200. If either principal has prior knowledge of the dual relationship in the agent, he is estopped from objecting to a contract which he has tacitly permitted to be made, *No. Brit. & M. Ins. Co.* v. *Lambert*, 26 Ore. 199, 37 Pac. 909. The insured should be advised to employ a broker to take charge of any important risk. In preparing "forms," maneuvering for lower premiums, watching for expirations, and in general supervision a broker's services and advice are valuable and cost the insured nothing, since his commission comes out of premium. If the broker is negligent in preparing the "forms," or in accepting policies with inappropriate clauses, he is personally liable, *Walker* v. *Block* (Pa. St., 1907), 65 Atl. 799.

[1] See Appendix, ch. II, Forms.

[2] Sometimes "the forms," a printed or typewritten rider, containing the description of the property, and special clauses, *e. g.*, privileges for other insurance, unoccupancy, lightning clause, etc., prepared by the broker to be pasted on the policy, are delivered at the same time. Appendix, ch. II, Forms. If the broker does not furnish his "forms" until after the contract has been closed by the binder, it leaves the matter of special clauses in unsatisfactory and indefinite shape, unless the contract is a renewal. Unfortunately this indefinite situation frequently exists for several days.

the application, he adds to the binder the name of his company and the amount accepted and signs the binder with his name or initials under the printed word "accepted." If nothing is written or said about premium or term, market or reasonable rate [1] and one year [2] are by usage of the trade understood.[3]

The broker usually hastens off with his binder leaving the application slip.[4] There are no copies exchanged or book entries made and there is no time for making them. The broker continues the rounds of the insurance offices until the gross amount at the head of his binder is covered.[5] Credit for premium is given by the company.[6] The policies may not be prepared and issued for weeks.[7] Though they all cover in identical terms the one risk, they may be delivered at different times and just as the convenience of the underwriters may dictate. If the insurance is taken at a local agency the agent, after filling out and executing the policy, sends to the head office of the company an exact transcript [8] of the written part, including the description and special clauses.

This transaction, so familiar to the insurance world, bears little resemblance to a conveyance of real estate or to ordinary commercial bargains, and certain of its peculiar characteristics challenge attention: (1) The act and time of delivery of the policy itself are of comparatively trifling significance; [9] (2) the contract is complete

[1] *Machine Co.* v. *Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

[2] *Concordia Fire Ins. Co.* v. *Heffron*, 84 Ill. App. 610.

[3] See § 79. If he accepts only temporarily or conditionally, he stamps or writes the qualification upon the binder; for example, "subject to survey and immediate cancellation," or "for two days only," etc. The vast majority of policies on mercantile risks run for the term of a year.

[4] By aid of the slip and the "forms" or description furnished by the broker the policy clerk subsequently prepares a formal policy which is executed by a higher officer.

[5] A company is willing to write only a limited line on one risk, but a less valuable property, whether mercantile or dwelling, is often covered by one policy.

[6] This is a mere act of courtesy towards the broker. The insured usually is still liable for the premium, and the company may sue him for its recovery immediately, in spite of its customary indulgence, *Karelsen* v. *Sun Fire Office*, 122 N. Y. 545, 25 N. E. 921; *Lipman* v. *Ins. Co.*, 121 N. Y. 454, 24 N. E. 699. Usually the broker is not liable to the company for the premium even though the insured fail to pay, *Touro* v. *Cassin*, 1 Nott. & McC. (S. C.) 173, 9 Am. Dec. 680, unless there is a trade usage or statute to the contrary as in marine insurance in England, Mar. Ins. Act (1906), § 53; *Universal Ins. Co.* v. *Merchants' Mar. Ins. Co.* (1897), 2 Q. B. 97; *Mannheim Ins. Co.* v. *Hollander*, 112 Fed. 549. Where the broker is liable for the premium as principal he may sue the insured for it though he has not actually paid it, *Ward* v. *Tucker*, 7 Wash. 399, 35 Pac. 1086. As to broker's lien upon a marine policy see *Fisher* v. *Smith* (1878), 4 App. Cas. 1; *Westwood* v. *Bell*, 4 Camp. 349; *McKenzie* v. *Nevins*, 22 Me. 138, 38 Am. Dec. 291. In England fire insurance is done more on a cash basis, premiums usually being paid in advance.

[7] *Thompson* v. *Adams*, L. R. 23 Q. B. D. 361.

[8] Called a daily report, *Clemments* v. *German Ins. Co.* (U. S. Cir. Ct.), 36 Ins. L. J. 114.

[9] *Thompson* v. *Adams*, L. R. 23

and closed when the application clerk signs and delivers the regular binder;[1] (3) the regular binder is the same thing in effect as the usual policy, for which it stands as a convenient, temporary substitute, and, whether it so states or not, embraces by inference all the clauses of the policy;[2] (4) important provisions of the contract, especially rate and term, are often understood by usage although nothing may be said or written respecting them until the policy is issued;[3] (5) the officers and managers of the insurance company have no knowledge of the contract except from the written evidence coupled with trade usage. There is no machinery for reporting to them any extraneous conversations or alleged understandings at variance with the terms of the policy.

§ 76. **Marine—How Closed.**—Both in England and in this country marine insurances are usually closed by binding slips, or covering notes, through the intervention of agents or brokers for the assured.[4] But in dealing with certain insurance companies of high repute in this country, it has become the custom for the marine broker to use a memorandum which is at once an application, and, after signature by the underwriter, a binder. This slip, temporarily the sole written evidence of the contract, is confidingly left with the underwriter, who has signed or initialed it, and with its aid the

Q. B. D. 361; *Xenos* v. *Wickham*, L. R. 2 H. L. 296.

[1] *Van Tassel* v. *Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365, 28 App. Div. 163, 161 N. Y. 413, 54 App. Div. 386, 66 App. Div. 531, 184 N. Y. 607. The trials (6) and hearings on appeal (10) in this remarkable case numbered sixteen. The binder was finally sustained as equivalent to a standard one-year policy and subject to the standard five-day cancellation clause, though the binder specified no rate and though no policy was ever delivered or premium paid.

[2] *Hicks* v. *Brit.-Am. Ins. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Lipman* v. *Ins. Co.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, and § 81.

[3] *Smith, etc., Co.* v. *Prussian Nat. Ins. Co.*, 68 N. J. L. 674, 54 Atl. 458 (reasonable rate inferred); *Machine Co.* v. *Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768 (customary rate and terms inferred); *Concordia Fire Ins. Co.* v. *Heffron*, 84 Ill. App. 610 (one-year term understood). And see *Brit.-Am. Ins. Co.* v. *Wilson*, 77 Conn. 559 (rate not fixed).

[4] In England insured is liable to the broker for the premium and the broker to the company, Mar. Ins. Act (1906), § 53; *Universal Ins. Co.* v. *Merchants', etc., Ins. Co.* (1897), 2 Q. B. 93; *Power* v. *Butcher*, 10 B. & Cr. 340. The broker is not agent for the insurer, *Empress Ass. Corp.* v. *Bowring* (1905), 11 Com. Cas. 107. By British revenue law unless the slip is stamped and contains particulars required for a policy it is not admissible in evidence as a contract, *Home Mar. Ins. Co.* v. *Smith* (1898), 2 Q. B. 351. But is legal evidence to clear up ambiguity after policy issues, Mar. Ins. Act (1906), §§ 21, 22, 89, *Ionides* v. *Pac. Mar. Ins. Co.* (1872), L. R. 7 Q. B. 517. Said Act, § 21, provides, "a contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not," etc. If no revenue law applies, binder may be sued on in England as in this country, *Bhugwandass* v. *Ins. Co.* (1888), 14 App. Cas. 83.

policy is subsequently written up and delivered to the broker, though meanwhile a loss may have occurred.[1]

§ 77. Life Insurance—How Closed.—Before issuing a policy a life company usually requires the insured to submit to a medical examination and to respond to numerous questions detailed on a printed application blank,[2] the answers to which are written in by the company's agents. The application, including the physician's report, is filed with the company. Except as statutory provisions have intervened,[3] it has not been customary to furnish the insured with a copy of the application, or afford him any opportunity of comparing his answers with the terms of his policy subsequently delivered.

Usually the contract is not complete until the first premium is paid and the policy delivered,[4] because of express provisions to that effect in the policy, which must be respected;[5] but, not infrequently, the local agent of the life insurance company collects the first premium from the applicant provisionally, and gives him in return a conditional binding receipt subject to approval of the application by the home office and issuance of the policy. Upon exercising such approval, and signing the policy, it has been held, the company becomes liable, although its action has not been made known to the insured, and although the policy remains with the agent undelivered until after the death of the insured.[6] It is evident also that an application for insurance may be accepted and the contract closed by letter as well as by binder or delivery of the policy.[7]

§ 78. Requisites of Complete Contract.—The essential terms which must be agreed upon to make a valid policy are said to be these: The names or description of the parties, the rate of premium,[8] the property or life insured, the risk insured against, the term or

[1] See Appendix, ch. II, Forms.

[2] See forms, Appendix, ch. II. Sometimes provisional insurance is given to cover until decision of main office.

[3] See Appendix, ch. I and N. Y. Ins. L. § 58.

[4] *Eq. Life Assur. Soc.* v. *Pettus*, 140 U. S. 226, 11 S. Ct. 822; *Busher* v. *N. Y. Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41. But see § 78.

[5] *N. Y. Life Ins. Co.* v. *Babcock*, 104 Ga. 67, 30 S. E. 273; but compare *Starr* v. *Mut. L. Ins. Co.*, 41 Wash. 228, 83 Pac. 116.

[6] *Starr* v. *Mut. L. Ins. Co.*, 41 Wash. 228, 83 Pac. 116. Compare the extraordinary litigations in which the plaintiff was at first defeated on the ground that the contract was not closed, *N. Y. Life Ins. Co.* v. *McIntosh*, 86 Miss. 236, 38 So. 775, but subsequently succeeded, on the ground that the company, by a letter sent to the insured, was estopped to deny the insurance of the policy, *N. Y. Life Ins. Co.* v. *McIntosh* (1906), 41 So. 381.

[7] *Waters* v. *Security L. & Ann. Co.* (N. C., 1907), 57 S. E. 437 (citing many cases).

[8] Eng. Mar. Ins. Act (1906), § 23, omits rate as an essential; "reasonable rate" being presumed, § 31 of the Act.

duration of the insurance, and the sum or sums insured;[1] and to constitute a contract of insurance there must be, as in other cases,[2] a meeting of the minds of the parties—that is, a mutual assent, either express or implied, to all the provisions of the contract.[3]

Thus, if both parties intend that the insurance shall cover a certain ship or a certain house, the contract will not necessarily be invalidated because by mutual mistake they misname it in the policy; but if one party has in mind one ship, and the other party has in

[1] *Eames* v. *Ins. Co.*, 94 U. S. 621, 629, 24 L. Ed. 298; *Commercial F. Ins. Co.* v. *Morris*, 105 Ala. 498, 18 So. 34; *Trustees of Church* v. *Brooklyn Fire Ins. Co.*, 28 N. Y. 161; *Bradley* v. *Stand. L. & A. Ins. Co.*, 112 App. Div. 536, 541. 98 N. Y. Supp. 797. See *Hartford F. I. Co.* v. *Trimble*, 25 Ky. Law R. 1497, 78 S. W. 462. Whether contract is written or parol, same rule applies, *Cleveland Oil Co.* v. *Norwich Ins. Co.*, 34 Ore. 228, 55 Pac. 435. It is also essential that there should be mutuality of obligation, *Reynolds* v. *Mut. F. Ins. Co.*, 34 Md. 280, 6 Am. Rep. 337. Closing of contract or delivery of policy and liability for premiums are concurrent, *Hardwick* v. *State Ins. Co.*, 20 Ore. 547, 26 Pac. 840, but time of payment of premium may be postponed without disturbing the binding effect of the contract, *King* v. *Cox*, 63 Ark. 204, 37 S. W. 877; *Jones* v. *N. Y. Life Ins. Co.*, 168 Mass. 245, 47 N. E. 92; *Pac. Mut. Ins. Co.* v. *Shaffer*, 30 Tex. Civ. App. 313, 70 S. W. 566. Court refused specific performance where insured would not have been bound for premium except for ratification after loss of his agent's unauthorized act in taking insurance, *Ins. Co.* v. *Schall*, 96 Md. 225, 53 Atl. 925, 61 L. R. A. 300. As to general rule that the person for whose benefit the insurance is taken may adopt and ratify it even after loss, see *Waring* v. *Ind. F. Ins. Co.*, 45 N. G. 606, 6 Am. Rep. 146; *Herkimer* v. *Rice*, 27 N. Y. 163, 179, but in these and other similar cases the person taking out the insurance was liable for the premium and no question of lack of mutuality of obligation arose. The English act provides: "Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss," Mar. Ins. Act (1906), § 86; *Williams* v. *Ins. Co.* (1876), 1 C. P. D. 757, 764; *Boston Fruit Co.* v. *Brit., etc., Co.* (1906), App. Cas. 336. But compare *Keighley* v. *Durant* (1901), App. Cas. 240.

[2] *Michigan Pipe Co.* v. *Mich. F. & M. Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277.

[3] *Clark* v. *Ins. Co.* 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276; *Goddard* v. *Ins. Co.*, 108 Mass. 56, 11 Am. Rep. 307 (building not agreed upon); *Zimmermann* v. *Dwelling House Ins. Co.*, 110 Mich. 399, 68 N. W. 215, 33 L. R. A. 698; *Prescott* v. *Jones*, 69 N. H. 305, 41 Atl. 352; *Bell* v. *Peabody Ins. Co.*, 49 W. Va. 437, 38 S. E. 541; *Sheldon* v. *Hekla Fire Ins. Co.*, 65 Wis. 436, 27 N. W. 315 (the companies not agreed upon). Thus, the court says: "An unevinced mental determination to accept a proposition to enter into a contract is not sufficient to establish the contract," *Bradley* v. *Stand. L. & A. Ins. Co.*, 112 App. Div. 536, 541. There is no contract, where, after a proposition submitted, a new condition is annexed and the former proposition is subsequently accepted, but without the added condition, *Travis* v. *Nederland Life Ins. Co.*, 104 Fed. 486, 43 C. C. A. 653; *Stephens* v. *Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. 139. A contract is closed when unconditional acceptance of offer is duly mailed, *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Busher* v. *New York Life Ins. Co.*, 72 N. H. 551, 58 Atl. 41; *Hartford Steam B. Insp. Co.* v. *Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629, 44 Am. St. R. 859; and see *Eames* v. *Ins. Co.*, 94 U. S. 621, 24 L. Ed. 298. Execution and delivery of the policy in accordance with application evidence a completed transaction, and constitute a contract, *Travelers' Ins. Co.* v. *Jones* (Tex. Civ. App.), 73 S. W. 978; and see *Grier* v. *Mut. Life Ins. Co.*, 132 N. C. 542, 44 S. E. 28. So also when such a policy is duly deposited in post office, postage prepaid, *Triple*

mind another ship, although the two ships may have the same name, there is, speaking generally, no contract.[1]

Whatever may be the rule in the case of other classes of contracts, it is apparent that time is of the essence of the insurance contract, even to the very instant agreed upon for the commencement and the termination of the risk.

Link, etc., Assn. v. *Williams*, 121 Ala. 138, 26 So. 19, 77 Am. St. R. 34, but not if the delivery of the policy is conditional, *Hartford Fire Ins. Co.* v. *Wilson*, 187 U. S. 467, 23 S. Ct. 189, 47 L. Ed. 261; *Harnickell* v. *N. Y. Life Ins. Co.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150. Neglect to reply to an application raises no presumption of acceptance, *More* v. *N. Y. Bowery F. Ins. Co.*, 130 N. Y. 537, 29 N. E. 757; *Ross* v. *N. Y. Life Ins. Co.*, 124 N. C. 395, 32 S. E. 733; *Royal Ins. Co.* v. *Beatty*, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. R. 622. Nor does unreasonable delay, *Ala. Gold. L. Ins. Co.* v. *Mayes*, 61 Ala. 163; *Winchell* v. *Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. 503; *Brink* v. *Merchants' & F. Mut. Ins. Co.*, 17 S. D. 235, 95 N. W. 929; *Conn. Mut. L. Ins. Co.* v. *Rudolph*, 45 Tex. 454; but see *Phœnix Ins. Co.* v. *Hale*, 67 Ark. 433, 55 S. W. 486; *Pickett* v. *German F. Ins. Co.*, 39 Kan. 697, 18 Pac. 903; *Mallette* v. *Brit.-Am. Assur. Co.*, 91 Md. 471, 46 Atl. 1005; *Robinson* v. *U. S. Ben. Soc.*, 132 Mich. 695, 94 N. W. 211. Retention of premium by insurance company is some evidence that contract was closed, *Tucker* v. *Dairy Mut. Ins. Co.*, 116 Iowa, 37, 89 N. W. 37; *Moulton* v. *Masonic Mut. Ben. Assn.*, 64 Kan. 56, 67 Pac. 533, and see *Keen* v. *Mut. L. Ins. Co.*, 131 Fed. 559. If premium has been paid or acknowledged and policy has been signed in accordance with application and held or transmitted to company's agent for delivery, it has been held by several courts that the contract is complete though agent has failed to deliver it, he being regarded as agent or trustee for the insured, *Harrigan* v. *Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180; *N. Y. Life Ins. Co.* v. *Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. R. 134; *Mut. Life Ins. Co.* v. *Thomson*, 94 Ky. 253, 22 S. W. 87; *Hallock* v. *Commercial Ins. Co.*, 26 N. J. L. 268; *Porter* v. *Mut. Life Ins. Co.*, 70 Vt. 504, 41 Atl. 970; *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296 (marine policy to be kept until assured called for it); *Roberts* v. *Security Co.* (1897), 1 Q. B. 111. (burglary policy); and see *Wagner* v. *Supreme Lodge*, 128 Mich. 660, 87 N. W. 903; *Supreme Court* v. *Davis*, 129 Mich. 318, 88 N. W. 874; but compare *Heiman* v. *Phœnix Mut. L. Ins. Co.*, 17 Minn. 153, 10 Am. Rep. 154; *Hamblet* v. *City Ins. Co.*, 36 Fed. 118.

[1] *Hughes* v. *Mercantile Mut Ins. Co.*, 55 N. Y. 265, 14 Am. Rep. 254; and see *Sanders* v. *Cooper*, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. R. 801. But if the contract as written is without ambiguity, until reformed it is conclusively presumed to express the intent of the parties. See § 85. Policy to be binding on company must, of course, be executed by one having real, *Planters' & Peoples' Mut. Fire Assn.* v. *De Loach*, 113 Ga. 802, 39 S. E. 466, or apparent, *Continental Ins. Co.* v. *Ruckman*, 127 Ill. 364, 20 N. E. 77, 11 Am. St. R. 121; *Western Home Ins. Co.* v. *Hogue*, 41 Kan. 524, 21 Pac. 641, authority, *Miller* v. *Northwestern Life Ins. Co.*, 111 Fed. 465, 49 C. C. A. 330; *Gillespie, etc., Mut. F. Ins. Co.* v. *Prather*, 105 Ill. App. 123. Or his unauthorized act must be ratified by it, *Mohr Distilling Co.* v. *Ohio Ins. Co.*, 13 Fed. 74; *Glens Falls Ins. Co.* v. *Hopkins*, 16 Ill. App. 220. His authority is apparent if he is furnished with blank policies, signed by proper officers, *Am. Employers' L. Ins. Co.* v. *Barr*, 68 Fed. 873, 16 C. C. A. 51, 32 U. S. App. 444. Insured is not bound by secret instructions to agent, of which he is ignorant, *Commercial Fire Ins. Co.* v. *Morris*, 105 Ala. 498, 18 So. 34; *Brown* v. *Franklin Fire Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. R. 534; *Ruggles* v. *Am. Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. R. 674 (apparently general agent). A solicitor of a life company has no apparent authority to conclude a contract of insurance, *Cotton States Life Ins. Co.* v. *Scurry*, 50 Ga. 48; *Miller* v. *Northwestern Mut. L. Ins. Co.*, 111 Fed. 465, 49 C. C. A. 330. As to territorial jurisdiction of agent compare *Lightbody* v. *No. Am. Ins. Co.*, 23 Wend.

§ 79. The Particulars Sometimes Understood.—It is not necessary in order to close the contract that all the particulars should be made the subject of express negotiation between the parties; for it may well be understood, in the absence of any express declaration to the contrary, that the usual form of policy,[1] or statutory form, if there be one,[2] is intended, or that the market rate [3] or a reasonable rate [4] of premium is to apply,[5] or the same rate [6] or the same terms as before.[7]

(N. Y.) 18, and *Hahn* v. *Guardian Assur. Co.*, 23 Ore. 576, 32 Pac. 683, 37 Am. St. R. 709, with *Ins. Co.* v. *Thornton*, 130 Ala. 222, 30 So. 614, 55 L. R. A. 547, 89 Am. St. R. 30. A mere solicitor, or agent, employed to receive and forward applications cannot conclude a contract, *Greenwich Ins. Co.* v. *Waterman*, 54 Fed. 839, 4 C. C. A. 600, 6 U. S. App. 549; *O'Brien* v. *New Zealand Ins. Co.*, 108 Cal. 227, 41 Pac. 298; *Sun Fire Office* v. *Wich*, 6 Colo. App. 103, 39 Pac. 587; but the agent exceeding his authority might become personally liable to the insured in damages for his misrepresentations or deceit, *Gilmore* v. *Bradford*, 82 Me. 547, 20 Atl. 92 (deceit); *Montross* v. *Roger Williams Ins. Co.*, 49 Mich. 477, 13 N. W. 823 (agency revoked); *Kræger* v. *Pitcairn*, 101 Pa. St. 311, 47 Am. Rep. 718 (misrepresentations). An agent issuing policy of an unauthorized company is personally liable to insured, *Noble* v. *Mitchell*, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238 (statute); *McBride* v. *Rinard*, 172 Pa. St. 542, 33 Atl. 750 (statute). See N. Y. Ins. L. § 50, requiring certificate. Such statutes are constitutional, *Noble* v. *Mitchell*, 164 U. S. 367, 11 S. Ct. 110, 41 L. Ed. 472. Agent held liable where company was insolvent, *Morton* v. *Hart*, 88 Tenn. 427, 12 S. W. 1026. Agent of insurance company with power to insure has apparent power to renew policy, *International Tr. Co.* v. *Norwich U. F. Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608, 36 U. S. App. 277. Payment of premium is sometimes expressly made essential to the completion of the contract, *Eq. Life Assur. Soc.* v. *Pettus*, 140 U. S. 226, 11 S. Ct. 822, 35 L. Ed. 497; *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656; *Roberts* v. *Ætna Life Ins. Co.*, 101 Ill. App. 313. So also approval by the home office may be made a prerequisite though premium has been paid to agent of the company, *Pace* v. *Provident Sav. Life Assur. Soc.*, 113 Fed. 13, 51 C. C. A. 32; *St. Paul Fire & M. Ins. Co.* v. *Kelley* (Neb. Apl. 1902), 89 N. W. 997; *Pickett* v. *German Fire Ins. Co.*, 39 Kan. 697, 18 Pac. 903. So also delivery of policy sometimes made essential, *Ray* v. *Security T. & L. Ins. Co.*, 126 N. C. 166, 35 S. E. 246; especially in life insurance, *Paine* v. *Pac. Mut. Life Ins. Co.*, 51 Fed. 689; 2 C. C. A. 459; *Langstaff* v. *Met. Life Ins. Co.*, 69 N. J. L. 54, 54 Atl. 518.

[1] *De Grove* v. *Met. Ins. Co.*, 61 N. Y. 602, 19 Am. Rep. 305; *Newark Mach. Co.* v. *Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

[2] *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424.

[3] *Train* v. *Holland Purchase Ins. Co.*, 62 N. Y. 598; *Cleveland Oil Co.* v. *Norwich Ins. Co.*, 34 Ore. 228, 55 Pac. 435.

[4] *Brit.-Am. Ins. Co.* v. *Wilson*, 77 Conn. 559; *Newark Mach. Co.* v. *Kenton Ins. Co.*, 50 Ohio St. 549, *supra; Smith & Wallace Co.* v. *Prussian Nat. Ins. Co.*, 68 N. J. L. 674, 54 Atl. 458.

[5] *Cooke* v. *Ins. Co.*, 7 Daly (N. Y.), 555; *Audubon* v. *Ins. Co.*, 27 N. Y. 216.

[6] *Baldwin* v. *Phœnix Ins. Co.*, 107 Ky. 356, 54 S. W. 13, 92 Am. St. R. 362; *Post* v. *Ætna Ins. Co.*, 43 Barb. 351; but compare where company had various forms of policies at different rates, *Cotton* v. *Southwestern Mut. L. Ins. Co.*, 115 Iowa, 729, 87 N. W. 675.

[7] *Ames-Brooks Co.* v. *Ætna Ins. Co.*, 83 Minn. 346, 86 N. W. 344. Contract may be closed and yet certain particulars be left open to be agreed upon when information is obtained. "Reasonable rate" may then be understood, *Scammell* v. *China Mut. Ins. Co.*, 164 Mass. 341, 41 N. E. 649, 49 Am. St. R. 462; Eng. Mar. Ins. Act (1906), § 31.

Even the essentials of the contract may often be agreed upon, inferentially, by reference to a prior course of dealing between the parties.[1]

Thus, if A, whose fire insurance policy is about to expire, goes to the office of the insurer, and requests a renewal for a year, and receives the answer from the proper representative of the company that he may consider his policy as renewed, and that the policy or renewal receipt will be sent in the course of a few days, and that he may then pay the premium, the contract of renewal is complete and binding, whether the new policy or renewal receipt may chance to be delivered before a fire or not.[2]

§ 80. Contract Closed by Parol.—An oral contract of insurance or an oral contract to issue a policy in future is valid, unless prohibited by statute, and will be binding from the time the oral contract is complete, although the loss occur before a policy is issued.[3]

The statute of frauds is not applicable to a contract of insurance, reinsurance, or renewal.[4]

[1] *Ruggles* v. *Am. Central Ins. Co.*, 114 N. Y. 418, 21 N. E. 1000; *Winne* v. *Niagara Fire Ins. Co.*, 91 N. Y. 190; *Boice* v. *Thames & M. Marine Ins. Co.*, 38 Hun (N. Y.), 246. The court will infer the intention of the parties if it can from the circumstances, *Concordia F. Ins. Co.* v. *Heffron*, 84 Ill. App. 610 (no express agreement as to term, or premium, term of one year assumed).

[2] *Eames* v. *Home Ins. Co.*, 94 U. S. 621, 24 L. Ed. 298; *Wiebeler* v. *Mil. Mach. Mut. Ins. Co.*, 30 Minn. 464, 16 N. W. 363; *Angell* v. *Hartford Fire Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322. A promise by the local commissioned agent to renew, with credit for the premium is sufficient, *Squier* v. *Hanover F. Ins. Co.*, 162 N. Y. 552, 57 N. E. 93, 76 Am. St. R. 349. An agreement to renew means upon same terms as before if no change mentioned, *Ins. Co.* v. *Walsh*, 54 Ill. 164; *Mallette* v. *Brit.-Am. Assur. Co.*, 91 Md. 471, 46 Atl. 1005.

[3] *Relief Fire Ins. Co.* v. *Shaw*, 94 U. S. 574, 24 L. Ed. 291; *Ins. Co.* v. *Colt*, 20 Wall. (U. S.) 560, 22 L. Ed. 423; *Howard Ins. Co.* v. *Owen's Admx.*, 94 Ky. 197, 21 S. W. 1037; *Mallette* v. *Brit.-Am. Assur. Co.*, 91 Md. 471, 46 Atl. 1005; *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Fish* v. *Cottenet*, 44 N. Y. 538; 4 Am. Rep. 715; *Ellis* v. *Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Van Loan* v. *Farmers' Mut. Fire Ins. Co.*, 90 N. Y. 280; *Lenox* v. *Greenwich Ins. Co.*, 165 Pa. St. 575, 30 Atl. 940. *Contra*, *Bishop* v. *Ins. Co.*, 49 Conn. 167; *Bell* v. *Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; but all terms must be expressly or impliedly agreed upon, § 78. The oral contract becomes merged in the policy when the latter is accepted, *Merchants' Mut. Ins. Co.* v. *Lyman*, 15 Wall. 664; *Roberts* v. *Security Co.* (1897), 1 Q. B. 111 (protection note). A renewal may be by parol, *Squier* v. *Hanover Fire Ins. Co.*, 162 N. Y. 552, 57 N. E. 93, 76 Am. St. R. 349. So also reinsurance, *Merchants' Ins. Co.* v. *Union Ins. Co.*, 58 Ill. App. 611. Application may expressly provide that no liability shall attach until delivery of policy, *McCully* v. *Phœnix Mut. Life Ins. Co.*, 18 W. Va. 782.

[4] None of the clauses of the statute applies, *Springfield F. & M. Ins. Co.* v. *De Jarnett*, 111 Ala. 248, 19 So. 995; *Phœnix Ins. Co.* v. *Spiers*, 87 Ky. 286, 8 S. W. 453; *Sanford* v. *Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. R. 358, 54 N. E. 883; *Wiebeler* v. *Milwaukee, etc., Ins. Co.*, 30 Minn. 464, 16 N. W. 363; but see *Klein* v. *L. & L. & G. Ins. Co.*, 22 Ky. L. R. 301, 57 S. W. 250. Statute of Frauds is not applicable even to reinsurance, *Merchants' Ins. Co.* v.

§ 81. Contract Closed by Binding Slip.—The regular binder is present insurance, like a policy.[1] It is a temporary, convenient substitute or equivalent for the policy or renewal receipt pending the execution of the formal instrument.[2] It becomes merged in the policy after the policy is delivered.[3]

§ 82. Contract Governed by Terms of Usual Policy.—Whether the contract of insurance is closed orally or by a binding slip, if there is no express agreement to the contrary the legal presumption is that the usual form of policy is to follow.[4] Hence the stipulations and conditions of the policy are binding upon the insured from the

Union Ins. Co., 58 Ill. App. 611; *Security F. Ins. Co.* v. *Kentucky, etc., Co.*, 7 Bush (Ky.), 81, 3 Am. Rep. 301 (*contra*, *Egan* v. *Firemen's Ins. Co.*, 27 La. Ann. 368); or to a fidelity or guaranty policy as answering for the debt or default of another, *Fidelity & Cas. Co.* v. *Ballard*, 20 Ky. L. R. 1169, 48 S. W. 1074. The usual individual contract of suretyship is apt to be gratuitous; not so with an insurance contract, *Tebbets* v. *Mercantile, etc., Co.*, 73 Fed. 95, 19 C. C. A. 281; *Bank of Tarboro* v. *Fid. & Dep. Co.*, 128 N. C. 366, 38 S. E. 908. Moreover, an insurance company is fairly well protected by its records and usual course of business. Although the charter of a company provides that the contract of insurance must be in writing, this requirement is by most courts held to be a direction to the company, and not binding upon an innocent party who has parted with value to the company in good faith or relied upon protection under an oral contract, *Franklin Fire Ins. Co.* v. *Colt*, 20 Wall. 560, 22 L. Ed. 423; *Palmer* v. *Hartford Fire Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Phœnix Ins. Co.* v. *Ireland*, 9 Kan. App. 644, 58 Pac. 1024; *Parish* v. *Wheeler*, 22 N. Y. 494; *Lloyd* v. *West Branch Bank*, 15 Pa. St. 172; and see *Goodhue* v. *Hartford Fire Ins. Co.*, 175 Mass. 187, 55 N. E. 1039. A preliminary oral contract is valid, *Sanford* v. *Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. R. 358, 54 N. E. 883. Same rule applies to mutuals, *Brown* v. *Franklin Mut. Fire Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. R. 534; *Zell* v. *Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521, 44 N. W. 828; but under the rules of a fraternal association the issuance of a certificate may be essential to the completion of the contract, *Wagner* v. *Supreme Lodge*, 128 Mich. 660, 87 N. W. 903. But the representative of the company to bind it, by parol or otherwise, must be one having actual or apparent authority, and stipulations in the application or policy in restriction of his authority will, if true in fact, be binding upon the insured, at all events after notice of them is received, *Ins. Co.* v. *Norton*, 96 U. S. 240, 24 L. Ed. 689; *Walsh* v. *Hartford Fire Ins. Co.*, 73 N.Y. 5, § 78, note.

[1] *Belt* v. *Am. Cent. Ins. Co.*, 29 App. Div. 546, 53 N. Y. Supp. 316, aff'd 163 N. Y. 555. For course of business in use of, see §§ 75, 76. As to English law, see § 76, note.

[2] *Van Tassel* v. *Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365, subsequent appeal, 28 App. Div. 163, 51 N. Y. Supp. 79. After trials and hearings on appeals, sixteen in number, this binder, which had an exceptional phrase upon it, was finally and without dissent sustained as equivalent to the usual policy, 184 N. Y. 607; *Lipman* v. *Niagara Fire Ins. Co.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719; *Karelsen* v. *Sun F. Office*, 122 N. Y. 545, 25 N. E. 921; and see *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Smith, etc., Co.* v. *Prussian Nat. Ins. Co.*, 68 N. J. L. 674, 54 Atl. 458.

[3] *Lipman case*, 121 N. Y. 454, *supra*; *Roberts* v. *Security Co.* (1897), 1 Q. B. 111.

[4] *Vining* v. *Franklin Fire Ins. Co.*, 89 Mo. App. 311; *Agricultural Ins. Co.* v. *Fritz*, 61 N. J. L. 211, 39 Atl. 910; *Newark Machine Co.* v. *Kenton Ins. Co.*, 50 Ohio St. 549, 556, 35 N. E. 1060, 22 L. R. A. 768. Same rule in marine insurance, *Ruger* v. *Firemen's Fund Ins. Co.*, 90 Fed. 310.

moment of closing the contract, although the policy may not be received until after the loss, and although, through ignorance of its conditions, he may have forfeited his rights thereunder.[1] For example, the insured, though suing on the binder or preliminary oral contract, must observe the provisions of the fire insurance policy relating to proofs of loss and limitation of time for bringing action.[2] And in like manner the terms of the usual policy are binding upon the company. Thus, it can cancel the binder during its life only by complying with the provisions of the standard five-day cancellation clause.[3]

§ 83. Same Subject—Form of Action.—Where the agreement is for present insurance and loss occurs before the policy is issued, the action may be brought as at common law upon the binder or oral contract, including in it by inference the terms of the standard or usual policy.[4]

[1] *De Grove* v. *Metrop, Ins. Co.*, 61 N. Y. 602, 19 Am. Rep. 305; *Lipman* v. *Niagara Fire Ins. Co.*, 121 N. Y. 454, 24 N. E. 699; *Sanborn* v. *Fireman's Ins. Co.*, 16 Gray (Mass.), 448.

[2] *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 824. *Contra*, for example, *Nebraska Ins. Co.* v. *Seivers*, 27 Neb. 541, 43 N. W. 351; *Hardwick* v. *State Ins. Co.*, 23 Oreg. 290, 31 Pac. 656. But if the company repudiate liability and refuse to issue a policy, no proofs of loss need be served, *Campbell* v. *Ins. Co.*, 73 Wis. 100, 40 N. W. 661.

[3] *Van Tassel* v. *Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365, finally after many trials and appeals affirmed, 184 N. Y. 607; but the fifteen-day binder expires at the end of the period specified, *Underwood* v. *Greenwich Ins. Co.*, 161 N. Y. 413, 55 N. E. 936. (the adoption of the N. Y. city fifteen-day binder followed this litigation). After delivery of policy the insured is conclusively presumed to be acquainted with its terms and is bound by them, whether he has read the policy or not, *Fletcher case*, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934; *Monitor Mut. Fire Ins. Co.* v. *Buffum*, 115 Mass. 343; *Allen* v. *German-Am. Ins. Co.*, 123 N. Y. 6, 25 N. E. 309.

[4] *Van Tassel* v. *Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365, 184 N. Y. 607, 28 App. Div. 163, 51 N. Y. Supp. 79; *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Belt* v. *Am. Cent. Ins. Co.*, 29 App. Div. 546, 53 N. Y. Supp. 316, aff'd 163 N. Y. 555, 57 N. E. 1104; *Kerr* v. *Union Mar. Ins. Co.*, 124 Fed. 835; but see *Nebraska Ins. Co.* v. *Seivers*, 27 Neb. 541, 43 N. W. 351; *Hardwick* v. *State Ins. Co.*, 23 Oreg. 290, 31 Pac. 656; *Campbell* v. *Ins. Co.*, 73 Wis. 100, 40 N. W. 661 (contract to insure). After policy has been accepted the prior agreement becomes merged in it, *Merchants' Mut. Ins. Co.* v. *Lyman*, 15 Wall. 664, 21 L. Ed. 246; *Kleis* v. *Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155; *Roberts* v. *Security Co.*, (1897), 1 Q. B. 111. A present contract of insurance must be distinguished from a promise to grant or renew insurance in future, *Misselhorn* v. *Mut. Res. Fund Life Assn.*, 30 Mo. App. 589; *Consumers' Match Co.* v. *German Ins. Co.*, 70 N. J. L. 226, 57 Atl. 440; *Taylor* v. *Phœnix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, 3 N. W. 584. The latter contracts also in most jurisdictions may be made by parol, and unless the loss occur before the specified future date when risk is to attach are enforceable, *Ellis* v. *Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *McCabe* v. *Ætna Ins. Co.*, 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641; *Baldwin* v. *Phœnix Ins. Co.*, 107 Ky. 356, 54 S. W. 13, 92 Am. St. R. 362; by suit for specific performance before loss, *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187; or after loss either by suit for specific per-

§ 84. Construction of Contract.—The general rules of law must be invoked to arrive at a proper construction of the insurance contract.[1] But the more important of these rules in their relation to insurance law demand special notice.

§ 85. The Same—Policy best Evidence.—In the absence of fraud or mutual mistake the written contract, if there be one, is the best and only admissible evidence of what the contract is as to all matters which it purports to cover.[2]

formance or for damages for breach of agreement, *Sproul* v. *Western Assur. Co.*, 33 Ore. 98, 54 Pac. 180. If no policy has been delivered before loss suit may be upon the agreement, *Fire Ins. Co.* v. *Sinsabaugh*, 101 Ill. App. 55; *Preferred Acc. Ins. Co.* v. *Stone*, 61 Kan. 48, 58 Pac. 986; *Sanford* v. *Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 884, 75 Am. St. R. 358; *Campbell* v. *Am. Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661. As to whether in action for breach of promise to issue policy, the provisions and limitations contained in policy are applicable, compare *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, with *Hardwick* v. *State Ins. Co.*, 23 Ore. 290, 31 Pac. 656; *Sanford* v. *Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. R. 358; *Campbell* v. *Ins. Co.*, 73 Wis. 100, 40 N. W. 661. So also the assured may maintain action in equity to compel the issuance of a new paid-up life policy, *Wilcox* v. *Eq. Assur. Soc.*, 173 N. Y. 50, 65 N. E. 857, 93 Am. St. R. 579; or to require the insurer to live up to a policy already issued, *Langan* v. *Supreme Council*, 174 N. Y. 266, 66 N. E. 932.

[1] *Liverpool & London & Globe Ins. Co.* v. *Kearney*, 180 U. S. 132, 21 S. Ct. 326, 45 L. Ed. 460; *Hart* v. *Standard Ins. Co.*, L. R. 22 Q. B. D. 499.

[2] *Ins. Co.* v. *Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Ins. Co.* v. *Lyman*, 15 Wall. (U. S.) 664, 21 L. Ed. 246; *Mich. Shingle Co.* v. *London & Lan. Ins. Co.*, 91 Mich. 441, 51 N. W. 1111; *Thurston* v. *Burnett & B. Dam Ins. Co.*, 98 Wis. 476, 74 N. W. 131. All parts of the written contract must if possible be harmonized, *Gunther* v. *L. & L. & G. Ins. Co.*, 134 U. S. 110, 10 S. Ct. 448; *Griffin Iron Co.* v. *L. & L. & G. Ins. Co.*, 68 N. J. L. 368, 54 Atl. 409; *German Ins. Co.* v. *Roost*, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236. A contemporaneous parol promise in regard to the premium cannot be shown, *Thompson* v. *Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765. In a leading case the court says: "It is a fundamental rule, in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 318, 22 S. Ct. 133, 46 L. Ed. 213, reviewing many decisions. That is still ostensibly the rule, but under the doctrine of waiver and estoppel as applied to insurance contracts in many jurisdictions it may be questioned whether it should not be called the exception rather than the rule. See Chapters VI–VIII. An application made part of the contract is admissible, *Northwestern Life Assur. Co.* v. *Tietze*, 16 Colo. App. 205, 64 Pac. 773, or any clause attached to policy and incorporated, *Hartford Fire Ins. Co.* v. *Post*, 25 Tex. Civ. App. 428, 62 S. W. 140. As to life insurance policy, see N. Y. Ins. L. § 58. Some of the terms may be indorsed upon the back of the policy and signed by the proper officers or agents, *Bushnell* v. *Farmers' Mut. Ins. Co.*, 91 Mo. App. 523. The binding slip, if there be one, has been held admissible to explain ambiguity in policy, *Saunders* v. *Agricultural Ins. Co.*, 167 N. Y. 261, 60 N. E. 635; *Phœnix F. Ins. Co.* v. *Gurnee*, 1 Paige Ch. 278; *Ionides* v. *Pac. Fire Ins. Co.*, L. R. 6 Q. B. 674, 7 Q. B. 517; Eng. Mar. Ins. Act (1906), § 89. Compare *Empress Assur. Corp.* v. *Bowring* (1905), 11 Com. Cas. 107. Evidence is not admissible to show that property other than that specified was covered by the policy, *Franklin Fire Ins. Co.* v. *Hellerick*, 20 Ky. Law R. 1703, 49 S. W. 1066; *Sanders* v. *Cooper*, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. R. 801. Or that marine risk was to begin at a place other than that specified, *Robertson* v.

It is to be observed that the language of the policy is not in all cases conclusively binding and effective; for grounds may sometimes exist for relief in equity. Thus, in a clear case of mutual mistake of fact [1]—that is, where it plainly appears [2] by evidence outside the contract that the real agreement of the parties is other than that evidenced by the policy [3]—or where there is a mistake on one side

French, 4 East, 130, or that the character of occupancy of property was intended to be other than that described in policy, *Jennings* v. *Chenango Mut. Ins. Co.*, 2 Denio (N. Y.), 75. And a pamphlet, circular, or prospectus issued by the insurance company is not admissible in evidence to disturb the terms of the policy, although the insured may have incurred a forfeiture in consequence of reliance upon its representations, *Fowler* v. *Metropolitan Ins. Co.*, 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805; since all prior and contemporaneous negotiations, promises, and statements, whether written or oral, become merged in the contract, *Ins. Co.* v. *Lyman*, 15 Wall. (U. S.) 664, 21 L. Ed. 246; *Douglas* v. *Knickerbocker Life Ins. Co.*, 83 N. Y. 492; *Liverpool & L. & G. Ins. Co.* v. *Richardson Lumber Co.*, 11 Okla. 585, 69 Pac. 938. Anything printed, written, stamped, or attached as riders, appearing in the body of the policy or on the margin is part of the contract, *Wright* v. *Association*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. R. 749; *Mascott* v. *Ins. Co.*, 68 Vt. 253, 35 Atl. 75; but mere reference in the policy to extrinsic papers does not make them a part of the contract unless the policy unequivocally so states, *Mutual Life Ins. Co.* v. *Cohen*, 179 U. S. 262, 21 S. Ct. 106, 45 L. Ed. 181; *Am. Popular Life Ins. Co.* v. *Day*, 39 N. J. L. 89, 23 Am. Rep. 198; *Burritt* v. *Ins. Co.*, 5 Hill (N. Y.), 188, 40 Am. Dec. 345; *Ky. & L. Mut. Ins. Co.* v. *Southard*, 8 B. Mon. (Ky.) 634. Even indorsements on the back, though referred to, are no part of the contract unless expressly made so, *The Majestic*, 166 U. S. 375, 17 S. Ct. 597, 41 L. Ed. 1039; *Porter* v. *Ins. Co.*, 160 Mass. 183, 35 N. E. 678; *Harris* v. *Ins. Co.*, 5 Johns. (N. Y.) 368. The significance of the distinction is that extrinsic matters are not warranties, but at most only representations, and questions of materiality and good faith in respect to them ordinarily go to the jury. Extraneous evidence whether written or oral is proper to identify and describe the subject-matter of the contract, *Saunders* v. *Agricultural Ins. Co.*, 167 N. Y. 261, 60 N. E. 635; *N. Y. Ins. Co.* v. *Thomas*, 3 Johns. Cas. 1. In interpreting the meaning and legal effect of the policy the court must apply the written language of the contract to the subject-matter as thus identified and described, *Moore* v. *Fire Ins. Co.*, 199 Pa. St. 49, 52, 48 Atl. 869, 85 Am. St. R. 771; *Lower Rhine & W. Ins. Assur.* v. *Sedgwick* (1899), 1 Q. B. 179, 190. Court is entitled to look at situation of parties, subject-matter, and surrounding circumstances, *Phetteplace* v. *Brit. & For. Ins. Co.*, 23 R. I. 26, 31, 49 Atl. 33, citing many cases. A conditional delivery may be proved by parol, *Underwood* v. *Greenwich Ins. Co.*, 161 N. Y. 413, 55 N. E. 936; *Hartford Ins. Co.*, *Wilson*, 187 U. S. 467, 23 S. Ct. 189, 47 L. Ed. 261. To establish waiver or estoppel in those jurisdictions where permitted, extrinsic evidence by parol of contemporaneous knowledge of facts and conversations at variance with policy, is freely admitted. See *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213, in which, by a divided court, the practice is disapproved, and this disapproval is reiterated in *Hartford Fire Ins. Co.* v. *Wilson*, 187 U. S. 467, 478, 23 S. Ct. 189, 47 L. Ed. 261.

[1] *Dougherty* v. *Greenwich Ins. Co.*, (N. J.) 33 Atl. 295.

[2] The evidence must be "clear, unequivocal and convincing," *United States* v. *Budd*, 144 U. S. 154, 12 S. Ct. 575; *Spalding* v. *Crocker* (1897), 2 Com. Cas. 189. A mere preponderance of evidence is not sufficient, *Trustees* v. *Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. 1140. As to whether case must be established "beyond a reasonable doubt," compare *Wall* v. *Meilke* (Minn. 1903), 94 N. W. 688; *Southard* v. *Curley*, 134 N. Y. 148, with *Boyertown Nat. Bank* v. *Hartman*, 147 Pa. St. 558; *Highlands* v. *R. R. Co.*, 209 Pa. St. 286

[3] *Dalton* v. *Mil. Mach. Ins. Co.*, 126 Iowa, 377, 102 N. W. 120; *Slobodisky* v.

and fraud inducing it on the other, the written contract may in a proper case be reformed in equity to correspond with the real agreement.[1]

Phœnix Ins. Co., 52 Neb. 395, 72 N. W. 483.

[1] *Hearne* v. *Mar. Ins. Co.*, 20 Wall. 488, 490, 22 L. Ed. 395; *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. 283; *Bryce* v. *Lorillard Ins. Co.*, 55 N. Y. 240; *Steinbach* v. *Prudential Ins. Co.*, 62 App. Div. (N. Y.) 133, 70 N. Y. Supp. 809; *Scheussler* v. *Ins. Co. of Co. of Phila.*, 103 App. Div. 12, 92 N. Y. Supp. 649, aff'd 185 N. Y. 578. This case is an extreme one, for the agent of the company intended to insert the warranty complained of. There was no fraud and no mutual mistake of fact. The plaintiffs had simply omitted to disclose the character of the risk. Compare *Travelers' Ins. Co.* v. *Henderson*, 69 Fed. 762, 16 C. C. A. 390, and *Goddard* v. *Ins. Co.*, 108 Mass. 56, 11 Am. Rep. 307; *Harris* v. *Columbiana County Mutual Ins. Co.*, 18 Ohio St. 116, 51 Am. Dec. 448. See *Birnstein* v. *Stuyvesant Ins. Co.*, 83 N. Y. App. Div. 436, 82 N. Y. Supp. 140, and *Trenton Potteries Co.* v. *Title Guar. & Trust Co.*, 176 N. Y. 65, 68 N. E. 132. If action could not be successfully maintained after reformation such relief will not be granted, *Thompson* v. *Phœnix Ins. Co.*, 136 U. S. 299, 10 S. Ct. 1019, 34 L. Ed. 408. If company promises to renew and changes terms of former policy, equity will reform, *Palmer* v. *Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Thomason* v. *Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. 843; *Hay* v. *Star F. Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607; but judgment on insurance contract is a bar to an action to reform it, *Washburn* v. *Great West. Ins. Co.*, 114 Mass. 175; *Steinbach* v. *Relief Fire Ins. Co.*, 77 N. Y. 498, 33 Am. Rep. 655. *Contra*, *Grand View Bldg. Assn.* v. *Northern Assur. Co.* (Neb.), 102 N. W. 246, where recovery was allowed after defeat in United States supreme court, 183 U. S. 308; and see same case, 203 U. S. 103, in which recovery in state court was left undisturbed. But pendency of action on policy is no bar to action by defendant for reformation, *Nat. F. Ins. Co.* v. *Hughes*, 189 N. Y. 84. Mere knowledge by company's agent of existing facts at variance with terms of policy may be made basis of reformation, *Fitchner* v. *Fidelity Mut. Fire Assn.*, 103 Iowa, 276, 72 N. W. 530; *Grand View Bldg. Assn.* v. *Northern Assur. Co.* (Neb.), 102 N. W. 246. Mistake of only one party is no ground for reformation, *Mœller* v. *Am. Ins. Co.*, 52 Minn. 336, 54 N. W. 189; *Hartford Ins. Co.* v. *Haas*, 87 Ky. 531, 9 S. W. 720. If name of wrong owner is furnished the company, reformation cannot be granted to insert the true owner, *Schmid* v. *Virginia F. & M. Ins. Co.* (Tenn. Ch. App.), 37 S. W. 1013; *Cushman* v. *New England Ins. Co.*, 65 Vt. 569, 27 Atl. 426; but reformation will be granted if mistake as to owner or interest is mutual, *Snell* v. *Ins. Co.*, 98 U. S. 85, 25 L. Ed. 52, or as to description of property, *Home Ins. & B. Co.* v. *Lewis*, 48 Tex. 622. While mistake of law is in general said to present no ground for reformation, *Westchester Fire Ins. Co.* v. *Wagner* (Tex. Civ. App.), 38 S. W. 214, yet mistake of law, especially if induced by company's agent, as to meaning of language employed in policy has often been made basis of reformation where both parties intended to accomplish a different result, *Sias* v. *Roger Williams Ins. Co.*, 8 Fed. 183; *Woodbury Savings Bank* v. *Charter Oak Ins. Co.*, 31 Conn. 517; *Longhurst* v. *Star Ins. Co.*, 19 Iowa, 364; *Esch* v. *Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. R. 443; *Hartford F. Ins. Co.* v. *McCarthy*, 69 Kan. 555, 77 Pac. 90; *Lansing* v. *Commercial Union Ins. Co.* (Neb.), 93 N. W. 756; *Eastman* v. *Provident Mut. R. Assn.*, 65 N. H. 176, 18 Atl. 745, 5 L. R. A. 712, 23 Am. St. R. 29; *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. 283. Reformation and recovery may be had in same action, *German Ins. Co.* v. *Davis*, 6 Kan. App. 268, 51 Pac. 60; *Maryland Home Ins. Co.* v. *Kimmell*, 89 Md. 437, 43 Atl. 764; *Grand View Bldg. Assn.* v. *Northern Assur. Co.* (Neb.), 102 N. W. 246; *N. Y. Ice Co.* v. *Northwestern Ins. Co.*, 23 N. Y. 357. Where similar relief is granted at law under the doctrine of waiver and estoppel no reformation is necessary, *German Ins. Co.* v. *Miller*, 39 Ill. App. 633; *Am. Cent. Ins. Co.* v. *McLanathan*, 11 Kan. 533;

Similarly, either party may obtain in equity a rescission of the contract for fraud or mutual mistake with a reinstatement of the parties.[1]

But it is important to notice that after a fire or marine loss, or after a loss under a life policy, unless the life policy has run for a large part of its anticipated duration, this form of relief would be unsatisfactory, the premium being so much less than the face of the policy.

§ 86. Court Must not Make New Terms.—A court must not use its discretion to modify the conditions or provisions of the contract entered into by the parties in order to effectuate what it might consider a more equitable arrangement than that resulting from an enforcement of the strict terms of the policy.[2]

The doctrine of waiver and estoppel, especially as applied in some jurisdictions, comes into sharp conflict with this elementary proposition of law.[3]

§ 87. Special Terms Prevail over General Form.—If there is any inconsistency between the written and the printed words of the policy, the former prevail, because they are framed and inserted with reference to the particular contract, and the parties do not generally take the trouble to revise or alter the formal printed conditions.[4]

Smith v. *Commonwealth Ins. Co.*, 49 Wis. 322, 5 N. W. 804; but where the mistake goes to the identity of the entire subject-matter, by the weight of authority, the only remedy is by reformation, *Collins* v. *St. Paul F. & M. Ins. Co.*, 44 Minn. 440, 46 N. W. 906; *Sanders* v. *Cooper*, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. R. 801. Compare *Kansas F. Fire Ins. Co.* v. *Saindon*, 52 Kan. 486, 35 Pac. 15, 39 Am. St. R. 356; *State Ins. Co.* v. *Schreck*, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. R. 696.

[1] *Union Cent. Life Ins. Co.* v. *Pottker*, 33 Ohio St. 459, 31 Am. Rep. 555. See *La Marche* v. *New York Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053.

[2] The contract must be enforced as written unless it would work a fraud, *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656; *Stewart* v. *Union Mut. L. Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147; *Peabody* v. *Satterlee*, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956; *Allen* v. *German Am. Ins. Co.*, 123 N. Y. 6, 25 N. E. 309. "The courts may not make a contract for the parties," *Imperial F. Ins. Co.* v. *Coos Co.*, 151 U. S. 452, 462, 14 S. Ct. 379, 38 L. Ed. 231. "We cannot make a new contract for them nor refuse to enforce the contract they made for themselves," *Elliott* v. *Farmers' Ins. Co.*, 114 Iowa, 153, 155, 86 N. W. 224.

[3] See ch. VI, *infra*. Plain, ordinary and popular sense to be given, *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S. 452, 463, 38 L. Ed. 231; *Hoover* v. *Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111; *Stone* v. *Granite State Fire Ins. Co.*, 69 N. H. 438, 45 Atl. 235; *Robertson* v. *French*, 4 East, 135; *Hart* v. *Standard Mar. Ins. Co.*, 22 Q. B. D. 499.

[4] *Hagan* v. *Scottish Union Nat. Ins. Co.*, 186 U. S. 423, 46 L. Ed. 1229, 22 S. Ct. 862; *Phœnix Ins. Co.* v. *Flemming*, 65 Ark. 54, 39 L. R. A. 789, 67 Am. St. R. 900, 44 S. W. 464; *Nicollet* v. *Ins. Co.*, 3 La. 366, 23 Am. Dec. 458; *Harper* v. *N. Y. City Fire Ins. Co.*, 22 N. Y. 443; *Sullivan* v. *Spring Garden Ins. Co.*,

On the same principle, it is held that the special clauses or riders stamped on the policy, or printed and attached to it, prevail over the more general terms of the usual printed form.[1]

§ 88. **Parol to Explain Ambiguity.**—If the language of the policy is ambiguous and fairly open to doubt, of which the court is to judge, parol evidence is admissible to explain the real meaning of the parties.[2]

§ 89. **Trade Custom.**—In seeking to arrive at the meaning of the contract, usage may be resorted to, in order to make definite what is

34 App. Div. 128, 54 N. Y. Supp. 629; *Faust* v. *Ins. Co.*, 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. R. 876; *Robertson* v. *French*, 4 East, 130. This doctrine is frequently invoked by the assured to justify an apparent violation of the memorandum clause of the fire insurance policy prohibiting the use of certain articles or uses. In the same way, insurance "as a manufacturer of brass clock works" permits the use of all such articles as are ordinarily employed in that manufacture, and the making of them for that purpose, if such be the ordinary course of the business, although the use of such articles be prohibited as extra hazardous by the printed terms of the policy, *Bryant* v. *Poughkeepsie Mut. Ins. Co.*, 17 N. Y. 200. And see *Haley* v. *Dorchester Fire Ins. Co.*, 12 Gray (Mass.), 545. So as to general printed clauses applicable to a voyage policy left in an English Lloyd's policy filled up and intended as a time policy, *Dudgeon* v. *Pembroke*, 2 App. Cas. 284. Similarly as to controlling effect of words written in the margin or at the foot of policies, and especially marine policies, *Chadsey* v. *Guion*, 97 N. Y. 333; *Swinnerton* v. *Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560; *Bruce* v. *Ins. Co.*, 58 Vt. 253, 2 Atl. 710. So it has been held that the words restricting the liability of the insurers "against actual total loss only," written upon the margin, prevail over any inconsistent printed provisions in the body of the policy, *Burt* v. *Brewers and Maltsters Ins. Co.*, 9 Hun (N. Y.), 383, aff'd 78 N. Y. 400. Written indorsement on face of policy "covering loss by lightning" prevails over printed clause exempting company from liability, *Haws* v. *Ins. Co.*, 130 Pa. St. 113, 15 Atl. 915, 2 L. R. A. 52.

[1] *St. Paul F. & M. Ins. Co.* v. *Kidd*, 55 Fed. 238, 5 C. C. A. 88, 14 U. S. App. 201; *Gunther* v. *L. & L. & Globe Ins. Co.*, 34 Fed. 501; *Jackson* v. *Brit.-Am. Assur. Co.*, 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636; *Benedict* v. *Ocean Ins. Co.*, 31 N. Y. 389; *Mascott* v. *Granite State Ins. Co.*, 68 Vt. 253, 35 Atl. 75. A specific stipulation governs the more general, *Northwestern L. Ins. Co.* v. *Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192. A rider pasted or attached to face of policy is part of contract and need not be referred to, *Washburn & Moen Mfg. Co.* v. *Reliance Mar. Ins. Co.*, 106 Fed. 116; *Hardy* v. *Ins. Co.*, 166 Mass. 210, 44 N. E. 209, 33 L. R. A. 241, 55 Am. St. R. 395; *Quinn* v. *Fire Assn.*, 180 Mass. 560, 62 N. E. 980; *Shakman* v. *U. S. Credit S. Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. R. 920 (an indorsement on the contract).

[2] *Orient Mut. Ins. Co.* v. *Wright*, 1 Wall. 456, 17 L. Ed. 505; *Rickerson* v. *Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856, but holding also that a party cannot be asked what his intent was, *Rickerson* v. *German-Am. Ins. Co.*, 6 App. Div. 550, 39 N. Y. Supp. 547; *Daniels* v. *Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192. So circumstances in connection with the execution of the policy may be considered in determining the intention of the parties, *Pietri* v. *Seguenot*, 96 Mo. App. 258, 69 S. W. 1055. In case of doubt may show the circumstances surrounding the parties at time of execution, *Borigut* v. *Springfield F. & M. Ins. Co.*, 34 Minn. 352, 25 N. W. 796; *Boyd* v. *Mississippi Home Ins. Co.*, 75 Miss. 47, 21 So. 708; *Bole* v. *N. H. Ins. Co.*, 159 Pa. St. 53, 28 Atl. 205; *McKeesport Mach. Co.* v. *Ben Franklin Ins. Co.*, 173 Pa. St. 53, 34

uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict its terms.[1]

Trade usage may be shown to explain the meaning of technical words or phrases.[2]

Atl. 16; *Carr* v. *Montefiore*, 33 L. J. Q. B. 256. This is not to dispute the written contract but to put the court in the position of the parties in interpreting its probable meaning. Only circumstances known or presumed to be known by both parties are relevant for such a purpose, *Rickerson* v. *Hartford F. Ins. Co.*, 149 N. Y. 307, 43 N. E. 856; *Hydarnes S. Co.* v. *Ind. Mut., etc., Co.* (1895), 1 Q. B. 500. In case of doubt the interpretation subsequently put upon the contract by the parties in its performance may be evidence of their intent, *Manhattan Life Ins. Co.* v. *Wright*, 126 Fed. 82, 61 C. C. A. 138; *Brooklyn Ins. Co.* v. *Dutcher*, 95 U. S. 269, 273, 24 L. Ed. 410, "the practical interpretation of an agreement by a party to it is always a consideration of great weight." The New York court says: "The practical construction put upon a contract by the parties to it is sometimes almost conclusive as to the meaning," *Nicoll* v. *Sands*, 131 N. Y. 24, 29 N. E. 818. And see *Woolsey* v. *Funke*, 121 N. Y. 92, 24 N. E. 191; *Phetteplace* v. *Brit. & For. Ins. Co.*, 23 R. I. 26, 49 Atl. 33. An admission by the insured as to what property was intended to be covered was received against him in *Leftwich* v. *Royal Ins. Co.*, 91 Md. 596, 46 Atl. 1010.

[1] *Moore* v. *United States*, 196 U. S. 157, 166, 25 S. Ct. 202; *Lillard* v. *Kentucky, etc., Co.*, 134 Fed. 168; *Grace* v. *Ins. Co.*, 109 U. S. 283, 3 S. Ct. 207, 27 L. Ed. 932; *Connelly* v. *Assn.*, 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. R. 296; *Glendale Woolen Co.* v. *Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309; *Bornzewski* v. *Middlesex Assur. Co.*, 186 Mass. 589, 72 N. E. 250; *Mooney* v. *Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277. The New York court says: "Custom or usage is presumed to enter into the intention when it is found as a fact, not only that it existed, but was uniform, reasonable and well settled, and either known to the parties when the contract was made or so generally known as to raise a presumption that they had it in mind at the time," *London Assur. Corp.* v. *Thompson*, 170 N. Y. 94, 99, 62 N. E. 1066. The actual intent of only one party is not to be shown by extrinsic testimony nor are customs known only to underwriters competent against the assured, *Rickerson* v. *Hartford F. Ins. Co.*, 149 N. Y. 307, 43 N. E. 856. Custom admissible as to time of attaching of the risk, *Cleveland Oil Co.* v. *Norwich Ins. Co.*, 34 Ore. 228, 55 Pac. 435. It is not competent to show custom to accept applications from persons who have attempted suicide, *Louis* v. *Conn. Mut. L. I. Co.*, 58 App. Div. 137, 68 N. Y. Supp. 683, aff'd 172 N. Y. 659, 65 N. E. 1119. Nor to show that a life company has sometimes accepted past-due premiums, *Easley* v. *Ins. Co.*, 91 Va. 161, 21 S. E. 235. Nor to show the universal understanding and practice of the trade in respect to the *pro rata* phrase of the reinsurance rider, *Home Ins. Co.* v. *Continental Ins. Co.* 180 N. Y. 389, 73 N. E. 65. And where term of reinsurance is definitely described, custom to issue for same term as direct insurance cannot be shown, *Milwaukee Mechanics' Ins. Co.* v. *Palatine Ins. Co.*, 128 Cal. 71, 60 Pac. 518. Opinion cannot be received as proof of usage, *Greenwich Ins. Co.* v. *Waterman*, 54 Fed. 839, 4 C. C. A. 600. Unjust and unreasonable custom though general will not be enforced, *Seccomb* v. *Provincial Ins. Co.*, 10 Allen (Mass.), 305.

[2] *Western Assur. Co.* v. *Altheimer Bros.*, 58 Ark. 565, 573, 25 S. W. 1067; *Ins. Co.* v. *McMillan*, 31 Ala. 711; *Union Ins. Co.* v. *Am. Ins. Co.*, 107 Cal. 327, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. R. 140; *Houghton* v. *Watertown Ins. Co.*, 131 Mass. 300; *Phœnix Ins. Co.* v. *Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548. But Alabama company reinsuring New York company is not presumed to know New York customs, *German Am. Ins. Co.* v. *Commercial Ins. Co.*, 95 Ala. 469, 11 So. 117, 16 L. R. A. 291. Every underwriter is presumed to know the usages of the trade he insures. If he does not he ought to inform himself, *Hearne* v. *Mar. Ins. Co.*, 20 Wall. 488, 492, 22 L. Ed. 395; *Parsons* v. *Mass., etc., Co.*, 6 Mass. *197, *204; *McCall* v. *Sun*

Trade usage has always played a particularly important part in the law of marine insurance.[1]

§ 90. Construction Liberal to Insured.—The contract of insurance being a unilateral contract framed mainly in the interest of insurers, and the insured being compelled to accept the form offered, in order to secure insurance, any ambiguity as to the purpose or meaning of its terms, or what property was intended to be covered, will be construed in favor of the insured.[2]

Mut. Ins. Co., 66 N. Y. 505, 513; *Merchants & Mfrs. Ins. Co.* v. *Shillito*, 15 Ohio St. 559, 566; *Mey* v. *South Car. Ins. Co.*, 3 Brev. (S. C.) *329, *331; *Noble* v. *Kennoway*, 2 Dougl. 513, Mansfield, J.; *Da Costa* v. *Edmunds*, 4 Camp. 143, Ellenborough, J.; whether such practice is recently established or not, *Macy* v. *Ins. Co.*, 9 Metc. (Mass.) 354. Usage of trade is equivalent to notice to underwriter, *Mount* v. *Larkins*, 8 Bing. 108, 122. "He took the risk on the supposition that what was usual and necessary should be done," *Eyre* v. *Mar. Ins. Co.*, 5 Watts. & S. (Pa.) 116. "It is absurd to suppose that when the end is insured the usual means of attaining it are to be excluded," *McCall* v. *Sun Mut. Ins. Co.*, 66 N. Y. 505, 513.

[1] *Mason* v. *Skurray*, 1 Marsh. 226, Lord Mansfield; *Preston* v. *Greenwood*, 4 Dougl. 28, Lord Mansfield; *Long* v. *Allan*, 4 Dougl. 276, Buller, J. Lord Mansfield says: "What is usually done by such a ship, or such a cargo, in such a voyage is understood to be referred to in every policy and to make a part of it as much as if it was expressed," *Pelly* v. *Royal Exch. Ass. Co.*, 1 Burr. 341. This does not vary the terms of the policy; it "introduces matter upon which the policy is silent," *Blackett* v. *Royal Exch. Ass. Co.*, 2 Cr. & Jer. 249; *Hall* v. *Janson*, 4 E. & B. 504, 24 L. J. Q. B. 101. The marine policy was largely founded upon usage, *Ocean S. Co.* v. *Ætna Ins. Co.*, 121 Fed. 882. And see § 10. General and known usages of trade determined by a course of judicial decision form part of the law merchant and as such are thenceforward judicially noticed by the courts, *Barnett* v. *Brandao*, 6 M. & Gr. 630; but a particular or local custom must be affirmatively established by evidence and shown to have been known to both parties, *Walls* v. *Bailey*, 49 N. Y. 464; *Pelly* v. *Royal Exch. Ass. Co.*, 1 Burr. 341; *Gabay* v. *Lloyd*, 3 B. & Cr. 793; *Bartlett* v. *Pentland*, 10 B. & Cr. 760.

[2] *Liverpool & London & G. Ins. Co.* v. *Kearney*, 180 U. S. 132, 45 L. Ed. 460; *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144, 18 S. Ct. 552; *Thompson* v. *Ins. Co.*, 136 U. S. 287, 10 S. Ct. 1019; *American S. S. Co.* v. *Indemnity Mut. Mar. Ins. Co.*, 108 Fed. 421; *Forest City Ins. Co.* v. *Hardesty*, 182 Ill. 39, 74 Am. St. R. 161, 55 N. E. 139; *Janneck* v. *Met. Life Ins. Co.*, 162 N. Y. 574, 57 N. E. 182; *Kratzenstein* v. *Western Assurance Co.*, 116 N. Y. 54, 22 N. E. 221; *Foot* v. *Ætna Fire Ins. Co.*, 61 N. Y. 571; *Hoffman* v. *Ætna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 339; but see *Kirk* v. *Home Ins. Co.*, 92 N. Y. App. Div. 26, 86 N. Y. Supp. 980. And where the assured furnishes the description of the property, as to that the rule may be modified, *London Assur. Corp.* v. *Thompson*, 170 N. Y. 94, 62 N. E. 1066; but the description of the property which is often comparatively brief and general should be held to be inclusive rather than exclusive, no matter who prepares it, *Rickerson* v. *Hartford F. Ins. Co.*, 149 N. Y. 307, 43 N. E. 856. And compare, for general rule, *Nostrand* v. *Knight*, 123 N. Y. 614. As to location of movable property in a business plant, see *McKeesport Machine Co.* v. *Ben Franklin Ins. Co.*, 173 Pa. St. 53, 34 Atl. 16. In *Lite* v. *Firemen's Ins. Co.*, 104 N. Y. Supp. 434, landlord's policy on profits was construed as open and not valued on partial loss. Compare construction of valued policy on freight in *N. Y., etc., S. Co.* v. *Royal Exch. Assur.*, 145 Fed. 713. Conditions are construed strictly against the insurer, *Robinson* v. *Ætna Ins. Co.*, 128 Ala. 477, 30 So. 665. The New York court says: "The words of the policy should not be taken in any technical or nar-

§ 91. Forfeitures not Favored.—The same principle is paraphrased in the maxim that forfeitures are not favored,[1] and, therefore, equivocal words, or provisions repugnant to one another, will be so construed as to give effect to the instrument rather than to avoid it.[2] But the fair and reasonable intendment of a condition, though technical, must not be frustrated by such rules of interpretation. Thus, a deed of trust was held to be in effect a chattel mortgage and to forfeit a fire policy prohibiting such incumbrance without written permit.[3]

The adoption of a standard form of fire policy has not changed the rules of construction previously prevailing in this regard.[4]

row sense. They need not be taken in the sense in which they may have been understood by underwriters, but they must be taken in their ordinary sense as commonly used and understood. We must endeavor to ascertain how the insured understood and could properly understand them," *Herrman* v. *Mechanics' Ins. Co.*, 81 N. Y. 184; *Hoffman* v. *Ætna Fire Ins. Co.*, 32 N. Y. 405. And the rule applies to mutual companies though members are charged with a knowledge of by-laws, *Brock* v. *Brotherhood Acc. Co.* (Vt., 1903), 54 Atl. 176. So also beneficiary association, *Matthes* v. *Imperial Acc. Assn.*, 110 Iowa, 222, 81 N. W. 484.

[1] The court says: "Courts have always set their faces against an insurance company, which, having received its premiums, has sought by a technical defense to avoid payment," *Mut. L. Ins. Co.* v. *Hill*, 193 U. S. 551, 559, 24 S. Ct. 538.

[2] *McMaster* v. *New York Life Ins. Co.*, 183 U. S. 25, 46 L. Ed. 64; *Hartford F. Ins. Co.* v. *Unsell*, 144 U. S. 439, 12 S. Ct. 671; *Snyder* v. *Ins. Co.*, 59 N. J. L. 544, 37 Atl. 1022; *Phœnix Ins. Co.* v. *Tomlinson*, 125 Ind. 84, 21 Am. St. R. 203; *Woodmen's Accident Assn.* v. *Byers*, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291; *Baley* v. *Homestead Fire Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570. In *Rickerson* v. *Hartford Fire Ins. Co.*, 149 N. Y. 307, 313, 43 N. E. 856, the court adopts Mr. May's rule and says: "No rule in the interpretation of a policy is more fully established or more imperative and controlling than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance it was his object to secure. When the words are susceptible of two interpretations that which will sustain his claim and cover the loss, must in preference be adopted." So no intendment in favor of forfeiture should be indulged in, *Northwestern Mut. Life Assn.* v. *Schulz*, 94 Ill. App. 156. Nevertheless the United States Supreme Court said: "Forfeitures are necessary and should be fairly enforced," *Nederland L. Ins. Co.* v. *Meinert*, 199 U. S. 171.

[3] *Hunt* v. *Springfield F. & M. Ins. Co.*, 196 U. S. 47, 25 S. Ct. 179, 49 L. Ed. 381. A conspicuous illustration of the principal rule and far distant from the last case stands, *Michael* v. *Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810, in which it was held that transfer of gross earnings to a pool was no change of interest whatsoever under use and occupancy insurance. though pool agreement provided that despite fire assured should continue to receive full percentage of pool earnings. "Loss payable as their interest may appear," *held*, not equivalent to permit for chattel mortgage in *Atlas Reduct. Co.* v. *New Zealand Ins. Co.*, 138 Fed. 497. To avoid forfeiture violence must not be done to the language of the instrument, *Behling* v. *Northwestern Nat. L. I. Co.*, 117 Wis. 24, 93 N. W. 800; *Peabody* v. *Satterlee*, 166 N. Y. 174, 179, 59 N. E. 818, 52 L. R. A. 956.

[4] *Matthews* v. *Am. Cent. Ins. Co.*, 154 N. Y. 449, 456, 48 N. E. 751. The object of the New York statute is declared to be to provide a uniform contract or policy of fire insurance—not to prescribe terms which should seem to the legislature reasonable, *Walradt* v. *Phœnix Ins. Co.*, 136 N. Y. 382, 32

§ 92. What Law Governs Construction of Contract.—Ordinarily the laws and usages of the place where the contract of insurance is made are to be applied in its interpretation and construction.[1]

This rule is peculiarly appropriate to this branch of the law because in insurance there may be several places where the contract is operative—one place for the payment of premiums, another for the payment of loss, and a third for the location of the subject of insurance. But if the policy provides that the premiums and loss are to be payable at the home office, the latter place would seem to be the place of performance, and there would in that case be cogent reason for holding, in analogy to the general rule,[2] that its law is to prevail in the construction of the policy.[3]

It is often important to determine by what law the validity and

N. E. 1063. When the original act was passed, the form of policy had not yet been adopted. Its preparation was left to insurance men, and by section 3 of the act it was provided that any policy made in terms inconsistent with the provisions of the act should nevertheless be binding upon the company, L. 1886, c. 488; L. 1892, c. 690, § 121.

[1] *Mut. Life Ins. Co.* v. *Hill*, 193 U. S. 551, 24 S. Ct. 538; *Mut. Life Ins. Co.* v. *Cohen*, 179 U. S. 262, 21 S. Ct. 106, 45 L. Ed. 181; *Equitable Life Assur. Society* v. *Clements*, 140 U. S. 226, 11 S. Ct. 822, 35 L. Ed. 497. The Federal Supreme Court says: "Contracts are to be governed as to their nature, their validity and their interpretation, by the law of the place where they were made unless the contracting parties clearly appear to have had some other law in view," *Liverpool, etc., S. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397; *Washington Life Ins. Co.* v. *Glover*, 78 S. W. 146 (Ky., 1904); *Supreme Council of American Legion of Honor* v. *Getz*, 112 Fed. 119, 50 C. C. A. 153; *Carrollton Furniture Mfg. Co.* v. *Am. Credit Indemnity Co.*, 124 Fed. 25, 27, 59 C. C. A. 545. The place of the contract is usually where the policy is delivered and the first premium paid, *City of Lake Charles* v. *Ins. Co.*, 114 La. 836, 38 So. 578; but if possible the intent of the parties as to what law governs is to be ascertained, *Bottomley* v. *Met. Life Ins. Co.*, 170 Mass. 274, 49 N. E. 438; *Union Cent. Life Ins. Co.* v. *Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 272, 64 Am. St. R. 715, but see *Dolan* v. *Mut. Res. Fund L. Assn.*, 173 Mass. 197, 53 N. E. 398. Considerations based on justice and public policy may determine what law shall apply, *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 20 S. Ct. 962, 44 L. Ed. 1116; *Seyk* v. *Millers' Nat. Ins. Co.*, 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523. When the contract is completed by mailing the policy to the assured in another state, the place of mailing is the place of the contract and its law prevails, *Hartford S. B. I. & Ins. Co.* v. *Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629. In the absence of evidence to the contrary the presumption is that the laws of the other state are the same as those of the forum, *Stewart* v. *Union Mut. L. Ins. Co.*, 155 N. Y. 257, 264.

[2] *London Assur. Co.* v. *Companhia de Moagens*, 167 U. S. 149, 17 S. Ct. 785, 42 L. Ed. 113.

[3] *Mut. Life Ins. Co.* v. *Phinney*, 178 U. S. 327, 338, 20 S. Ct. 903; *Summit* v. *U. S. Life Ins. Co.*, 123 Iowa, 681, 99 N. W. 563; *Mut. Life Ins. Co.* v. *Bradley* (Tex. Civ. App.), 79 S. W. 367; but where the contract was closed and the first premium paid in Massachusetts the court concluded that the law of that state must apply though the policy provided that premiums and loss should be paid in New York, *Millard* v. *Brayton*, 177 Mass. 533, 537, 59 N. E. 436. See recent case in which Wisconsin court refused to enforce contract, though made in Philadelphia, because it violated a Wisconsin statute, *Presbyterian M. Fund* v. *Thomas*, 123 Wis. 281, 105 N. W. 801.

effect of the policy are to be governed, because the statutory provisions, as well as usages and decisions,[1] relating to the insurance contract vary greatly in different states, and such statutes generally have no extraterritorial effect.[2]

If the policy provides that it will not be binding until countersigned at a certain agency, the agency is ordinarily the place of contract;[3] so if the policy is sent to the agent for delivery on receipt of the premium;[4] but if the application is accepted at the home office, and the policy mailed from there to the applicant in another state, the home office will be the place of contract.[5] As a general thing the contract is considered made where the last act necessary to complete it is done.[6]

§ 93. Who Construes the Contract, Court or Jury.—The question whether judge or jury is to pass upon the validity and effect of the contract is intensely practical, because a court tries to construe the agreement according to its legal meaning and intent, whereas a jury

[1] *Thwing* v. *Gt. West. Ins. Co.*, 111 Mass. 93.

[2] *Prov. Sav. Life Ass. Soc.* v. *Bailey*, 118 Ky. 36, 80 S. W. 452; *Mut. Life Ins. Co.* v. *Hill*, 193 U. S. 551, 24 S. Ct. 538, 48 L. Ed. 788, which also holds that parties contracting outside of a state may incorporate into the contract the law of that state and make its provisions controlling. The same court held that where the policy provided "claims to be adjusted according to the usages of Lloyds" it was to be interpreted according to English law, *London Assur.* v. *Companhia de Moagens*, 167 U. S. 149; but parties making a contract in a certain state must not by that method be allowed to evade a statutory rule of public policy; for example, the Massachusetts statute requiring attachment of correct copy of application to life insurance policy, *Albro* v. *Man. Life Ins. Co.*, 119 Fed. 629. See ch. VI, *infra*.

[3] *Continental Life Ins. Co.* v. *Webb*, 54 Ala. 688; *Antes* v. *State Ins. Co.*, 61 Neb. 55, 84 N. W. 412.

[4] *Thwing* v. *Great Western Ins. Co.*, 111 Mass. 93.

[5] *Commonwealth, etc., Ins. Co.* v. *Knabe Co.*, 171 Mass. 265, 50 N. E. 516; *Daniels* v. *Ins. Co.*, 12 Cush. (Mass.) 416; 59 Am. Dec. 192; *Cook* v. *Johnson*, 3 Dutch. (N. J.) 645, 72 Am. Dec. 379.

[6] *Northampton Live Stock Co.* v. *Tuttle*, 40 N. J. L. 476; or where the acquiescence of the minds of the parties is completed, *Fidelity Mut. Assn.* v. *Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. R. 813. The act of final assent fixes the place of the contract, *Meyer* v. *Supreme Lodge*, 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839; *Coverdale* v. *Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; *Born* v. *Home Ins. Co.*, 120 Iowa, 299, 94 N. W. 849. The court, however, must always endeavor to give effect to the intention of the parties as disclosed by the terms of the contract or by other competent evidence, and in one case though the contract was made in New Hampshire the court concluded that the parties intended the law of another state to apply largely because the New Hampshire standard statutory form of policy had not been employed, *Davis* v. *Ætna Mut. F. Ins. Co.*, 67 N. H. 218, 34 Atl. 464, 67 N. H. 335, 39 Atl. 902. And in another case the court went so far as to conclude that the parties intended that the laws of Missouri should apply though the contract declared that it should be construed according to the laws of New York, *Pietri* v. *Lequenot*, 96 Mo. App. 268, 69 S. W. 1055. The last act done to complete contract is significant, *Supreme Lodge* v. *Meyer* (U. S.), 25 S. Ct. 754; *Equitable L. Assur. Soc.* v. *Perkins* (Ind. App.), 80 N. E. 682.

is too apt to consider an insurance an absolute contract of indemnity regardless of warranties, and is prone to find for the insured unless his claim is characterized by some element of dishonesty or bad faith.

The general rule is that the interpretation of the meaning of the policy falls within the province of the court. It is, therefore, for the court to determine whether a given statement or stipulation amounts to a warranty.[1] And if a warranty, as hereinafter shown, a statement must be exactly true, and a stipulation must be strictly fulfilled regardless of its materiality;[2] but when the language employed to describe the thing warranted is not free from ambiguity, or when it is equivocal and its interpretation depends upon the sense in which the words are used in view of the subject to which they relate, the relation of the parties, and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact. Such a question is to be submitted to the jury under appropriate instructions.[3] Whether the statement or stipulation warranted has or has not been complied with is in its essence a question of fact. Such an issue if really amounting to a controversy belongs exclusively to the jury.[4] But if the testimony

[1] But in most of our state courts the meaning and effect of the policy are largely turned over to the determination of the jury by application of the doctrine of waiver and estoppel. Not so in the federal and English courts, Ch. VI–VIII.

[2] *Dwight* v. *Germania Life Ins. Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729, *Held*, error to leave it to jury to say whether insured was engaged in sale of liquor.

[3] *Kenyon* v. *Knight Templars*, 122 N. Y. 247, 25 N. E. 299 (warranty regarding occupation as liquor dealer). And see *Northwestern Life Ins. Co.* v. *Muskegon Bank*, 122 U. S. 501, 7 S. Ct. 1221, 30 L. Ed. 1100 (warranty as to temperate habits).

[4] Thus, the court says: "Whether a given state of admitted or proved facts works a forfeiture or lapse of a policy is a question of law for the decision of the court. When there is an issue about the facts, the matter should be submitted to the jury under proper instructions," *Mass. Ben. L. Assn.* v. *Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. Thus, whether in fact the risk of fire has been increased, *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339; *Long* v. *Beeber*, 106 Pa. St. 466, 51 Am. Rep. 532; or under the standard fire policy whether it has been increased by any means within the knowledge or control of the insured, *Alston* v. *Greenwich Ins. Co.*, 100 Ga. 282, 29 S. E. 268; or whether the applicant for a life policy was in sound health, *Packard* v. *Metropolitan Ins. Co.*, 72 N. H. 1, 54 Atl. 287; *Plumb* v. *Penn. Mut. Life Ins. Co.*, 108 Mich. 94, 65 N. W. 611; or whether a vessel was seaworthy, *Starbuck* v. *Phœnix Ins. Co.*, 47 App. Div. (N. Y.) 621, aff'd 166 N. Y. 593, 59 N. E. 1130. Indeed an issue of fact must not be withdrawn from the jury by the court if there be any rational doubt as to the falsity of the statements, *Henn* v. *Met. L. Ins. Co.*, 67 N. J. L. 310, 51 Atl. 689; *Holden* v. *Met. Life Ins. Co.*, 165 N. Y. 13, 58 N. E. 771 (warranty that no brother had died of consumption). If the facts or inferences deducible from them are in dispute the issue is for the jury, *McFarland* v. *U. S. Mut. Acc. Assn.*, 124 Mo. 204, 27 S. W. 436; *Foster* v. *Fidel. & Cas. Co.*, 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833. "If reasonable minds

bearing upon such an issue is without dispute, there remains no controverted question of fact.[1] In general it may be stated that if the facts are such that to the average mind only one inference is deducible from them, the court must make a decision as matter of law.[2]

might reach different conclusions as to the ultimate fact the question was one for the jury," *Payne* v. *Fraternal Acc. Assur. Co.*, 119 Iowa, 342, 345, 93 N. W. 361.

[1] Undisputed testimony showed assured kept prohibited articles, carbon oil in bulk, *Gunther* v. *L. & L. & G. Ins. Co.*, 134 U. S. 110, 10 S. Ct. 448, 33 L. Ed. 857. So also alcohol, etc., *Appleby* v. *Astor Fire Ins. Co.*, 54 N. Y. 253. So also under standard fire policy it appearing that insured knew that risk was being increased, *Alston* v. *Greenwich Ins. Co.*, 100 Ga. 282, 29 S. E. 268. So where facts relating to physical condition were undisputed, court directed judgment for company under life policy, *Foley* v. *Royal Arcanum*, 151 N. Y. 196, 45 N. E. 456, 56 Am. St. R. 621. And where statements relating to catarrh and sound health were palpably untrue, *Lippincott* v. *Supreme Council*, 64 N. J. L. 309, 45 Atl. 774. So also if a portion of goods insured by a marine policy reach destination uninjured the jury may not be permitted to find an actual total loss, *Washburn & M. Mfg. Co.* v. *Reliance Mar. Ins. Co.*, 179 U. S. 1, 21 S. Ct. 1, 45 L. Ed. 49. And see as to similar issue under fire policy, *Corbett* v. *Spring Garden Ins. Co.*, 155 N. Y. 389, 50 N. E. 282, 41 L. R. A. 318 (new trial), 40 App. Div. 628, 58 N. Y. Supp. 148, aff'd 167 N. Y. 596. Compare cases where issue of total or partial loss is sent to jury, *Liverpool & L. & G. Ins. Co.* v. *Heckman*, 64 Kan. 388, 67 Pac. 879; *Thuringia Ins. Co.* v. *Malott*, 111 Ky. 917, 64 S. W. 991, 55 L. R. A. 277; *Poppitz* v. *German Ins. Co.*, 85 Minn. 118, 88 N. W. 438.

[2] *Donahue* v. *Ins. Co.*, 56 Vt. 380. And see *Taylor* v. *Security Mut. F. Ins. Co.*, 88 Minn. 231, 92 N. W. 952. The Connecticut court says: "Extreme cases either way may be easily determined. Between them there is a wide belt of debatable ground, and cases falling within it are governed so much by the peculiar circumstances of each case that it is much better to determine the matter as a question of fact," *Lockwood* v. *Ins. Co.*, 47 Conn. 553. It is often difficult to determine whether the meaning and scope of the description of the property insured is for court or jury, thus two recent cases before the same court involved the question whether the building destroyed, a separate building in each case, could be included under the written description "additions." In *Rickerson* v. *Hartford F. Ins. Co.*, 149 N. Y. 307, 43 N. E. 856, the court held that the question should have been left to the jury. In *Arlington Co.* v. *Colonial Assn. Co.*, 180 N. Y. 337, the court held as matter of law that the building was covered. The federal circuit court, however, in applying the same form of policy to the same facts had arrived at an opposite conclusion and had held as matter of law that the building was not covered, *Arlington Mfg. Co.* v. *Ins. Co.*, 107 Fed. 662, 46 C. C. A. 542. In all these cases the facts were without dispute. It was the inferences only that differed. In another recent decision the court below held that a separate boiler house was not an "addition," but supreme court reversed and held that it was, *Guthrie Laundry Co.* v. *Northern Assur. Co.*, 87 Pac. 649, citing many cases. If there is doubt as to whether certain buildings or property are covered by the language of the policy the issue is for jury, *Wolverine Lumber Co.* v. *Phœnix Ins. Co.*, 145 Mich. 558, 108 N. W. 1088.

CHAPTER IV

General Principles—Continued

Representations and Concealments

§ 94. Introductory.—The peculiar character and conduct of the transaction have given rise to appropriately exceptional rules of law, applicable to the contract of insurance. Many of these rules became formulated in connection with marine insurance, the earliest branch, at a time when modern means of rapid transmission of news were unknown, and before underwriters had attained to their present thorough methods of obtaining, and conveniently recording, mainly through the services of their own expert surveyors, general descriptions of insurable properties of all kinds.[1] Nevertheless the essential nature, and also the conventional mode of consummating contracts of insurance upon property, especially when closed in the larger cities,[2] are much the same as they were of old, and are commonly affected by much the same sort of environment. At the present day, with the enormous increase and concentration of values both in ships and in buildings, perhaps more than ever before, the public demand, and in response should receive, immediate protection against the contingency of future disaster from the operation of multiplied perils, some of them of intensified gravity.[3] Now, as heretofore, the under-

[1] As to fire insurance see § 15. Lloyd's Lists are now amalgamated with the Shipping Gazette, De Hart & Simey, Ins. (1907), p. 25. They contain reports of departures of ships from and their arrivals at ports, also casualties and other useful shipping news, which is classified and posted for the benefit of members and subscribers, and afterwards recorded. Lloyd's Register of British and Foreign Shipping gives full details as to ships. "A 1" is the symbol for the highest class of wooden vessels; "100 A 1" for the highest class of iron vessels. Lloyd's Captains' Register is a biographical dictionary of the certified masters of the British mercantile marine. The following cases refer to Lloyd's Lists and discuss the question, how far underwriters are presumed to know their contents, *Morrison* v. *Universal Mar. Ins. Co.* (1873), L. R. 8 Exch. 40, 197; *Nicholson* v. *Power* (1869), L. T. N. S. 580; *MacKintosh* v. *Marshall*, 11 M. & W. 116; *Frière* v. *Woodhouse*, Holt N. P. 572; and see 2 Duer, Mar. Ins. 555.

[2] See §§ 74–76.

[3] The enormous influx into this country of degraded foreigners greatly increases the moral hazard of fire. The wiring of buildings for various purposes, the multiplication of lofty structures, the multiplied keeping of automobiles and gasolene, and other

writer is asked to assume the burden of an unknown risk or speculation, and, as shown in the last chapter, he is asked to assume it forthwith, and in return for a premium comparatively trifling in amount. Nor is an applicant for insurance willing now, any more than formerly, to brook the delay involved in awaiting a present and special examination of his risk when proffered by him to his insurers. Nor, in most instances, is he willing to pay the increased cost necessitated by revising to date earlier reports or surveys of his property on file with the companies.

And what is the subject of this engagement between the parties, proposed in the manner just described? In the answer to this question lies a crucial point, too often ignored or misunderstood. It is not the visible and tangible property at risk that directly constitutes the subject-matter of the underwriter's promise to grant indemnity for a possible loss. He is not asked to take over, or to give up, a property or any right in it, or to use or improve, or even to guard the property itself. The real subject of the contract is a mere risk of injury. It is a chance, and a chance only, that the underwriter is requested to carry, and in return for which he is to be paid a corresponding price. Material facts unknown to the proposer and to his agents, however influential they may be, are part of this hazard or chance of which he is to be relieved, and therefore what he does not know he need not ascertain and disclose to his underwriters;[1] but, by parity of reasoning, facts at present known to a party, as to him, form no legitimate part of the contemplated chance. And if, at the time of closing the contract, the one party has knowledge of facts material to the risk which, with or without design, he fails to disclose to the other party, then the parties are not contracting with reference to the same chance. There is no meeting of the minds upon the same essential subject-matter of their contract. It is as though the one party were undertaking with reference to one ship or one stock of goods, and the other party with reference to a different ship or a different stock of goods. Speaking generally, under such circumstances there can be no valid contract.[2]

causes, increase the physical risk. The growing efficiency of fire departments and insurance patrols, the adoption of fire-proof materials and methods of construction for ships and buildings, and the installation of automatic sprinkler equipment, hand extinguishers, and other useful contrivances, in business establishments, mills and factories, tend to diminish it. Exclusive even of the stupendous conflagration in San Francisco, the total fire loss in this country for 1906 was much above normal.

[1] *Alsop* v. *Commercial Ins. Co.*, 1 Fed. Cas. 564.

[2] See § 78. Long ago, in a leading case, Lord Mansfield, with sure prescience, announced the general doctrine for all time to come in these

Nor is the agreement of insurance fair and equitable, if entered into without a frank and free disclosure by each party of all material facts within his knowledge and unknown to the other prior to the adjustment of the amount of premium. With reference to present knowledge of the risk, at the time the engagement is concluded, the parties must stand upon the same plane; they must, as some authorities express it, contract *pari passu*, since, as shown in chapter first, the rate of premium is carefully proportioned to the character and extent of the hazard contemplated. The owner of a ship, or cargo, or stock of merchandise, or even of a building, usually has a more precise knowledge of the present condition of his property than has an insurance company. His material concealment and material misrepresentation, when he applies for insurance, alike go to the very essence of the proposed contract, and alike amount to a false description of its subject-matter. Of necessity, either results in a wrong classification or estimate of the risk, and the assignment of a mistaken rate of premium by the underwriter,[1] and this inequitable result follows inevitably and with equal force, although subsequently it may be shown that the material fact concealed or misrepresented in no wise contributed to the loss.[2]

It cannot be denied that, if the underwriter has received private advices of the safe termination of a distant voyage, it would be a fraud for him to accept pay for insuring the same voyage as a future contingency.[3] He is aware that no such contingency exists, and that consequently no subject-matter for the contract remains. In like manner, if the owner knows that his ship is already unsea-

words: "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement," *Carter* v. *Bœhm*, 3 Burr. 1905, 1909.

[1] Thus the English court says, "contracts of insurance are generally matters of speculation, where the person desiring to be insured has means of knowledge as to the risk, and the insurer has not the means or not the same means. The insured generally puts the risk before the insurer as a business transaction, and the insurer, on the risk stated, fixes a proper price to remunerate him for the risk to be undertaken," *Seaton* v. *Heath* (1899), 1 Q. B. 782, 793, Romer, L. J. In marine insurance especially, means of information are peculiarly, and sometimes exclusively, within the reach of the applicant, *Clarkson* v. *Western Assur. Co.*, 33 App. Div. 23, 53 N. Y. Supp. 508.

[2] *Daniels* v. *Hudson R. F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

[3] *Carter* v. *Bœhm* (1765), 3 Burr. 1905; Chalmers & Owen, Ins. (1907), 25.

worthy, or that in any respect, whether of condition, or location, or surroundings, it falls below the assumed standard of a ship safe and sound, he cannot honestly ask anyone to guarantee its immunity from harm. No such risk is longer possible. The mischief, in whole or in part, has already happened, or is more seriously impending than is represented. In legal theory, only unknown misfortunes, stored up by fate, can be made the subject of legitimate insurance.

From such premises and course of reasoning have been deduced the common-law rules relating to concealment, misrepresentation, and warranty, set forth in this and the next chapter, as well as the more general rule that the contract of insurance in all its branches is one requiring good faith between the parties.[1] It is a contract *uberrimæ fidei;*[2] and if the utmost good faith be not observed by either party the contract may be avoided by the other party.[3]

§ 95. Concealment: Marine Insurance.—In marine insurance a concealment of a material circumstance by a party or his authorized agent, whether intentional or unintentional, innocent or fraudulent, avoids the contract.[4] Thus, if the insured when applying for a policy has information inducing him to believe that his ship is in distress or in special peril, and does not disclose it, the contract is vitiated.[5]

Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining

[1] *Seaton* v. *Heath* (1899), 1 Q. B. 782 (rule is not confined to life, fire, and marine, but applies to all kinds of insurance).

[2] *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 509, 510, 1 S. Ct. 582.

[3] Eng. Mar. Ins. Act, 1906, § 17; *Reliance Mar. Ins. Co.* v. *Herbert*, 3 App. Div. (N. Y.) 593, 38 N. Y. Supp. 373. In construing the contract the doctrine that the contract is one *uberrimæ fidei* may also be applied in favor of the insured, *Schoneman* v. *Ins. Co.*, 16 Neb. 404, 406, 20 N. W. 284; *Merchants' Ins. Co.* v. *Edmond*, 17 Grat. (Va.) 138, 144; *Wolff* v. *Horncastle*, 1 Bos. & P. 316.

[4] *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 510, 1 S. Ct. 582, 27 L. Ed. 337; *Livingston* v. *Maryland Ins. Co.*, 6 Cranch (U. S.), 274, 3 L. Ed. 222; *Howe Machine Co.* v. *Farrington*, 82 N. Y. 126; *The Bedouin*, (1894) Prob. 1, 12; *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; *North British Ins. Co.* v. *Lloyd*, 10 Exch. 523; *Blackburn* v. *Haslam*, L. R. 21 Q. B. D. 144 (1888).

[5] *Vale* v. *Phœnix Ins. Co.*, 28 Fed. Cas. 867, 1 Wash. C. C. 283; *Hoyt* v. *Gilman*, 8 Mass. 336; *Biays* v. *Union Ins. Co.*, 3 Fed. Cas. 329, 1 Wash. C. C. 506; *Bulkley* v. *Protection Ins. Co.*, 4 Fed. Cas. 614, and elaborate note reviewing many cases; *Kohne* v. *Ins. Co. of N. A.*, 6 Bin. (Pa.) 219; *Lynch* v. *Hamilton*, 3 Taunt. 37 (fatal omission to disclose the name of the vessel, which had been reported at Lloyd's, though erroneously, as leaky. *Held*, that news though really untrue should have been reported); and see *Smith* v. *Ins. Co.*, 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. R. 144. As to duty even after loss to disclose ship's papers see *Boulton* v. *Houlder Bros.* (1904), 1 K. B. 784; *Harding* v. *Bussell* (1905), 2 K. B. 83. Under no obligation to disclose facts of which he is ignorant, *Alsop* v. *Commercial Ins. Co.* 1 Fed. Cas. 564.

whether he will take the risk.[1] All such facts, so far as known to the applicant for insurance, must be frankly and fully disclosed before the negotiations are concluded. The principle of *caveat emptor* does not apply. There must be no silence or evasion or equivocation. It is not enough even that the underwriter be furnished with materials from which he might by a course of reasoning or an effort of memory succeed in ferreting out the extent of the risk.[2]

No matter whether the omission to disclose the material fact is the result of intention, indifference or mistake, the validity of the marine policy impliedly is conditioned upon the completeness and accuracy of the description of the character of the risk as put forth by the applicant.[3]

A good illustration of the rule is furnished by an early American case where the insured had neglected to disclose the imperfect condition of the hull of a boat converted into a steamboat, used for river transit, and his policy, though against fire only, was held avoided.[4]

So also in an English case, the policy covered goods including "risk of craft" or lighterage. The insured omitted to disclose that in consideration of lower rates of lighterage the common-law liability of the lighterman as a carrier had been limited. This circumstance might affect the insurer's right of subrogation and the policy was held avoided.[5]

[1] *Columbian Ins. Co.* v. *Lawrence*, 10 Pet. (U. S.) 507, 9 L. Ed. 512; *Seaton* v. *Burnand* (1900), App. Cas. 135, 149; *Ionides* v. *Pender*, L. R. 9 Q. B. 531 (gross over-valuation not disclosed); *Clarkson* v. *West. Assur. Co.*, 33 App. Div. 23, 28, 53 N. Y. Supp. 508. Thus even a doubtful rumor of capture, *Da Costa* v. *Scandret*, 2 P. Wms. 170; or shipwreck, *Nicholson* v. *Power* (1869), 20 L. T. N. S. 580; or rumor of proximity of hostile privateer, *Durrell* v. *Bederley* (1816), Holt N. P. 283; must be disclosed though the insured does not believe the information, *Morrison* v. *Universal Mar. Ins. Co.*, L. R. 8 Exch. 40 (entry of stranding on Lloyd's List not disclosed because thought to apply to another ship of same name), and though the information eventually prove to be untrue, *Seaman* v. *Fonnereau*, 2 Strange, 1183. Insured bound to disclose that his vessel was a notorious Confederate cruiser, *Bates* v. *Hewitt*, L. R. 2 Q. B. 595. The Connecticut court held that an application for other insurance, believed to be unsuccessful, was not material and need not be disclosed, *Cutler* v. *Royal Ins. Co.*, 70 Conn. 566, 40 Atl. R. 529, 41 L. R. A. 159. The English court held that the fact of over-valuation of the property was material, *Ionides* v. *Pender*, L. R. 9 Q. B. 531; but non-disclosure of edict of Persian Government against importation of arms believed to be a dead letter was held not to avoid though confiscation followed, *Francis* v. *Sea Ins. Co.*, 79 L. T. (N. S.) 28, 8 Asp. 418. Unless he can prove fraud it is not enough for insurer to show that fact concealed would have influenced him. He must show that it would have influenced an ordinarily prudent underwriter, *Rivaz* v. *Gerussi* (1880), 6 Q. B. D. 222.

[2] Kerr, Fraud (1902), 89.

[3] *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 1 S. Ct. 582.

[4] *Lexington, etc., Ins. Co.* v. *Paver*, 16 Ohio, 324.

[5] *Tate* v. *Hyslop* (1885), 15 Q. B. D 368. The materiality of the non-

This extreme doctrine in the law of marine insurance, it may be observed, is in contrast with the rule applicable to the ordinary contract made at arm's length, by virtue of which a concealment or a misrepresentation of a material fact must be fraudulent to support an action for deceit.[1]

In the absence of inquiry by the underwriter, however, the following need not be disclosed: Any circumstances diminishing the risk;[2] any circumstance known or presumed to be known to the insurer, for instance, matters of common notoriety or knowledge,[3] and matters which in the ordinary course of business he ought to know.[4]

To render the agent's concealment fatal, he must be one who is so connected with the business at the time of closing the contract that his concealment can fairly be said to be the act of the principal, within the scope of the employment, and before the agency is terminated.[5]

The doctrine is that if an agent, whose duty it is to keep his employer informed of matters affecting the subject-matter insured, has withheld from his principal information of a material fact which he

disclosure to a fire insurance company of the provision in a lease depriving him of the right of subrogation, raises a question for the jury, *Pelzer Mfg. Co.* v. *St. Paul F. & M. Ins. Co.*, 41 Fed. 271; *Pelzer Mfg. Co.* v. *Sun Fire Office*, 36 S. C. 213, 15 S. E. 562. Where a policy is on chartered freight, if the charter contains a canceling clause, the fact must be disclosed, *Mercantile S. Co.* v. *Tyser* (1881), 7 Q. B. D. 73.

[1] *Laidlaw* v. *Organ*, 2 Wheat. (U. S.) 178, 4 L. Ed. 214 (a sale; intelligence need not be volunteered). Lord Blackburn said: "There can be no doubt that the plea is bad. There is no allegation of fraud, and short of that, the mere concealment of a material fact, except in cases of policies of insurance, does not avoid a contract," *Fletcher* v. *Krell*, 42 L. J. Q. B. 55; *North Brit. Ins. Co.* v. *Lloyd*, 10 Exch. 523; *Moens* v. *Heyworth*, 10 M. & W. 147 (a sale; *held*, that misrepresentation, to avoid, must be fraudulent). Even the contract of individual suretyship "is one in which there is no universal obligation to make disclosure," *Railton* v. *Matthews* (1844), 10 Cl. & F. 934.

[2] *Carter* v. *Boehm*, 3 Burr. 1909.

[3] *Buck* v. *Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151, 160, 7 L. Ed. 90; *Tennant* v. *Henderson* (1813), 1 Dow. 324. It is not necessary to disclose any fact of which information is waived by the insurer, *Asfar* v. *Blundell* (1895), 2 Q. B. D. 196, 202. Nor, according to English codification, any circumstance which it is superfluous to disclose because of any express or implied warranty, Mar. Ins. Act (1906), § 18; *Haywood* v. *Rodgers* (1804), 4 East, 590. Past knowledge, not present to the mind of the insurer at the time, will not excuse a concealment by the insured, *Bates* v. *Hewitt* (1867), L. R. 2 Q. B. 595.

[4] *Carter* v. *Boehm*, 3 Burr. 1909; *Ruggles* v. *General Int. Ins. Co.*, 4 Mason, 81; *Green* v. *Merchants' Ins. Co.*, 10 Pick. (Mass.) 402. But the insurer is not presumed to know the contents of Lloyd's Lists, *Morrison* v. *Universal Marine Ins. Co.*, L. R. 8 Exch. 40. As to general information published in newspapers, see *Folsom* v. *Mercantile Ins. Co.*, 9 Fed. Cas. 349, aff'd 18 Wall. 237, 21 L. Ed. 827; Green v. *Merchants' Ins. Co.*, 10 Pick. (Mass.) 402. If the knowledge of the insured is more complete than the underwriters' the former is bound to make disclosure, *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 1 S. Ct. 582.

[5] *Ruggles* v. *General Ins. Co.*, 12 Wheat. (U. S.) 408; *Blackburn* v. *Vigors*, L. R. 12 App. Cas. 531.

might in the ordinary course have communicated to the latter at the time when the insurance was effected, the contract can be avoided by the underwriter on account of the non-disclosure of this matter which, if the agent had done his duty, the principal would have been able to disclose.[1] The master of a ship and a general agent for shipping business are such agents of a ship-owner.[2] A factor employed to ship a cargo and the general agent of a cargo-owner at a foreign port are such agents of the cargo-owner.[3] But Lloyd's agents in foreign ports are not the agents of the individual underwriters, who consequently are not affected with their knowledge of casualties abroad.[4]

An agent effecting marine insurance must disclose every material circumstance known to him;[5] also every material circumstance which the assured is bound to disclose, unless it come to the knowledge of the principal too late to communicate it to the agent in the exercise of reasonable diligence.[6]

An English case, often cited, illustrates the necessity, laid upon the insured and upon his agents acting for him, of promptly and frankly posting the underwriters as to the situation, if it is reasonably practicable to do so, before taking out insurance. An agent of the insured, located at Smyrna, learned of the stranding of the vessel which contained the goods of his principal. Instead of telegraphing his principal the news of the casualty according to his custom, he advised him by slower course of mail in order to allow him opportunity to insure the goods. Before receipt of the letter, the principal took out a policy upon the goods "lost or not lost." The court held that it was avoided because of concealment by the agent, although no inkling of the loss had as yet reached the principal.[7]

[1] De Hart & Simey, Ins. (1907), 23; *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531.

[2] De Hart & Simey, Ins. (1907), 23; *Gladstone* v. *King* (1813), 1 M. & S. 35.

[3] De Hart & Simey, Ins. (1907), 23; *Fitzherbert* v. *Mather* (1785), 1 T. R. 12. It is not necessarily the duty of an insurance broker to communicate all his information to his employer. Therefore, if A employs a broker, B, to effect an insurance, but the insurance is afterwards effected independently by another broker, C, B's knowledge is not relevant to the validity of the policy, De Hart & Simey, Ins. (1907), 23.

[4] De Hart & Simey, Ins. (1907), 24; *Wilson* v. *Salamandra Ins. Co.* (1903), 8 Com. Cas. 129.

[5] *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144; *Blackburn* v. *Vigors*, 12 App. Cas. 531 (broker omitted to disclose that ship was being repaired).

[6] *Maclanahan* v. *Universal Ins. Co.*, 1 Pet. (U. S.) 170, 7 L. Ed. 98; *Snow* v. *Ins. Co.*, 61 N. Y. 164; *Andrews* v. *Ins. Co.*, 9 Johns. (N. Y.) 32; *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511.

[7] *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; criticising *Ruggles* v. *General Ins. Co.*, 12 Wheat. (U. S.) 408, in which the court sustained the policy, holding that the casualty terminated the agency, and hence ended the obligation to send report "Where the insurance is effected through a broker the underwriter is entitled to the knowledge not only of the principal, but also of that broker and his sub-

§ 96. **Concealment: Fire and Life.**—In regard to contracts of life and fire insurance it is generally laid down as the law in this country that the concealment of a material fact, when not made the subject of express inquiry by the insurers, must be intentional to avoid the policy; and this is partly on the ground that insurers have for a long time been in the habit of propounding questions upon all points except those in respect to which they are content to rely upon their own independent means of information, and partly because fire policies and often life policies make a multitude of particulars material by virtue of express warranties.[1]

By way of explanation for this distinction between the law of marine insurance and that of fire in this country, it is often stated that inasmuch as buildings and their contents are for the most part near at hand and accessible to examination, it is the fault of the underwriter if he does not make himself familiar with their character.[2]

agents. But he is not entitled to the knowledge of another broker, who, though originally instructed to effect an insurance, did not succeed in doing so. Nor is he entitled to the knowledge of the principal unless the latter received the information in sufficient time, before the conclusion of the contract, for the principal to have communicated it to the broker," De Hart & Simey, Ins. (1907), 26.

[1] *German American Mut. L. Assn.* v. *Farley*, 102 Ga. 720, 29 S. E. 615; *Washington Mills Mfg. Co.* v. *Weymouth Ins. Co.*, 135 Mass. 503; *Mallory* v. *Travellers Ins. Co.*, 47 N. Y. 52; *Hartford Protection Ins. Co.* v. *Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684. Concealment is said to be the designed withholding of any fact material to the risk, which the insured in honesty and good faith ought to communicate, *Clark* v. *Union Mut. Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721; *Daniels* v. *Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Mascott* v. *Nat. F. Ins. Co.*, 69 Vt. 116, 37 Atl. 255. But by most of the State Civil Codes it is provided that a concealment, whether intentional or unintentional, gives to the other party a right of rescission, Cal. Civ. Code (1906), § 2562; Montana Civ. Code (1895), § 3421; North Dak. Civ. Code (1905), § 5914; South Dak. Civ. Code (1903), § 1816. The same codes also provide, however, "an intentional and fraudulent omission to communicate information of matters proving or tending to prove the falsity of a warranty entitles the insurer to rescind."

[2] Thus the Ohio court says: "The reason of the rule, and the policy on which it was founded, in its application to marine risks, entirely fail when applied to fire policies. In the former the subject of insurance is generally beyond the reach, and not open to the inspection, of the underwriters, often in distant parts or upon the high seas, and the peculiar perils to which it may be exposed, too numerous to be anticipated or inquired about, known only to the owners and those in their employ; while in the latter it is, or may be, seen and inspected before the risk is assumed, and its construction, situation, and ordinary hazards as well appreciated by the underwriter as by the owner. In marine insurance the underwriter, from the very necessities of his undertaking, is obliged to rely upon the assured, and has therefore the right to exact a full disclosure of all the facts known to him which may in any way affect the risk to be assumed. But in fire insurance no such necessity for reliance exists, and, if the underwriter assumes the risk without taking the trouble to either examine or inquire, he cannot very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated. And so are the latest and best authorities," *Hartford Protection Ins. Co.* v. *Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684. The New York court concluded that the rule in fire is the same as that in marine

But to those versed in the practical methods of closing contracts of insurance as already detailed,[1] this plausible explanation is hardly satisfying, and the reasons given in the text are more accurate and forcible. In comparison with the facilities of the insured in acquainting himself with the character of his own stock of merchandise or other personal property, its value and amount, the title, chattel mortgages upon it, precautions in management, and other important particulars relating to it as a marketable risk, a doubt may well be entertained whether the underwriter, when issuing his binder upon it in usual course, holds a position relatively as advantageous as when asked to insure, upon its rating and official description, the average ship, though at the time harbored in a foreign port or out upon the high sea; and many a ship is insured at home, and many a distant building with its contents, located sometimes in a foreign land, is insured against fire.[2] Indeed for the underwriter, before issuing his binder, to insist upon making his own separate and independent examination into all the facts fairly bearing upon the risk of loss of personal property, would cost much more than the average premium, and would be regarded by the public as intolerably inconvenient. It is, therefore, clear that some measure of responsibility must remain with the insured to see to it, that, through faults of omission on his part, the fire or life insurance company is not misled into an erroneous estimate of the risk.

Indeed, in England the rule is made applicable to all kinds of insurance, that the non-disclosure of a material fact, whether intentional or unintentional, will avoid the contract.[3]

insurance, where the subject-matter is located at a distance, *Clarkson* v. *Western Ins. Co.*, 33 App. Div. 23, 53 N. Y. Supp. 508.

[1] See §§ 74–76, 94.

[2] Many western and southern railroads, warehouses, factories, and other properties, have been insured from New York City or Chicago, though now resident agency laws frequently intervene to localize the business.

[3] *London Ass. Co.* v. *Mansel*, L. R. 11 Ch. D. 363; *Moens* v. *Heyworth*, 10 M. & W. 155; *Carter* v. *Boehm*, 1 W. Bl. 593; s. c., Smith's Lead. Cas. Neither party is bound to volunteer information of matters which the other knows, or which in the exercise of ordinary care the other ought to know, and of which the former has no reason to suppose him ignorant, or those of which the other waives communication, *Armenia Ins. Co.* v. *Paul*, 91 Pa. St. 520, 36 Am. Rep. 676; *Harrower* v. *Hutchinson* (1870), L. R. 5 Q. B. 590; *Laing* v. *Union Ins. Co.* (1895), 11 Times L. R. 359. Each party is bound to know matters of general intelligence or of public notoriety, including general usages of trade which are open to his inquiry equally with that of the other, *Carter* v. *Boehm*, 3 Burr. 1905; *Bulkley* v. *Protection Ins. Co.*, 4 Fed. Cas. 614; *De Longuemere* v. *N. Y. Fire Ins. Co.*, 10 Johns. (N. Y.) 120. Matters of mere opinion or belief need not be stated and only good faith is required with respect to them. *Chalaron* v. *Ins. Co.*, 48 La. Ann. 1582, 21 So. 267, 36 L. R. A. 742; *Smith* v. *The Columbia Ins. Co.*, 17 Pa. St. 253, 55 Am. Dec. 546. But a fact which the insured ought to have known to be material, it is said, must be disclosed, *Dennison* v. *Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42.

The English rule doubtless is simpler and more easily applied, and, from the underwriter's point of view, is more logical, since, as already stated, a misdescription of the risk results equally from a non-disclosure, and an affirmative misrepresentation of a material fact.[1] The American rule, however, on the whole seems more reasonable. To the insured and to most courts, a clear distinction is obvious between making a positive misstatement, however innocent, regarding one's own property, and merely keeping silence as to some particular not already covered by the express stipulations of a carefully prepared and voluminous instrument, whether application or policy.[2]

But when it comes to the practical application of the American rule, as is often the case with legal doctrines founded upon fraud, we find that the definitions of the courts lack uniformity and precision. A New York court, adopting the phraseology of a text-writer, has defined concealment as the willful withholding of some fact material to the risk, which the insurer had a right to know, and which the insured was under a duty to disclose.[3] The Missouri court has met the question more squarely in holding, that to unfavorably affect his policy the insured must know the fact to be material, and must also intentionally neglect to communicate it. In common with many other courts it also holds that when a detailed application is used, fatal concealment cannot, without bad faith on the part of the insured, be predicated on an omission to volunteer facts concerning which no express inquiry is made.[4]

But perhaps the most satisfactory and workable version of the American rule is that approved by a Federal Circuit Court and by the Supreme Court of South Carolina. The former court sustained a submission to the jury of two questions: (1) was the fact which the plaintiff omitted to disclose material? (2) Was it known, or should it have been known, to him to be a material fact?[5] The

[1] Thus in a life insurance case, Mr. Justice Bayley said: "I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material." *Lindenau* v. *Desborough*, 8 Barn. & C. 586.

[2] *Daniels* v. *Hudson R. F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192 (silence as to matter the insured does not consider important is not fatal).

[3] *American Artistic Gold S. Co.* v. *Glens Falls Ins. Co.*, 1 Misc. 114, 118.

[4] *Boggs* v. *American Ins. Co.*, 30 Mo. 63.

[5] *Pelzer Mfg. Co.* v. *St. Paul F & M. Ins. Co.*, 41 Fed. 271.

other court by its Chief Justice sustained as correct a charge to the jury, that the insured, the same plaintiff with the same issue as in the last case, was bound not to withhold any fact which he knew, or had reason to believe, would be likely to influence the insurer in fixing rates or rejecting the insurance.[1] The Maine court has adopted the same view.[2] And a similar doctrine in West Virginia, in reference to defective answers in an application for life insurance, is indicated by the declaration of the court that, "legal fraud may exist when there is no intention to deceive." [3]

Where the insurer makes special inquiries, as by requiring the execution of an application, it may generally be assumed that the information asked for is all that is required.[4] Other incidental matters relating to the risk, or particulars about the title, or nature and extent of interest not asked for, need not be volunteered, unless believed to be material.[5] This, in practice, constitutes an important modification of the general rule requiring a full disclosure of all material facts, inasmuch as a written application is almost invariably made the basis of a life policy, and the fire policy by its own terms provides for certain disclosures;[6] but even then the applicant must evince good faith, and would be guilty of a wrongful concealment if he withheld intelligence which would clearly affect the judgment of the insurer; as, for example, that attempts had lately been made to set fire to his house.[7]

[1] *Pelzer Mfg. Co.* v. *Sun Fire Office*, 36 S. C. 213, 15 S. E. 562 (non-disclosure of provision in lease depriving insurer of right of subrogation).

[2] *Dennison* v. *Thomaston Mut. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42.

[3] *Schwarzback* v. *Ohio Val., etc., Union*, 25 W. Va. 655.

[4] *Clark* v. *Ins. Co.*, 8 How. (U. S.) 235, 240, 12 L. Ed. 1061; *Cross* v. *National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390; *Browning* v. *Home Ins. Co.*, 71 N. Y. 508; *Gates* v. *Madison, etc., Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360; *Pelzer Mfg. Co.* v. *Sun Fire Office*, 36 S. C. 213, 270, 15 S. E. 562; *Union Assur. Soc.* v. *Nalls*, 101 Va. 613, 44 S. E. 896, 99 Am. St. R. 923.

[5] *McClelland* v. *Greenwich Ins. Co.*, 107 La. 124, 31 So. 691; *Seal* v. *Farmers', etc., Ins. Co.*, 59 Neb. 253, 80 N. W. 807; *Graham* v. *American Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. R. 707; *Southern Ins. Co.* v. *Estes*, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. R. 892 (liens); *Wytheville Ins. Co.* v. *Stultz*, 87 Vir. 629, 13 S. E. 77; *Johnson* v. *Scottish Union & Nat. Ins. Co.*, 93 Wis. 223, 67 N. W. 416 (here based on statute); *Roloff* v. *Farmers' Home Mut. Ins. Co.* (Wis., Jan., 1907), 110 N. W. 261 (contents of disclosed lease); but this rule offers no excuse for a violation of the express conditions of the policy. Cases to the contrary like *Dooly* v. *Hanover F. Ins. Co.*, 16 Wash. 159, 47 Pac. 508, 58 Am. St. R. 29, cannot be considered sound.

[6] *Parsons* v. *Lane*, 97 Minn. 98, 106 N. W. 485. Thus the standard fire policy calls for special permit if there be a chattel mortgage, but real estate mortgage need not be disclosed unless inquiry be made, *Van Kirk* v. *Citizens' Ins. Co.*, 79 Wis. 627; *American Artistic Gold S. Co.* v. *Glens Falls Ins. Co.*, 1 Misc. (N. Y.) 114.

[7] *Bebee* v. *Hartford Co. Mut. Fire Ins. Co.*, 25 Conn. 51, 65 Am. Dec. 553; *Walden* v. *Ins. Co.*, 12 La. 134, 32 Am. Dec. 116; *Curry* v. *Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *North Am. Ins. Co.* v. *Throop*, 22 Mich. 146;

In failing to fill out a statement in the application as to the amount of incumbrances on the property, the court held that the applicant was not guilty of a fatal concealment of a material fact, since the company had notice that the question was not answered.[1] If the company accepts an application on the face of which it appears that there is a failure to answer a question, or in which the answers are imperfect or incomplete and not necessarily false, in the absence of bad faith the company cannot claim forfeiture on the ground of concealment.[2]

In fire insurance, questions of concealment and misrepresentation are now governed by the express warranty on that subject contained in the policy.

§ 97. **Representations.**—A representation is an oral or written statement of facts or circumstances made at the time of or before the closing of the contract and relating to the proposed adventure, upon the faith of which the agreement is made.[3] The circumstances represented may be matter of fact or of expectation or belief. The term "representations" as here employed does not refer to statements which are incorporated into the contract and expressly made warranties, but rather to collateral matter of inducement.[4] It is a general rule in the law of insurance, that a material misrepresentation

Campbell v. *Victoria Mut. Ins. Co.*, 45 U. C. (Q. B.) 412. *Contra, German Am. Ins. Co.* v. *Norris*, 100 Ky. 29, 37 S. W. 267, 66 Am. St. R. 324. Must disclose that at time of application a fire was raging near the property, *Orient Ins. Co.* v. *Peiser*, 91 Ill. App. 278; or that the applicant for life insurance was about to fight a duel, *Penn. Mut. Life Ins. Co.* v. *Mech. S. Bank & Trust Co.*, 72 Fed. 413, 435, 19 C. C. A. 286, 38 L. R. A. 33; but held that married woman need not disclose pregnancy, *Merriman* v. *Grand Lodge* (Neb.), 110 N. W. 302, 36 Ins. L. J. 340. Ignorance on the part of the agent of the insurer that the insured was a woman does not show fatal concealment, *Mechanics' & Traders' Ins. Co.* v. *Floyd*, 20 Ky. Law Rep. 1538, 49 S. W. 543. Antecedent threats of incendiarism from parties, since dead, need not be disclosed, Arkansas Mut. F. Ins. Co. (Ark. 1907), 36 Ins. L. J. 607.

[1] *Parker* v. *Otsego Co. F. Ins. Co.*, 47 App. Div. 204, 62 N. Y. Supp. 199, aff'd 168 N. Y. 655, 61 N. E. 1132.

[2] *Phœnix Mut. Life Ins. Co.* v. *Raddin*, 120 U. S. 183, 7 S. Ct. 500, 30 L. Ed. 644; *Conn. Mut. Life Ins. Co.* v. *Luchs*, 108 U. S. 498, 2 S. Ct. 949, 27 L. Ed. 800. It is held generally in this country that concealment cannot be predicated on an omission to answer a question propounded by the insurer in the application, *Tiefenthal* v. *Citizens' Mut. F. Ins. Co.*, 53 Mich. 306, 19 N. W. 9; *Carson* v. *Jersey City F. Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *Armenia Ins. Co.* v. *Paul*, 91 Pa. 520, 36 Am. Rep. 676; or on a partial disclosure, if on its face partial, *Phœnix Ins. Co.* v. *Stocks*, 149 Ill. 319, 36 N. E. 408; *Miotke* v. *Mil. Mech. Ins. Co.*, 113 Mich. 166, 71 N. W. 463.

[3] *Clark* v. *Ins. Co.*, 8 How. (U. S.) 235, 12 L. Ed. 1061.

[4] *Campbell* v. *Ins. Co.*, 98 Mass. 381. For example the life policy usually makes the application a part of the contract and its statements or answers warranties. These again by statute in many states are made analogous to mere representations, see Appendix, ch. 1.

of fact by either party or his authorized agent, whether innocent and unintentional, or willful and fraudulent, renders the policy voidable at the option of the other party,[1] provided the misrepresentation is not too remotely connected in time with the transaction.[2] For example, an incorrect statement that no lamps were used in the picker room of a cotton factory insured was held to avoid a policy which was issued upon the faith of this representation.[3]

It is important to observe that, unlike warranties, mere representations of fact need be only substantially correct.[4]

Thus a broker, in offering a risk to the underwriter, showed the latter his written instructions, which comprised a statement respecting the vessel, that "she mounts twelve guns and twenty men:" in point of fact, the vessel had not this precise force on board; but she had an armament of guns and swivels, with a crew of men and boys, which in both particulars was equivalent to, though not identical with, the force specified. It was held that the statement made to the underwriter, being a representation, was satisfied by the substantial fulfillment, though had it been a warranty nothing less than a strict and literal fulfillment would have sufficed.[5]

A policy on ship and goods from Nassau to the Clyde was effected on the 18th of June, 1814. The broker showed the underwriters a letter, dated April 2, in which it was stated, the *Brilliant*, the ship insured, "will sail on the 1st of May." In fact, the ship had sailed on the 20th of April, and on the 11th of May had been captured by an American privateer. These facts were wholly unknown to the parties by whom the representation was made, yet it was held that the policy was avoided for misrepresentation.[6]

[1] *Armour* v. *Transatlantic F. Ins. Co.*, 90 N. Y. 450; *Blackburn* v. *Vigors*, L. R. 17 Q. B. Div. 553, 561, 12 App. Cas. 539. Must be both material and untrue to avoid, if not made a warranty, *Fidelity & C. Co.* v. *Alpert*, 67 Fed. 460, 14 C. C. A. 474, 28 U. S. App. 393. "Fraud need not be pleaded to make the complaint non-demurrable, for there is in every contract of insurance, in the absence of an express provision on that head, an implied condition of the truth of all material representations of the insured on the faith of which the contract is made," *Evans* v. *Columbia Fire Ins. Co.*, 40 Misc. 316, 321, 81 N. Y. Supp. 933. If not material the untruth is quite unimportant, *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, 504; *Vivar* v. *Supreme Lodge*, 52 N. J. L. 455, 20 Atl. 36. In practice it is usually the insurance company that seeks to have the policy adjudged void for misrepresentation.

[2] *Barnett* v. *Barnett*, 83 Va. 504, 2 S. E. 733.

[3] *Clark* v. *Ins. Co.*, 8 How. (U. S.) 235, 12 L. Ed. 1061.

[4] *Jeffrey* v. *United Order*, 97 Me. 176, 53 Atl. 1102 (statements in an application which were not made warranties); *Ætna Ins. Co.* v. *Simmons*, 49 Neb. 811, 69 N. W. 125 (warranty must be literally true, representation only substantially so); *Suckley* v. *Delafield*, 2 Caines (N. Y.), 222; *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Continental Ins. Co.* v. *Kasey*, 25 Gratt. (Va.) 268, 18 Am. Rep. 681.

[5] *Pawson* v. *Watson*, Cowp. 785.

[6] *Dennistoun* v. *Lillie*, 3 Bligh. P. C.

And where a representation was made some time before the ship sailed, to the effect that she was to sail with convoy and a certain armament, Lord Ellenborough held, that, as it had not been substantially complied with, it avoided the policy, though made without moral fraud.[1]

In a New York case the insured innocently represented that he had two hundred thousand dollars of other fire insurance upon his property, whereas, in reality, his other insurance amounted to only thirty thousand dollars: the court was of opinion that this overestimate was material as matter of law, and that, though unintentional, it would avoid the contract.[2] And where an applicant erroneously stated that no other company had refused to grant him life insurance it was held to be a material misrepresentation, and good ground for decreeing a cancellation of the policy.[3]

202. But it is also declared that the date of sailing will not always be regarded as material to the risk, *McLanahan* v. *Universal Ins. Co.*, 1 Pet. (U. S.) 188, 7 L. Ed. 98; *Kerr* v. *Union Mar. Ins. Co.*, 130 Fed. 415, 417, 64 C. C. A. 617.

[1] *Edwards* v. *Footner*, 1 Camp. 530. So in case of an insurance on goods, where the words "to return five per cent for convoy and arrival" were inserted in the policy, Lord Eldon was of opinion that these words clearly amounted to a representation that it was probable the vessel would sail with convoy; and as it appeared that the assured knew, when the policy was effected, that the ship had actually sailed without convoy, the contract was avoided, *Reid* v. *Harvey*, 4 Dow. 97.

[2] *Armour* v. *Transatlantic Fire Ins. Co.*, 90 N. Y. 450. In the last case attention was also called to the fact that the rule as to misrepresentations and concealments is more strict in marine than in fire insurance. An applicant named the payee as his wife when he knew that she was not his lawful wife; *held*, that there was no material misrepresentation, *Vivar* v. *Supreme Lodge*, 52 N. J. L. 455 (compare 95 App. Div. (N. Y.) 241). But where the agent of the assured represented that the property was owned by a successful business man when in fact it was owned by a married woman who exercised no supervision, the court held that there could be no recovery, *Freedman* v. *Fire Assn. of Phila.*, 168 Pa. St. 249, 32 Atl. 39.

[3] *Am. Union Life Ins. Co.* v. *Judge*, 191 Pa. St. 484, 43 Atl. Rep. 374. Any promissory representation made during negotiations is merged in the contract and cannot be shown to vary the contract, but if such representation is made as an inducement with fraudulent intent it has been said that it may be shown in an action to rescind, *Prudential Assur. Co.* v. *Ætna Life Ins. Co.*, 23 Fed. 438 (promise not to reinsure); *Prudential Assur. Co.* v. *Ætna L. Ins. Co.*, 52 Conn. 576; *Alston* v. *Mechanics' Mut. Ins. Co.*, 4 Hill (N. Y.), 329 (promise to discontinue fire place); *Kimball* v. *Ætna Ins. Co.*, 9 Allen (Mass.), 540, 85 Am. Dec. 786 (promise that house should in future be occupied); *Knecht* v. *Mut. Life Ins. Co.*, 90 Pa. St. 118, 35 Am. Rep. 641; and see *N. J. Rubber Co.* v. *Commercial Union Assur. Co.*, 64 N. J. L. 580, 46 Atl. 777. This distinction, however, is questionable since in effect it seems to permit the addition by parol of a new condition or warranty to the contract, *Mayor* v. *Brooklyn Fire Ins. Co.*, 4 Keyes (N. Y.), 465, 466 ("It is a well settled rule, that a verbal representation to vitiate a contract of insurance must relate to some past or existing fact material to the risk, and that a representation in the nature of a promise or stipulation for future conduct must be inserted in the policy, or the underwriters cannot avail themselves of it); *Alston* v. *Mechanics' Ins. Co.*, 4 Hill (N. Y.), 329, criticizing *Dennistoun* v. *Lillie*, 3 Bligh. 202, and citing many authorities; *Merchants', etc., Ins. Co.* v. *Washington, etc., Ins.*

§ 98. Mere Opinion or Belief not Generally Fatal.—Misrepresentations of fact must be distinguished from erroneous expressions of opinion, expectation or belief, or exaggerated estimates of value. These usually are not fatal, whether correct or incorrect, unless made in bad faith.[1]

Thus where a broker, in proposing an insurance upon certain vessels engaged in the African trade, stated that they were expected to leave the coast of Africa in November or December, when in fact they had all left in May, it was held that this statement having been made without intent to deceive, though material to the risk, was a mere expression of opinion, and that the contract was not void.[2]

§ 99. Test of Materiality.—A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will assume the risk.[3] Accord-

Co., 1 Handy (Ohio), 408. A verbal promise that no other fire shall be used cannot be shown, *Schmidt* v. *Peoria M. & F. Ins. Co.*, 41 Ill. 295. The United States Supreme Court says: "The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made," *Ins. Co.* v. *Mowry*, 96 U. S. 544, 547, 24 L. Ed. 674. See *Poste* v. *American Union Life Ins. Co.*, 32 App. Div. 189, 191, aff'd 165 N. Y. 631. And Judge Caldwell says: "While the representations that will create an estoppel generally have relation to a present or past state of things the rule is not inflexible," *American Surety Co.* v. *Ballman*, 115 Fed. 292, 293 (certiorari denied in 187 U. S. 646, 23 S. Ct. 846); and see *Dickerson* v. *Colgrove*, 100 U. S. 578, 25 L. Ed. 618 (representations as to intentions).

[1] *Nat. Bank* v. *Ins. Co.*, 95 U. S. 673; *Wheelton* v. *Hardisty*, 8 El. & Bl. 232.

[2] *Barber* v. *Fletcher*, 1 Doug. 306. So as to erroneous representation by broker that ship then at Lisbon was to sail in a few days. *Held*, to be mere expression of expectation, *Bowden* v. *Vaughan*, 10 East, 415. So also opinion as to good health, *Barnes* v. *Asso.*, 191 Pa. St. 618, 43 Atl. 341, 45 L. R. A. 264; as to physical condition, *Royal Neighbors* v. *Wallace* (Neb., 1904), 99 N. W. 256; as to serious illness, *Supreme Ruling, etc.*, v. *Crawford* (Tex. Civ. App., 1903), 75 N. W. 844; as to cause of death of relatives, *Supreme Lodge* v. *Dickson*, 102 Tenn. 255, 52 S. W. 862; as to values, *Phœnix Ins. Co.* v. *Pickel*, 119 Ind. 155, 21 N. E. 546, 119 Ind. 291, 21 N. E. 898; as to age of building, *Phœnix Ins. Co.* v. *Wilson*, 132 Ind. 449, 25 N. E. 592; as to whether any material facts are omitted in application, *Louis* v. *Conn. Mut. L. Ins. Co.*, 58 App. Div. 137, 68 N. Y. Supp. 683, aff'd 172 N. Y. 659, 65 N. E. 1119.

[3] *Mattson* v. *Modern Samaritans*, 91 Minn. 434, 98 N. W. 330; *Clark* v. *Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721. Experts are not allowed to testify as to whether a representation is material to the risk and the issue is ordinarily for the jury, *Penn Mut. Life Ins. Co.* v. *Mechanics', etc., Co.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Clark* v. *Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721. Burden is on insurer to allege and prove defence of material misrepresentation or concealment, *Price* v. *Phœnix M. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166; *McCarty* v. *Imperial Ins. Co.*, 126 N. C. 820, 36 S. E. 284; *Metropolitan Life Ins. Co.* v. *Howle*, 62 Ohio St. 204, 56 N. E. 908.

ingly it will be observed that the materiality of a concealment or representation of fact depends, not on the ultimate influence of the fact upon the risk or its relation to the cause of loss, but on the immediate influence upon the party to whom the communication is made, or is due, in forming his judgment at the time of effecting the contract. The party thus sought to be influenced is generally the insurance company. Though the loss should arise from causes totally unconnected with the material fact concealed or misrepresented, the policy is void, because a true disclosure of the fact might have led the company to decline the insurance altogether, or to accept it only at a higher premium.[1]

§ 100. Refers to What Time.—The closing of the contract is the time to which a misrepresentation or concealment must be presumed to refer, and any material facts coming to the knowledge of either party pending the negotiations must be communicated, even after written proposals have been submitted.[2]

This rule may be illustrated by an English case, in which an insurance office, in the course of its negotiations for a policy of reinsurance from the defendant, made representations that it was itself retaining a substantial net liability over and above the total amount of its reinsurance. Subsequently, however, the plaintiff, the original insurer, by taking out further reinsurance from another underwriter, fully covered its liability under the policy issued by it to the owner, leaving to itself no real share or net interest in the risk. In other words, it had become fully reinsured. Although the plaintiff's representation was true when made, and although through inadvertence it had omitted to correct it, nevertheless the court held that the policy of reinsurance issued by the defendant was avoided.[3]

If the contract has been closed by a written or oral binding, as, for example, by the usual binding slip, that date controls, and not a subsequent date when the policy may chance to be signed or delivered.[4]

[1] *Daniels* v. *Hudson R. F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

[2] *Snow* v. *Merchants' Mar. Ins. Co.*, 61 N. Y. 160; *Baldwin* v. *Chouteau Ins. Co.*, 56 Mo. 151, 17 Am. Dec. 671. Thus if a representation be true when made by the assured yet by some change intervening between that time and the time of closing the contract it then becomes untrue, it will void the contract if the change be material and to the prejudice of the insurers, *Kerr* v. *Union Mar. Ins. Co.*, 130 Fed. 415

[3] *Traill* v. *Baring*, 4 D. J. & S. 318.

[4] *Ionides* v. *Pacific Ins. Co.*, L. R. 6 Q. B. 685; *Commercial Mut. Mar. Ins. Co.* v. *Union Mut. Ins. Co.*, 19 How. (U. S.) 318; *Cory* v. *Patton*, L. R. 9 Q. B. 577 (1874); *Whitaker* v. *Farmers' Union Mut. Ins. Co.*, 29 Barb. 312.

Until the completion of the contract, representations may be withdrawn or qualified, but not afterwards, without consent.[1]

§ 101. Materiality and Substantial Truth: Questions of Fact.—Whether a representation be material or not, and whether substantially true or not, are questions of fact, and ordinarily are to be determined by the jury;[2] but when the testimony in its entirety, relating to a question of fact, is such that to a reasonable mind only one inference is deducible from it, the issue becomes one of law, and is to be determined by the court.[3]

But compare *Merchants' Mut. Ins. Co.* v. *Lyman*, 15 Wall. (U. S.) 664, 21 L. Ed. 246, in which there seems to be a *dictum* to the effect that in any action upon the policy its date or the date of its execution will prevail for this purpose. If such was intended to be the doctrine of that case it is at variance with the current of authority, and see *Gordon* v. *United States Casualty Co.* (Tenn. Ch. A., 1900), 54 S. W. 98.

[1] *Freeland* v. *Glover*, 7 East, 462.

[2] *Carrollton Furniture Co.* v. *Am. Credit, etc., Co.*, 124 Fed. 25, 59 C. C. A. 545; *Miss., Kan. & Tex. Tr. Co.* v. *German Nat. Bk.*, 77 Fed. 117, 23 C. C. A. 65; *Brooks* v. *Erie Fire Ins. Co.*, 76 App. Div. 275, 278, 78 N. Y. Supp. 748, aff'd 177 N. Y. 572 (facts as to title); *Dulaney* v. *Fidelity & Cas. Co.* (Md.), 66 Atl. 614; *Stribley* v. *Imperial Mar. Ins. Co.* (1876), 1 Q. B. D. 507. It is said that expert evidence is now in practice regularly admitted to show whether a particular circumstance is material or not, De Hart & Simey, Ins. (1907), 25. Facts which have only to do with an excepted risk clearly are not material.

[3] See § 93 *supra;* also cases cited in latter part of § 97.

CHAPTER V

General Principles—Continued

Warranties

§ 102. Warranties: Introductory.—The investigation which we have already made into the nature of insurance has demonstrated that a very large number of circumstances, within the knowledge or control of the insured, may have some possible bearing upon the risk to be run by the insurer. By virtue of the general rule laid down in the last chapter, it appeared that the insured is theoretically under obligations at all times to act in perfect good faith towards his insurers. But opinions of what constitutes good faith differ widely. By virtue of other rules, discussed in the same chapter, we learned also that, in legal theory, facts material to the risk must be disclosed with substantial accuracy before the contract is closed. But the determination of issues relating to materiality and substantial truth is not only inherently a matter of considerable difficulty, but in practice turns upon the chance notions of juries. It is obvious, therefore, that, from the application of such general principles of law, the underwriter can obtain no very definite criterion by which to form a scientific estimate of the extent of the hazard in a particular instance. Moreover, one party insured must incur and is willing to pay for an exceptional hazard. The necessities of other parties insured may be altogether different; and yet it is of the utmost importance that a uniform and conventional contract, the meaning of which may be settled by the courts and the general tenor of which may become familiar to the public, shall be employed as the basis for many instances.

Thus it happens that a large number of matters, which in the judgment of expert underwriters are apt to have an influence upon the risk or upon the adjustment of a loss, and which are often involved in the course of an orderly and reasonable fulfillment of the main engagement of the underwriter, must become part and parcel of the contract itself, and must fall into the shape of detailed and

definite stipulations on the part of the insured, incorporated either expressly or impliedly into the usual policy of insurance.

Such provisions, whether few or numerous, have been selected out of the mass, and in terms intended to be definite have been inserted in the contract so that the parties may understand that they are to be performed, not substantially, as in the case of other pertinent matters, but literally. They are called warranties; and, with recognition that the purpose of incorporating them into the contract, either expressly or by implication of law, is to render definite, what otherwise would be uncertain, the law prescribes that they must be, not substantially, but precisely met and satisfied.[1]

This construction of the warranty in insurance law, regarded as fair to the underwriter, was also deemed promotive of the general good, since many of the usual stipulations of the policy embody precautionary measures calculated to diminish the number and severity of the casualties insured against, and strongly tend in the direction of preventing dishonest claims and fraudulent fires and shipwrecks. Many classes of contracts have little bearing upon the public welfare. Take, for example, the familiar instance of a building contract. Like the contract of insurance, it is apt to contain many particulars and some of them relating to minute details. Unlike the case of insurance, however, substantial performance by the builder will save him from a forfeiture of his contract rights.[2] And doubtless one reason for the liberality of the rule in favor of the builder is found in the fact that the public has little interest in the result of his engagement. But not so at all in the case of insurance upon property. Indeed, a conflagration is likely to be a menace to the safety of the whole community, and for every loss to building or to ship insured, whether it be an honest or a dishonest loss, the insured public must make payment in premiums. Every dishonest loss, therefore, is a wrong not only to the insurer but also to the public at large. Perhaps no doctrine in the law of insurance is more important than that of warranties. In connection with the marine policy, at an early date, the principle of construction became well established that the insurer is discharged from liability as from the time of default if it appear that the insured has failed in an exact fulfillment of any condition, whether in the form of statement

[1] *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231; *Capital Fire Ins. Co.* v. *King* (Ark., 1907), 102 S. W. 194; *Gaines* v. *Fidelity & Cas. Co.*, 188 N. Y. 411, 81 N. E. 169; *Berwind* v. *Greenwich Ins. Co.*, 114 N. Y. 231, 21 N. E. 15 (implied warranty of seaworthiness).

[2] *Flaherty* v. *Miner*, 123 N. Y. 382

or stipulation, warranted by the contract.[1] But liability already incurred by the marine underwriter remains undisturbed notwithstanding a subsequent breach of contract,[2] and this rule is the same in other branches of insurance, except as the insurer is exonerated from liability for prior loss by the express terms of the policy.

§ 103. **Definition of Warranty.**—Warranties are either express or implied.[3] An express warranty is a stipulation [4] inserted in writing on the face of the contract by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.[5] Almost all the provisions and conditions of all classes of insurance policies, implying obligation or action on the part of the insured, are construed to be warranties, except in those states where by statute they have been converted into mere representations or into engagements less stringent than warranties.[6]

Warranties are sometimes classified as affirmative and promissory, the affirmative relating to a situation or state of facts prior to, or

[1] Lord Eldon says: "It is a first principle in the law of insurance, that, if there is a warranty, it is a part of the contract that the matter is such as it is represented to be. The materiality or immateriality signifies nothing," *Newcastle F. Ins. Co.* v. *Macmorran*, 3 Dow Parl. Cas. 255; Lord Mansfield, "A warranty must be strictly performed, nothing tantamount will do," *Pawson* v. *Watson*, Cowp. 785; Mr. Justice Buller, "It is a matter of indifference whether the thing warranted be material or not, but it must be literally complied with," *Blackhurst* v. *Cockell*, 3 Term R. 360; Mr. Justice Ashhurst, "The very meaning of a warranty is to preclude all questions whether it has been substantially complied with, it must be literally," *De Hahn* v. *Hartley*, 1 Term R. 343, 2 Term R. 186. See many instances of warranties, Phillips, Ins., §§ 754, 865.

[2] Eng. Mar. Ins. Act (1906), § 33; *Baines* v. *Holland* (1855), 10 Exch. 802; Phill. Ins. § 771.

[3] As to implied warranties see ch. IX, *infra*.

[4] *Barnard* v. *Faber* (1893), 1 Q. B. 340 ("warranted same rate, terms, and identical interest" as other companies named).

[5] Eng. Mar. Ins. Act (1906), § 33; *Ripley* v. *Ætna Ins. Co.*, 30 N. Y. 136, 157, 86 Am. Dec. 362.

[6] See Appendix, ch. 1. Many of these warranties might more accurately be described as mere exceptions from liability, *Conner* v. *Manchester Assur. Co.*, 130 Fed. 743; *McCargo* v. *New Orleans Ins. Co.*, 10 Rob. (La.) 202, 43 Am. Dec. 180, *e. g.*, warranted "free from capture;" others as conditions precedent to right of recovery, *Ellinger* v. *Mut. Life Ins. Co.* (1905), 1 K. B. 31. Indeed the use of the term "warranty," as applied to a policy, is peculiar, since in other branches of the law the term signifies a collateral engagement, breach of which does not avoid the contract, but gives right to damages. A warranty may relate to past, present or future, one or all, for example, past or present occupancy of premises, *O'Niel* v. *Buffalo Fire Ins. Co.*, 3 N. Y. 122; keeping books in iron safe in future, *Virginia F. & M. Ins. Co.* v. *Morgan*, 90 Va. 290, 18 S. E. 191; keeping watchman in past and agreeing to do so for the future, *Blumer* v. *Phœnix Ins. Co.*, 45 Wis. 622. A warranty, if relating to past or present, is sometimes called affirmative, if relating to future, promissory, *King* v. *Tioga etc., Relief Assoc.*, 35 App. Div. 58, 60, 54 N. Y. Supp. 1057.

contemporaneous with, the inception of the insurance, and promissory relating to something to be done or omitted during the pendency of the contract;[1] but it must be carefully noted that both classes are stipulations, and that neither class are merely representations, unless made so by statute. By the recent codification of marine insurance law in England, both of these kinds of warranties are classified as promissory.[2]

The implied warranty of seaworthiness is affirmative. The implied warranty that there shall be no deviation from the usual course of a voyage is promissory. In the New York standard fire policy the express warranties regarding concealment and misrepresentation, the statement of the interest of the insured in the property, and the character of his ownership, are affirmative. The express warranties regarding increase of hazard, employment of mechanics, change of interest title or possession, vacancy or unoccupancy, proceedings after loss, and others, are promissory. The express warranties regarding fraud and false swearing, other insurance, and chattel mortgages, are both affirmative and promissory.

§ 104. **No Special Form Necessary.**—To constitute a warranty no particular form of words is necessary. Neither the presence nor the absence of the word "warranted" is at all conclusive.[3]

Thus it is worthy of notice in this connection that the word "warranted" nowhere appears in the New York standard fire policy, and the word "warranty," only once, and then with reference to an exceptional contingency; and that as employed in some clauses of the marine policy, the term "warranted" simply indicates an exception or limitation to the underwriter's liability. As explained hereafter under the topic "marine insurance," a clause "warranted free of average," that is, free of partial loss, is of this character. It means, not that the insurance will be vitiated by the occurrence of a partial loss, but that the responsibility of the underwriter to make payment is, under such a policy, created solely by a total

[1] May, Ins. § 157.

[2] Eng. Mar. Ins. Act (1906), § 33.

[3] *Ames* v. *Manhattan Life Ins. Co.*, 40 App. Div. 465, 58 N. Y. Supp. 244, aff'd 167 N. Y. 584; *Redman* v. *Hartford Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751. Such a word simply dispels ambiguity, *Wood* v. *Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92. The probable intent of the parties governs, *Virginia F. & M. Ins. Co.* v. *Morgan*, 90 Va. 290, 18 S. E. 191; *Bentsen* v. *Taylor* (1893), 2 Q. B. 281; *Behn* v. *Burness* (1863), 32 L. J. Q. B. 204, 205. An express warranty does not exclude an implied warranty, unless inconsistent therewith, *Sleigh* v. *Tyser* (1900), 2 Q. B. 333 (unseaworthy though approved by Lloyd's surveyors as provided).

loss, which may or may not follow a partial loss. So also a clause, "warranted free of capture," simply refers to an excepted peril, loss by which is not assumed by the underwriter, but remains with the insured. The same is true of what are sometimes called the memorandum clauses of the standard fire policy, enumerating certain articles and certain perils which are not covered, or are not covered unless liability therefor is specifically assumed in the policy.

Fire, life, and accident policies are for the most part explicit in describing what provisions go to the validity of the contract, and the courts are slow to construe as warranties any others than those so defined,[1] but in marine insurance any statement of fact or stipulation, appearing upon the face of the policy, or expressly incorporated into it by reference, and relating to a description of the subject insured or to the risk, will in general be regarded as a warranty by the insured whether called a warranty or condition, or not.[2]

§ 105. Warranty Must be Part of Contract.—While a representation, technically speaking, is a mere preliminary or collateral inducement,[3] to be a warranty, the statement or stipulation must form part of the contract itself.[4] Therefore when the contract is in writing an express warranty also must be in writing,[5] and contained either in the policy itself or in some paper which is not simply referred to, but made a part of, or incorporated into, the contract.[6] The

[1] *Daniels* v. *Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Ellinger* v. *Mut. Life Ins. Co.* (1905), 1 K. B. 31, 35. New York court questioned whether extreme rule of marine insurance should be applied to fire, *Farmers' Ins. L. Co.* v. *Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118.

[2] *Thomson* v. *Weems*, 9 App. Cas. 671, 684; Eng. Mar. Ins. Act (1906), § 35. Descriptive phrases used to describe the risk are construed as warranties, especially in marine insurance. Thus the "good American ship called the *Rodman*" is a warranty of nationality, *Barker* v. *Phœnix Ins. Co.*, 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; so also "the Swedish brig *Sophia*," *Lewis* v. *Thatcher*, 15 Mass. 431. Some courts have applied same rule to fire insurance, *Wood* v. *Hartford Fire Ins. Co.*, 13 Conn. 533; *Wall* v. *East River Mut. Ins. Co.*, 7 N. Y. 370 (holding the rule to be the same in fire as in marine); location is warranted, *Eddy, etc., Foundry* v. *Hampden, etc., Ins. Co.*, 8 Fed. Cas. 300; so also occupation, *Alexander* v. *Germania Fire Ins. Co.*, 66 N. Y. 464 ("occupied as dwelling"); *Baker* v. *German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041 ("occupied as hotel"); but not so with descriptive phrases if employed only to identify the subject, *Burleigh* v. *Gebhard F. Ins. Co.*, 90 N. Y. 220, 224. Thus where goods insured were shipped in vessel "called the American ship *President*," *held*, no warranty of nationality, *Le Mesurier* v. *Vaughan*, 6 East, 382. Insuring ship by an English name is no warranty that she is English, *Clapham* v. *Cologan*, 3 Camp. 382.

[3] *Glendale Woolen Co.* v. *Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.

[4] *Daniels* v. *Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

[5] Oral representations are not warranties, *Wytheville Ins. Co.* v. *Stultz*, 87 Va. 629, 13 S. E. 77.

[6] *First Nat. Bank* v. *Ins. Co.*, 50 N. Y. 45; *Goddard* v. *East Texas F. Ins. Co.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1; *Bean* v. *Stupart* (1778), 1 Dougl. 11.

importance of calling attention to this distinction will be more apparent when it is borne in mind that many written applications are made part of the contract and many are not.[1]

§ 106. What Reference Sufficient to Incorporate as Warranty.—A statement in an extraneous paper merely referred to in the policy is not a warranty;[2] but if the policy, and such is usually the case with the life policy, makes the application a part of the contract, and the basis of the undertaking, then the statements of fact or stipulations therein contained, whether relating to the past, present, or future, become warranties.[3]

[1] Especially in cities the brief written application for fire insurance usually is not made part of the contract. Applications for life insurance almost always are incorporated into the contract. A warranty may be inserted on the margin of the policy, or across the lines, *Wood* v. *Hartford Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *McLaughlin* v. *Atlantic Mut. Ins. Co.*, 57 Me. 170 (as to leakage and shifting of cargo); *Patch* v. *Phœnix Ins. Co.*, 44 Vt. 481 (as to payment of premium notes); or on a slip attached to the policy, *Home Ins. Co.* v. *Cary*, 10 Tex. Civ. App. 300, 31 S. W. 321; or on a separate paper expressly referred to in policy, and made part thereof, *Wood* v. *Hartford Fire Ins. Co.*, 13 Conn. 533, 545, 35 Am. Dec. 92. An indorsement upon the back, however, is not sufficient, unless it is expressly made a part of the contract, *Murdock* v. *Chenango Co. Mut. Ins. Co.*, 2 Comst. (N. Y.) 210. The words "see back" will not avail to incorporate the indorsement, *The Majestic*, 166 U. S. 375, 17 S. Ct. 597. As to meaning of "indorsed," see *Reynolds* v. *Atlas, etc., Ins. Co.*, 69 Minn. 93, 71 N. W. 831 (application was attached to the policy with mucilage).

[2] *Houghton* v. *Mfrs. Mut.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

[3] *Kelly* v. *Life Ins. C. Co.*, 113 Ala. 453, 21 So. 361 (warranted no previous application for other insurance); *Kraus* v. *Modern Woodmen* (Ia.), 110 N. W. 452, 36 Ins. L. J. 323 (statement as to age); *Fitch* v. *Amer. Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372. Thus the words, "Reference is had to survey No. 83 on file," etc., were held to incorporate contents of survey as representations and not warranties, *Sheldon* v. *Hartford F. Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420. Similarly in *Farmers' Ins. & L. Co.* v. *Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118; *Lebanon Mut. Ins. Co.* v. *Losch*, 109 Pa. St. 100; but held warranties where application was made "part of the contract," *Cushman* v. *U. S. Life Ins. Co.*, 63 N. Y. 404; *Chaffee* v. *Cattaraugus, etc., Ins. Co.*, 18 N. Y. 376; *Carson* v. *Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584 (*contra*, *Supreme Council* v. *Brashears*, 89 Md. 624, 73 Am. St. R. 244); or the "basis of the contract," *Bobbitt* v. *L. & L. & G. Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484; or "basis and a part of the contract," *Ellinger* v. *Mut. Life Ins. Co.* (1905), 1 K. B. 31; but where policy describes the answers as representations they will be so construed though application describes them as warranties, *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447; compare *Fell* v. *John Hancock Mut. L. Ins. Co.*, 76 Conn. 494, 57 Atl. 175; and where words were "reference being had to the application," etc., "which forms a part of the policy for a more particular description of the property," *held*, that contents of application were not warranties but merely descriptive, *Cumberland Valley Mut., etc., Co.* v. *Mitchell*, 48 Pa. St. 374. In the following cases the policy expressly made the application a warranty, *Morris* v. *Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. 595; *Thomas* v. *Farm Ins. Co.*, 108 Ill. 91; *Taylor* v. *Ætna Ins. Co.*, 120 Mass. 254; *Le Roy* v. *Market Fire Ins. Co.*, 39 N. Y. 90; *Foley* v. *Royal Arcanum*, 78 Hun, 222, 28 N. Y. Supp. 952. But

§ 107. Nature of Warranties.—Finding its origin in the law of marine insurance, at a time when the contract was comparatively simple, though obscurely expressed,[1] and when the underwriter was largely at the mercy of the insured for a correct description of the subject and the voyage insured, the rule became firmly imbedded in the English common law, that the insured must strictly comply with the terms of his warranties. That, with some tendency to relax the excessive stringency of the rule,[2] is still the law. To the fire and life insurance companies, whose policies are drawn less favorably to the insured, than is the conventional marine policy,[3] the rule is handed

statutes have been passed providing in substance that the application must be attached to the policy, or physically incorporated, to form part of the contract, or that the policy must contain the entire contract, see Appendix, ch. I and Eng. Mar. Ins. Act (1906), § 22. The New York Ins. L., § 58, provides, "every policy of insurance issued or delivered within the state by any life insurance corporation doing business within the state shall contain the entire contract," etc.

[1] *Brough* v. *Whitmore*. 4 T. R. 210.

[2] Certain authorities criticise the common-law rule, regarding it as too severe under modern conditions, May, Ins. § 156; *Germania Ins. Co.* v. *Rudwig*, 80 Ky. 223, 234; *Westfall* v. *Hudson R. Fire Ins. Co.*, 2 Duer (N. Y.), 490. And, as applied to fire and life policies, a few courts have come very much to the conclusion that a substantial compliance with a warranty, especially a promissory warranty, is sufficient, *Ætna Ins. Co.* v. *Johnson* (Ga.), 56 S. E. 643; *Germania Ins. Co.* v. *Rudwig*, 80 Ky. 223, 234; *Scottish Union & N. Ins. Co.* v. *Moore*, 36 Tex. Civ. App. 312; *Tucker* v. *Colonial F. Ins. Co.*, 58 W. Va. 30. To make this distinction because the warranty is promissory rather than affirmative seems unsound.

[3] The forms of fire policies, and conspicuously those in use prior to the adoption of the standard, were occupied mainly with numerous restrictive stipulations, printed in very small type, in effect agreements as to what the insured must do and as to what the *insurer would not do*. The New Hampshire court by its Chief Justice graphically pictured and scathingly criticised such a form in *De Laney* v. *Rockingham Mut. F. Ins. Co.*, 52 N. H. 581. These fine print conditions, rarely read, were fraught with danger to the unsuspecting policy holder. The New York court described them as, "crouched unseen in the jungle of printed matter with which a modern policy is overgrown," *Van Schoick* v. *Niagara Fire Ins. Co.*, 68 N. Y. 434. On the other hand, before the adoption of the memorandum clause, the conventional marine policy, in addition to the privilege granted to the insured known as the sue and labor clause, was occupied almost exclusively with statements of what the *underwriters would do*, in respect to parties, subject-matter, and voyage described. But the deficiency of restrictive clauses in the conventional marine policy was perhaps more than compensated for by maritime custom and by a strict enforcement of the canons of insurance law in favor of the marine underwriter. The exacting common-law rule regarding concealments and misrepresentations by the insured was explained in the last chapter. By legal inference the insured was obliged also to act in good faith generally in matters appertaining in any way to the risk; and the marine underwriter was given the full benefit of this doctrine during the entire life of his contract. Furthermore, a warranty of seaworthiness was implied in the voyage policy, and another warranty was inferred in both voyage and time policies that the customary course of the voyage should be pursued. While certain of our state courts have vied with one another in finding excuses for depriving fire insurance companies of timely and adequate proofs of loss, and reasonable contract methods of investigating the nature and extent of the loss, the English common law, even

down from the law of marine insurance as an inheritance not altogether deserved,[1] but is nevertheless well established. A warranty, in general, must be exactly true or fully performed, or the assured will forfeit his rights.[2] The validity of the policy is conclusively presumed to depend upon a fulfillment of the warranties, unless waived, because the parties by their contract have so stipulated.[3] It is

in the absence of express or statutory provision, inferred a duty resting upon the insured to make a full disclosure, after his marine loss, of evidential facts relating to his claim against the underwriter, *Boulton* v. *Houlder Bros.* (1904), 1 K. B. 784. And by maritime custom goods stowed on deck were not covered by a policy on ocean transit, *Blackett* v. *Royal Exch.* (1832), 2 Cr. & J. 250. A comparison of two cases, one in marine and the other in fire insurance law, will be found instructive, *Tate* v. *Hyslop* (1885), 15 Q. B. D. 368; *Pelzer Co.* v. *Sun Fire Office*, 36 S. C. 213. Both involved the non-disclosure of the release by the insured of what might otherwise have afforded the underwriter the right of subrogation for his reimbursement. In the fire policy was the express warranty on the subject. In the marine policy there was none. In both cases the issue of materiality of the fact concealed was submitted to the jury. But in the marine case we have a court friendly to the underwriter. In the other, despite the express warranty, we have a court friendly to the insured. Under the marine policy the underwriter establishes his defense. Under the fire policy, the insurance company is defeated and the insured wins out.

[1] Considering that the New York statutory fire policy is framed for all cases it is, in the main, fairly drawn. Legible type is prescribed. In individual instances, the provision against any "other insurance," rather than over or excessive insurance, is stringent and works injustice, also the provision including in the contribution clause invalid and uncollectible other insurance; also the provision annulling the contract, rather than suspending liability of the insurer, during the continuance of an innocent breach unconnected with the loss; also the requirement of a magistrate's certificate as a condition precedent, when called for by the insurer; and certain other particulars. The principal cause of just criticism by the courts, however, has arisen from the fact that many fire and life insurance companies have been too much in the habit of enforcing against meritorious claimants technical provisions of their policies, devised as a needed protection against fraudulent claims.

[2] *Western Assur. Co.* v. *Altheimer*, 58 Ark. 565, 25 S. W. 1067; *Dimick* v. *Met. L. Ins. Co.*, 67 N. J. L. 367, 51 Atl. 692; *Dwyer* v. *Mut. L. Ins. Co.*, 72 N. H. 572, 58 Atl. 502; *Met. L. Ins. Co.* v. *Howle*, 62 Ohio St. 204, 56 N. E. 909. The United States Supreme Court says: "For a comparatively small consideration the insurer undertakes to guarantee the insured against loss, upon the terms and conditions agreed upon and upon no other. . . . If the insured cannot bring himself within the conditions of the policy he is not entitled to recove. for the loss. . . . The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. . . . The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made," *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S. 452, 462, 14 S. Ct. 379, 38 L. Ed. 231.

[3] *Ætna L. Ins. Co.* v. *France*, 91 U. S. 510, 23 L. Ed. 401; *McKenzie* v. *Scot. Union & Nat. Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Hoover* v. *Royal Neighbors*, 65 Kan. 616, 70 Pac. 595; *Germier* v. *Ins. Co.*, 109 La. 341, 33 So. 361. The New York Court says: "The breach of an express warranty, whether material to the risk or not, whether the loss happens through the breach or not absolutely determines the policy and the assured forfeits his rights thereunder," *Cogswell* v. *Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076, aff'd on opinion, 157 N. Y. 709. "Whether a statement is a representation or a warranty is for the court. The question of the materiality of a warranty cannot in any

important, therefore, to grasp the legal notion that, by the prevailing rule, a compliance with the terms of a warranty, whether in its nature affirmative or promissory, is a condition precedent to a right of recovery under the policy. If an affirmative warranty, whether express or implied, is broken the policy never attaches to the risk at all. The contract is dead from its inception, and can be resuscitated only by the free grace or voluntary action of the insurer. If a promissory warranty is broken, the contract likewise is terminated from the time of the breach, unless, as before stated, the company chooses to condone the default, since the future performance promised is a condition precedent to the continuance of the contract.[1]

For example, where the warranty related to the cause of the death of the father of the assured [2] or to an application for other life insurance,[3] or asserted that the beneficiary was husband of the insured,[4] or that insured was "never an inmate of a hospital," [5] although in all these instances, had it been permissible to submit such an issue to the jury, the jury might easily have found that the matter warranted was immaterial; nevertheless, the policy was avoided because of the misstatement.[6] And so likewise a breach avoids the fire policy although the prohibited act be committed by a tenant without the knowledge or consent of the assured.[7] Accordingly it will be observed that motive, honest belief, good faith of the assured are all irrelevant, if it appear that a warranty has been violated.[8] Nor will it matter that the breach in nowise contributed to the loss.[9]

event be either a question for the court or jury because it is upon the literal truth of a warranty that the validity of the policy depends without reference to its materiality." *Royal Neighbors* v. *Wallace*, 66 Neb. 543, 92 N. W. 897.

[1] But by the express terms of a policy, as in the case of the New York standard fire policy, a breach of a promissory warranty also may avoid the entire contract.

[2] *Metropolitan Life Ins. Co.* v. *Rutherford*, 98 Va. 195, 35 S. E. 361.

[3] *Kelly* v. *Life Ins. C. Co.*, 113 Ala. 453, 21 So. 361.

[4] *Makel* v. *Hancock Mut. L. Ins. Co.*, 95 App. Div. 241, 88 N. Y. Supp. 757; or wife, *Gaines* v. *Fidelity & Cas. Co.*, 111 App. Div. 386, 97 N. Y. Supp. 836.

[5] *Farrell* v. *Security Mut. L. Ins. Co.*, 125 Fed. 684, 60 C. C. A. 374.

[6] See findings of jury and reversal on appeal in *McGowan* v. *Supreme Court*, 104 Wis. 173, 80 N. W. 603.

[7] *Gunther* v. *L. & L. & G. Ins. Co.*, 134 U. S. 110, 10 S. Ct. 448, 33 L. Ed. 857 (storing of oils without written permission); *Thuringia Ins. Co.* v. *Norwaysz*, 104 Ill. App. 390; *Badger* v. *Platts*, 68 N. H. 222, 44 Atl. 296, 73 Am. St. R. 572 (naphtha); *Kohlmann* v. *Schrage*, 34 App. Div. 380, 54 N. Y. Supp. 230 (gasoline); *Long* v. *Beeber*, 106 Pa. St. 466, 51 Am. Rep. 532; but see special clause in standard fire policy avoiding policy, if the hazard be increased by any means *within the control or knowledge of the insured*.

[8] *Met. Life Ins. Co.* v. *Schmidt* (Ky., June, 1906), 93 S. W. 1055 (disease of certain organs; falsity avoids regardless of applicant's belief); *Clemans* v. *Supreme Assembly*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33 (application for other insurance); *Schwarzbach* v. *Ohio Valley, etc., Union*, 25 W. Va. 622, 52 Am. Rep. 227 (had[illegible], etc.); *Boyle* v. *Northwestern Mut. Assn.*, 95 Wis. 312, 70 N. W. 351 (warranty "sound health").

[9] *Bank of Balston Spa* v. *Ins. Co.*, 50 N. Y. 45.

Thus, in an early case where the words "in port 20th July, 1776," were written in the margin of the policy, the ship in fact had sailed on the 18th of July, and Lord Mansfield held that a breach of warranty was established, though the discrepancy of two days might make no material difference in the risk.[1] Striking illustrations of the same legal doctrine may be gathered from recent decisions.

In an Arkansas case the application was made part of the contract of fire insurance and warranted by the insured. In it he stated that his house, on which he requested a policy of $1,200, cost $2,000, when in fact it cost but $1,700. About this fact there was no dispute for the jury. The plaintiff had admitted it. This slight discrepancy, however, seemed wholly immaterial, inasmuch as the policy amounted only to $1,200, considerably less than the actual cost. Nevertheless the majority of the court, after lucidly explaining the difference between a representation and a warranty, adjudged the policy void.[2]

In a New York case, nearly contemporaneous with the last, the decedent, the insured, had stated in his application for an accident policy, that the plaintiff, named as beneficiary, was his wife. In fact she was living with him, and indeed had married him, but had a prior husband living. The jury was obliged to find as matter of fact that she was not a lawful wife. Her counsel contended that the private affairs of this couple were of no concern to the insurance company and that the statement in the application was substantially correct, but the court, without dissent, as matter of law, concluded that the warranty had been broken and the insurance forfeited.[3]

[1] *Bean* v. *Stupart*, Doug. 12 (note). A ship warranted to sail from A. with "50 hands or upwards," starts with 46 only but afterwards takes on 6 more; policy is avoided, *De Hahn* v. *Hartley* (1786), 1 T. R. 343. Insurance on ship and cargo at and from Genoa to Dublin, adventure to begin from loading to clear for voyage, Lord Mansfield held that these words warranted that vessel had loaded or would load at Genoa; and as it appeared she had not done so, but at Leghorn, policy was avoided, *Hodgson* v. *Richardson*, 1 W. Bl. 463. A marine policy contained the clause, "warranted to navigate only inland waters of United States and Canada and not below the Thousand Islands;" the vessel sailed on the ocean at least ten miles below Sandy Hook Lighthouse, but received no injury there; *Held*, the policy was forfeited, *Cogswell* v. *Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076, aff'd 157 N. Y. 709. "Warranted no St. Lawrence between Oct. 1 and Apl. 1," in *Birrell* v. *Dryer* (1884), 9 App. Cas. 345. "Warranted not to proceed east of Singapore" in *Simpson S. Co.* v. *Premier, etc., Assn.* (1905), 10 Com. Cas. 198; "Sailing on or after Mch. 1" in *Sea Ins. Co.* v. *Blogg* (1898), 1 Q. B. 27; "Warranted no iron in excess of registered tonnage" in *Hart* v. *Stand. M. Ins. Co.* (1889), 22 Q. B. D. 499 ("iron" includes steel); "Warranted uninsured" above stated amount; the other insurance consisted of honor policies, in *Roddick* v. *Ins. Co.* (1895), 2 Q. B. 380; insurer insolvent in *General Ins. Co.* v. *Cory* (1897), 1 Q. B. 335.

[2] *Capital Fire Ins. Co.* v. *King* (Ark., 1907), 102 S. W. 194 (a suggestive dissenting opinion in which two judges as matter of construction sought to invoke, in favor of the insured, the express warranty regarding misrepresentations of *material facts*).

[3] *Gaines* v. *Fidelity & Cas. Co.*, 188 N. Y. 411, 81 N. E. 169. ("It is a

In the last two instances affirmative warranties were violated. The contracts, therefore, were void from inception; but in a Pennsylvania case, a householder had succeeded in procuring a valid insurance in standard form upon his household goods. On the day before the Fourth of July he bought, for use on the Fourth, a lot of assorted fireworks, which with his knowledge were put in his parlor overnight. By accident they ignited there and caused the damage. The policy provides that it shall be void "if there be kept, used or allowed on the above described premises benzine . . . fireworks," etc. Counsel for the insured claimed that this prohibition was aimed at a prolonged use or keeping, and urged that a temporary and incidental use of benzine or fireworks would have no more effect on the policy than if a stranger drove across the premises with gasoline in a grocery wagon or in an automobile. But the court decided that the promissory warranty had not been fulfilled. As a result the insurance was at an end, and the judgment granted below in favor of the plaintiff was reversed.[1]

The Virginia court furnishes another aspect of the same warranty. The insured, the defendant in error, but plaintiff below, having erected his building upon a pier built upon the bed of Chesapeake Bay, rented it to one Livingston who, without consulting with the insured, gave permission to a man by the name of Wells to set off fireworks on the pier on the night of the Fourth. The insured building was ignited and damaged in consequence. Here not only was the forbidden use temporary, but the insured, having no knowledge of it, was no more at fault than he would have been if his house had been struck by lightning. Nevertheless, the warranty against the use of fireworks on the premises had not been kept, and the recovery by the insured below was reversed on appeal.[2]

And if the insured by his fire policy warrants that there is no other insurance upon the property, the statement, if untrue, will avoid the policy, though made by the insured in ignorance of the fact, and though wholly immaterial in influencing the insurers.[3] And if by his contract of life insurance he warrants that he was not engaged

general rule . . . that the materiality of the fact stated by the assured is of no consequence, if the contract be that the matter is as represented, and that unless it prove so, whether from fraud, mistake, negligence or other cause, not proceeding from the insurer, or the intervention of the law, or the act of God, the assured can have no claim. . . . One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement.")

[1] *Heron* v. *Phœnix Mut. F. Ins. Co.*, 180 Pa. St. 257, 36 Atl. 740, 36 L. R. A. 517, 57 Am. St. R. 638.

[2] *Westchester F. Ins. Co.* v. *Ocean View Pleasure Pier Co.* (Va., 1907), 56 S. E. 584.

[3] *Allen* v. *German-Am. Ins. Co.*, 123 N. Y. 6, 25 N. E. 309; or if he omits to state one of the incumbrances upon his

in selling liquor, the validity of the policy will depend upon the truth of the statement.[1] If, however, the insured warrants that his building is "used for the storage of ice," that may be quite true, although at the time of the commencement of the risk there is no ice there.[2]

The clauses of the policies set forth in Part Second of this treatise will supply numerous examples of warranties.

108. Inability to Fulfill no Excuse.—The inability of the insured to comply with the requirements of his warranties offers no excuse, unless the insurers are in some way responsible for the omission.[3]

The insurers have promised to pay only upon condition that the insured shall fulfill the contract upon his part, not upon condition that he shall find it convenient or possible to do so.[4]

Sickness, insanity, death,[5] and, according to some authorities, even war [6] will furnish no excuse for the violation of a condition in the policy. But the United States Supreme Court and other courts have adopted the rule, that a war overrides the ordinary obligations of the policy, and simply suspends them until the war is terminated. However reasonable this rule may be, considered logically, it is inconvenient and difficult to apply, and the life policy may furnish some exception.[7]

§ 109. Warranties Contrasted with Representations.—As previously shown, a representation, technically speaking, is a collateral inducement which, if substantially true, or if immaterial in its influence upon the mind of the underwriter, will furnish no ground for avoiding the contract, while a warranty is a stipulation of the contract itself, to be rigidly enforced according to its terms;[8] but the

property, in answer to a question in the application calling for them, the policy will be vitiated if the answer is warranted to be full, although the jury find the fact to be immaterial, *Bowditch Mut. Ins. Co.* v. *Winslow*, 3 Gray (Mass.), 415.

[1] *Dwight* v. *Germania Life Ins. Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 229.

[2] *Dolliver* v. *St. Joseph's Fire and Marine Ins. Co.*, 131 Mass. 39.

[3] "Accident, mistake and misfortune" no excuse, *Johnson* v. *Cas. Co.*, 73 N. H. 259, 262, 60 Atl. 1009.

[4] *School District* v. *Dauchy*, 25 Conn. 530; *Evans* v. *U. S. Life Ins. Co.*, 64 N. Y. 304; but as to relaxation of the rule respecting requirements after loss see *McNally* v. *Phœnix Ins. Co.*, 137 N. Y. 389; *O'Brien* v. *Commercial Ins. Co.*, 63 N. Y. 108; *Bumstead* v. *Dividend Mut. Ins. Co.*, 12 N. Y. 81.

[5] *Thompson* v. *Ins. Co.*, 104 U. S. 252; *Carpenter* v. *Centennial Mut. Life Ins. Co.*, 68 Iowa, 453, 27 N. W. 456; *Howell* v. *Knickerbocker Life*, 44 N. Y. 277.

[6] *Worthington* v. *Charter Oak Life Ins. Co.*, 41 Conn. 401.

[7] *N. Y. Life Ins. Co.* v. *Statham*, 93 U. S. 24; *Semmes* v. *Hartford Ins. Co.*, 13 Wall. (U. S.) 158; *Cohen* v. *Mut. Life Ins. Co.*, 50 N. Y. 610.

[8] Thus New York court says: "A representation is collateral to the contract and to be effective must be material to the risk, but a warranty, whether material or not, being part of the contract has the force of a condi-

bare mention of these propositions in the abstract fails to explain or to lay proper emphasis upon a distinction of great practical moment to be drawn between a representation and a warranty. This distinction is better defined in the statement that, if the decisive issue on trial involve an inquiry either as to the substantial truth or as to the materiality of a representation, the right to determine the case is apt to be taken from the court and carried over to the jury. Very much the same result often follows where the decisive statement or representation, although made part of the contract itself, because of some special phraseology connected with it, is construed by the court to fall short of a warranty.

Thus, for example, under the standard fire policy personal property is warranted free of any chattel mortgage without written permit. The property, in a given instance, is so incumbered. The fact is indisputable, for the defendant on the trial produces from the record a certified copy of the mortgage. In this situation of the case the trial judge has no discretion. He must dismiss the complaint of the assured [1] or direct a verdict for the defendant as matter of law,[2] since a warranty has been broken. So also if the policy by express incorporation of an application contain a warranty, shown to be untrue, that the building is unincumbered.[3] But the New York standard fire policy by its own terms contains no warranty respecting incumbrances upon real estate, therefore the materiality of any innocent misrepresentation regarding a real estate mortgage or other lien on a building, whether uttered orally,[4] or appearing in a written application which is not incorporated into the contract as a warranty,[5] must, in general, be submitted to the decision of the jury,[6] unless the misstatement is so important and so erroneous as to be unquestionably misleading.[7]

tion precedent, and unless it is true, the insurer is not bound by his promise," *Donley* v. *Glens Falls Ins. Co.*, 184 N. Y. 107, 113, 76 N. E. 914.

[1] *Crikelair* v. *Ins. Co.*, 168 Ill. 309, 48 N. E. 167, 61 Am. St. R. 119 (unless there is a waiver); *Brown* v. *Westchester Fire Ins. Co.*, 9 Kan. App. 526, 58 Pac. 276.

[2] *Olney* v. *German Ins. Co.*, 88 Mich. 94, 26 Am. St. R. 281, 50 N. W. 100.

[3] *Gould* v. *York County Mut. Ins. Co.*, 47 Me. 403; *Smith* v. *Agricultural Ins. Co.*, 118 N. Y. 522, 23 N. E. 883; *King* v. *Tioga Co., etc., Assn.*, 35 App. Div. 58, 54 N. Y. Supp. 1057.

[4] *Buck* v. *Phœnix Ins. Co.*, 76 Me. 586; and see *Strong* v. *Mfrs. Ins. Co.*, 10 Pick. (Mass.) 40, at p. 44.

[5] *Lebanon Mut. Ins. Co.* v. *Losch*, 109 Pa. St. 100.

[6] *Fidelity & Cas. Co.* v. *Alpert*, 67 Fed. 460, 14 C. C. A. 474, 28 U. S. App. 393; and see *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. (U. S.) 507, 515.

[7] *Ryan* v. *Springfield F. & M. Ins. Co.*, 46 Wis. 671. Where a disclosure of incumbrances is expressly called for by the printed terms of an application blank, *Davenport* v. *New Eng. Mut. F. Ins. Co.*, 6 Cush. (Mass.) 340; or by the by-laws of a mutual company, *Hayward* v. *New England Mut. F. Ins. Co.*, 10 Cush. (Mass.) 444; *Towne* v. *Fitch*-

Again, the application for a life policy often contains many inquiries respecting the habits of the insured, and the physical condition, past or present, of himself and relatives, the answers to which, written in by the company's agent, are often more or less erroneous.[1] Where the accuracy of the answers is warranted by the terms of the policy the plaintiff's case, in the absence of an incontestable clause or of a waiver, is frequently hopeless, but the jury, if allowed to pass upon the question, is apt to regard such innocent mistakes as immaterial, no matter how influential they may in reality have been with the underwriters. Therefore, if the court is able to rule that under the terms of the contract in its entirety the misstatements are to be construed as representations rather than warranties,[2] the plaintiff may look forward with considerable confidence to a recovery.[3] An important illustration of this distinction is to be found in a recent Massachusetts case in which the court concluded that the usual sprinkler clause, frequently made a part of the standard fire policy, is not a warranty, but a mere representation to the effect that due diligence shall be exercised to keep up the sprinkler equipment. Accordingly, there also the jury was allowed to find for the plaintiff, although the facts relating to the condition of the equipment were substantially without dispute.[4]

In the interest of essential justice, while giving adherence to the common-law doctrine respecting warranties in policies of insurance, many courts have felt impelled, with the object of tempering its harshness, to adopt certain special countervailing rules in the interest of the insured. These form the subject of the next three chapters, and also of following sections in this chapter. They are in a measure exceptional in their character, and naturally have invited a lack of uniformity in the decisions relating to them and an

burg Mut. F. Ins. Co., 7 Allen (Mass.), 51, that circumstance will go far towards making material, as matter of law, any substantial misrepresentation regarding liens or their amount whether the application is made part of contract or not. The same is true regarding any other fact expressly called for by an application, *Vivar* v. *Knights of Pythias*, 52 N. J. L. 455, 20 Atl. 36; *Campbell* v. *New England Mut. Life Ins. Co.*, 98 Mass. 381, 406 ("spitting of blood"); *Lutz* v. *Met. Life Ins. Co.*, 186 Pa. St. 527 ("never sick," "never consulted physician," *held*, clearly material). Where specific inquiry is made, for instance, for date of sailing, court may conclusively presume it to be material, *Kerr* v. *Union Mar. Ins. Co.*, 130 Fed. 415, 64 C. C. A. 617.

[1] *Piedmont & A. L. Ins. Co.* v. *Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 13 Wall. 222, 20 L. Ed. 617.

[2] *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335; 4 S. Ct. 466; *Vivar* v. *Supreme Lodge*, 52 N. J. L. 455, 20 Atl. 36.

[3] *Fitch* v. *Am. Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *McGowan* v. *Supreme Court*, 104 Wis. 173, 80 N. W. 603. Jury excused many such misstatements in last two cases though some of them were serious.

[4] *Fuller* v. *N. Y. Fire Ins. Co.*, 184 Mass. 12, 67 N. E. 879.

unfortunate contrariety of judicial opinion. They include such principles of insurance law as these: (1) that while the insured must strictly fulfill his warranty, yet, in arriving at the meaning and scope of the warranty, special emphasis will be given to the doctrine that any doubt or ambiguity discoverable in the language used will be resolved against the insurer; (2) that expressions showing on their face that they are merely conjectural are no part of the warranty; (3) that a statement of present use is not necessarily a warranty of continuance; (4) that, to limit forfeiture to a part of the subject-matter insured, the court will strive to construe the contract as severable or divisible into two or more insurances; holding the breach of warranty applicable only to the portion really affected by the breach; (5) the moot doctrine that a temporary breach, unconnected with a loss in time or in causal relation, suspends liability of the underwriter during its continuance, but does not altogether avoid the policy; (6) waiver and estoppel.

§ 110. **In Interpreting Warranties, Courts Lean Towards the Insured.**—Warranties form a large part of many policies. The general rules applicable to the construction of the insurance contract, and mentioned heretofore, apply to them. What the insured warrants to be a fact, must be true. What he warrants to do, must be performed; but in determining what it is that is affirmed or promised, there is sometimes room for latitude, and in the preliminary inquiry to settle the meaning and scope of the warranty, doubts and ambiguities are resolved in favor of the insured. Thus, where the insured warranted that his storehouse "was detached at least one hundred feet," without stating from what, the court interpreted the warranty as meaning detached from buildings that would affect the risk, and held that the policy was not avoided by the existence of an insignificant building, though only seventy-five feet distant.[1]

[1] *Burleigh* v. *Gebbard F. Ins. Co.*, 90 N. Y. 220 (if words "from any building" had been added to warranty there would have been no room for a liberal construction). So also where the subject-matter of a marine policy is warranted "in good safety" on a particular day, it is sufficient if it be safe at any time during that day, *Blackhurst* v. *Cockell* (1789), 3 T. R. 360. If language and circumstances permit, court will construe as representation rather than warranty, *Moulor* v. *Ins. Co.*, 111 U. S. 335, 4 S. Ct. 466; *McClain* v. *Prov. Sav. Life Assn. Soc.*, 110 Fed. 80, 49 C. C. A. 31; *Provident Sav. Life Assur. Soc.* v. *Cannon*, 103 Ill. App. 534, aff'd 201 Ill. 260, 66 N. E. 388; *King Brick Mfg. Co.* v. *Phœnix Ins. Co.*, 164 Mass. 291, 294, 41 N. E. 277; *Jennings* v. *Supreme Council*, 81 App. Div. (N. Y.) 76, 86 (in which statements as to age, good health, etc., were considered). Will construe as warranty only when clearly the intent, *Carrollton Furniture Co.* v. *American Credit, etc., Co.*, 124 Fed. 25, 59 C. C. A. 545; *Ætna Ins. Co.* v. *Simmons*, 49 Neb. 811, 69 N. W. 125; *Kettenbach* v. *Omaha L. Assn.*, 49

Two recent cases, one in Texas and the other in Nebraska, aptly illustrate the rule. In the Texas case the application for life insurance, made a part of the contract, warranted the answers "to be full, complete and true, and without suppression of any circumstance which would tend to influence the company in issuing a policy." The insured was asked to give the name and address of each physician who had prescribed for him within the past five years. He named his regular physician only, Dr. McElroy. In fact, during a short portion of the period, from October 22 to the eleventh of the next month, he had frequently been attended by a Dr. Miller. By the uncontradicted testimony, therefore, his answer was not complete. But the court, while conceding that a warranty must be strictly fulfilled, nevertheless, as a matter of construction, fastened upon the qualifying words chosen by the underwriter, "without suppression of any circumstance which would tend to influence the company," and held that they converted the answers into representations, involving only the necessity of a substantial compliance in good faith.[1]

In the Nebraska case the written application, executed by the insured, provided that suicide, sane or insane, within three years from date, would render the certificate null and void. The certificate, however, issued by the association provided that it would be incontestable after two years from date. More than two years, but less than three years thereafter, the insured, while temporarily insane, took his own life. The court construed the ambiguity against the company, and allowed the widow to recover, by virtue of the incontestable clause.[2]

§ 111. **Statements of Opinion, Expectation, or Belief.**—Statements of opinion, expectation, or belief, though in the form of warranties, are ordinarily held to require only good faith.[3] To the

Neb. 842, 69 N. W. 135. This rule applies to statements in the application, *Fidelity Mut. L. A.* v. *Jeffords*, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193; *Northwestern Mut. L. I. Co.* v. *Woods*, 54 Kan. 663, 39 Pac. 189. Same rule applied though application made a part of policy, *Queen Ins. Co.* v. *May* (Tex. Civ. App., 1896), 35 S. W. 829. Thus where answers were qualified "as near correct as I can remember," *Ætna Life Ins. Co.* v. *France*, 94 U. S. 561, 566, 24 L. Ed. 287. Compare *McGowan* v. *Supreme Court of I. O. of F.*, 107 Wis. 462, 83 N. W. 775.

[1] *Reppond* v. *National Life Ins. Co.* (Tex., 1907), 101 S. W. 786.

[2] *Harr* v. *Highland Nobles* (Neb., 1907), 110 N. W. 713.

[3] *Clapp* v. *Mass. Ben. Assoc.*, 146 Mass. 519; *Henn* v. *Met. Life Ins. Co.*, 67 N. J. L. 310, 51 Atl. 689. Thus as to latent diseases, *Endowment Rank Knights* v. *Cogbill*, 99 Tenn. 28, 41 S. W. 340; *Endowment Rank Knights* v. *Rosenfeld*, 92 Tenn. 508, 22 S. W. 204; *Schwarzback* v. *Union*, 25 W. Va. 622, 52 Am. Rep. 227.

disclosure of facts known to the insured the insurer is entitled but not to his hopes or fears, opinions or conjectures. It would be prudent, therefore, for the applicant for life insurance, when signing the voluminous form of printed proposals usually required, to add the phrase "to the best of my belief," or similar qualifying words.[1]

An important application of the rule has frequently been made in the common instance of an erroneous answer to the inquiry of the life insurance company respecting the existence of latent diseases in the insured or his ancestors in the indefinite past. Such responses from a layman obviously can embody little more than opinion or belief.[2]

The Court of Errors and Appeals of New Jersey has repeatedly approved this doctrine, and once recently. Owen, the insured, died about a month after procuring a life policy from the Metropolitan Life Insurance Co. Defense was made on the ground that, in his application, he had warranted that he had never had heart disease. The case was devoid of evidence to show that any knowledge of the existence of this obscure disease had ever been brought home to the applicant, although there was evidence indicating that in fact his heart was seriously affected prior to his proposals. The court concluded that only good faith was required of Owen, and that the jury were at liberty to find that his answer in the defendant's application paper was given according to his *bona fide* belief and opinion.[3]

§ 112. Statement of Present Use.—A statement of the present use of property, if it does not go to the essential nature of the subject of insurance, is not generally considered a warranty of continuance

For example, the United States Supreme Court were of opinion that a warranty in a contract of fire insurance, that smoking was not allowed, if true when the representation was made, would not be broken though the assured or others smoked afterwards on the premises.[4] So also where the policy of insurance described the property insured as being a two-story frame building used for winding and coloring yarn and for the storage of spun yarn, it did not warrant that such building was to continue to be thus used.[5] But a war-

[1] *Moulor* v. *American Life Ins. Co.*, 111 U. S. 335; *Clapp* v. *Mass. Ben. Asso.*, 146 Mass. 519, 16 N. E. 433; *Wheelton* v. *Hardisty*, 8 E. & B. 231.

[2] *Henn* v. *Met. Life Ins. Co.*, 67 N. J. L. 310, 51 Atl. 689; *Endowment Rank Knights* v. *Coghill*, 99 Tenn. 28, 41 S. W. 340.

[3] *Owen* v. *Metropolitan L. Ins. Co* (N. J. L. 1907) 36 Ins. L. J. 760.

[4] *Hosford* v. *Germania Fire Ins. Co.*, 127 U. S. 399, 8 S. Ct. 1199, 32 L. Ed. 196.

[5] *Smith* v. *Mechanics' and Traders' Fire Ins. Co.*, 32 N. Y. 399. The Pennsylvania court held that words "clerk sleeps in the store" imported no war-

ranty that a house was of stone when in reality it was partly stone and partly wood,[1] or that the building insured was a dwelling house, or occupied as a dwelling, when in fact it was not, would avoid the policy.[2] If the warranty were simply that the house was a dwelling, that would not necessarily mean that it was *occupied* as a dwelling at that time.[3]

§ 113. **Questions Unanswered or Partially Answered.**—If a question in the application is not answered at all, or if the answer is not false in any respect, but upon its face is only incomplete, there is no breach of warranty, provided the insurer accepts the application without objection; since, if not satisfied, the company should demand fuller information. So, also, to avoid forfeiture, equivocal answers are construed most strongly against the company, but notwithstanding this, the applicant must answer in good faith and not attempt to evade, conceal, or mislead.[4]

§ 114. **Whether Temporary Breach Avoids or Only Suspends Contract.**—Does the contract revive when the situation constituting a breach of warranty terminates before loss? For example, if a vessel though unseaworthy at commencement of the voyage is made seaworthy shortly thereafter and before encountering any storm, or if a dwelling house during the term of the insurance happens to be without a tenant for more than the permitted period of ten days, but becomes occupied before the fire, is the policy forfeited?[5] It must be observed that in any event the insurer, though retaining the full premium if the policy has once attached, is relieved from all

ranty for the future, *Frisbie* v. *Ins. Co.*, 27 Pa. St. 325; so of words, "kiln for drying corn in use," *Shaw* v. *Roberts*, 6 Ad. & El. 75; so of words "occupied by tenants," *Catlin* v. *Springfield Ins. Co.*, 1 Sumn. 434; *Boardman* v. *N. H. Mut. F. Ins. Co.*, 20 N. H. 551.

[1] *Chase* v. *Hamilton Ins. Co.*, 20 N. Y. 52.

[2] *Alexander* v. *Germania Fire Ins. Co.*, 66 N. Y. 464, 23 Am. Rep. 76.

[3] *Browning* v. *Home Ins. Co.*, 71 N. Y. 508.

[4] *London Ass. Co.* v. *Mansel*, L. R. 11 Ch. D. 363; *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S. 183; *Carson* v. *Jersey City Fire Ins. Co.*, 43 N. J. L. 306; *Higgins* v. *Phœnix Mut. Ins. Co.*, 74 N. Y. 6; *Dilleber* v. *Home Ins. Life Co.*, 69 N. Y. 256, 25 Am. Rep. 182. Compare cases § 96. An answer so irresponsive as to leave the question unanswered will not avoid the policy unless fraudulently untrue, *Perine* v. *Grand Lodge*, 51 Minn. 224, 53 N. W. 367; *Hale* v. *Life, etc., Co.*, 65 Minn. 548, 68 N. W. 182.

[5] "Where a warranty is broken, the assured cannot avail himself of the defense that the breach has been remedied, and the warranty complied with, before loss," Eng. Mar. Ins. Act (1906). § 34 (2); *De Hahn* v. *Hartley* (1786), 1 T. R. 343 (express warranty); *Quebec Mar. Ins. Co.* v. *Bank* (1870), L. R. 3 P. C. 234 (implied warranty). Same rule applied under New York standard fire policy, *Couch* v. *Farmers' F. Ins. Co.*, 64 App. Div. (N. Y.) 367 (unoccupancy more than 10 days).

responsibility, so long as a breach of condition subsequent continues.[1] Induced by this and other considerations many courts have held that, if the language of the policy does not expressly impose absolute forfeiture as a penalty for noncompliance with a warranty, the contract will revive upon termination of the situation prohibited, especially in those instances in which the violated warranty is a condition subsequent to the attachment of the risk.[2]

§ 115. **To Avoid Forfeiture, Contract made Severable.**—Where two or more items of property are insured in a policy for separate amounts, either at separate rates or for a single premium, and the breach of warranty relates to a portion of the items only, courts are prone to divide the contract by construction into separate insurances so as to limit the operation of the forfeiture to the items really affected by the prohibited condition,[3] but the practical application of this principle has led to varying results.[4]

[1] *Adair* v. *South. Mut. Ins. Co.*, 107 Ga. 297, 303, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. R. 122 (change of use); *Hinckley* v. *Germania F. Ins. Co.*, 140 Mass. 38, 45, 1 N. E. 737, 54 Am. Rep. 445 ("it has the benefit of the temporary suspension of the risk without any rebate of the premium," temporary illegal use held to suspend); *Wheeler* v. *Phœnix Ins. Co.*, 53 Mo. App. 446 (loss during vacancy, no recovery).

[2] Temporary unseaworthiness though existing at outset held by some courts to suspend and not avoid, *Lapene* v. *Sun Mut. Ins. Co.*, 8 La. Ann. 1, 58 Am. Dec. 668; *Hinckley* v. *Germania F. Ins. Co.*, 140 Mass. 38, 46, 1 N. E. 737, 54 Am. Rep. 445; *Worthington* v. *Bearse*, 12 Allen (Mass.), 382, 386; *Deblois* v. *Ocean Ins. Co.*, 16 Pick. (Mass.) 303; but see prevailing rule, ch. IX, *infra*. Temporary overinsurance, *Obermeyer* v. *Globe Mut. Ins. Co.*, 43 Mo. 573; temporary increase of risk, *James* v. *Lycoming Ins. Co.*, 13 Fed. Cas. 309; *Mut. F. Ins. Co.* v. *Coatesville Shoe Factory*, 80 Pa. St. 407. Failure to keep fire buckets, *Cady* v. *Imperial Ins. Co.*, 4 Fed. Cas. 984; *Phœnix Assur. Co.* v. *Munger, etc., Co.*, (Tex. Civ. App.), 49 S. W. 271. But temporary deviation, from its date absolutely avoids ocean marine insurance, *Burgess* v. *Equitable, etc., Ins. Co.*, 126 Mass. 70, 30 Am. Rep. 654; *Cogswell* v. *Chubb*, 1 App. Div. 93, aff'd 157 N. Y. 709; *Fernandez* v. *Great West. Ins. Co.*, 48 N. Y. 571. As to conditions subsequent generally see *Ohio F. Ins. Co.* v. *Burget*, 65 Ohio St. 119, 61 N. E. 712, 87 Am. St. R. 596, 55 L. R. A. 825.

[3] New York court says, citing many cases, "Where by the same policy different classes of property, each separately valued, are insured for distinct amounts, even if the premium for the aggregate amount is paid in gross, the contract is severable, and a breach of warranty as to one subject of insurance only does not affect the policy as to the others, unless it clearly appears that such was the intention," *Donley* v. *Glens Falls Ins. Co.*, 184 N. Y. 107, 76 N. E. 914; *Woodside* v. *Canton Ins. Co.*, 84 Fed. 283 (purpose of court must be to ascertain probable intent of the parties); *Loomis* v. *Rockford Ins. Co.*, 77 Wis. 87, 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. R. 96 (sale of one of several buildings does not avoid as to others. Entirety of premium as consideration should not govern); but compare *McQueeny* v. *Phœnix Ins. Co.*, 52 Ark. 257, 12 S. W. 498, 5 L. R. A. 744, 20 Am. St. R. 179, and many cases cited; *Ætna Ins. Co.* v. *Resh*, 44 Mich. 55, 6 N. W. 114, 38 Am. Rep. 228.

[4] *Phœnix Ins. Co.* v. *Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. R. 393 (many cases cited *pro* and *con*. Risk on house and risk on barn held distinguishable and divisible).

Thus, a prohibited mortgage on pool tables was held not to avoid as to the other contents of the building.[1] And if a policy covers both building and contents the insurance on building is held to be undisturbed by a chattel mortgage on contents [2] or by sale of contents,[3] and the insurance on contents is held undisturbed by a fatal but innocent misstatement regarding the title to the real estate,[4] or by a prohibited mortgage on the real estate,[5] or even by alienation of the real estate,[6] but on this last point, as on others, the decisions lack uniformity.[7] A sale of one of several buildings will defeat the insurance only as to the one sold; [8] and vacancy of one house does not avoid as to another unless the risk in the latter is affected.[9] But if the breach as to one item or class increases the risk on the rest, or if the breach affects the risk in its entirety, this liberal rule of construction will not apply and the policy will be altogether avoided.[10]

[1] *Manchester F. Assur. Co.* v. *Feibelman*, 118 Ala. 308, 23 So. 759. And violation of iron safe clause held forfeiture only as to goods, not as to furniture or fixtures, *Mitchell* v. *Ins. Co.*, 72 Miss. 53, 18 So. 86, 48 Am. St. R. 535; or building, *Hanover Fire Ins. Co.* v. *Crawford*, 121 Ala. 258, 25 So. 912, 77 Am. St. R. 55; *Roberts* v. *Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955.

[2] *Wright* v. *Fire Ins. Co.*, 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; *Home F. Ins. Co.* v. *Bernstein*, 55 Neb. 260, 75 N. W. 839.

[3] *Royal Ins. Co.* v. *Martin*, 192 U. S. 149, 24 S. Ct. 247, 48 L. Ed. 385.

[4] *Schuster* v. *Dutchess Co. Ins. Co.*, 102 N. Y. 260, 6 N. E. 406; *Merrill* v. *Agricultural Ins. Co.*, 73 N. Y. 459, 29 Am. Rep. 184.

[5] *Kansas F. Ins. Co.* v. *Saindon*, 53 Kan. 623, 36 Pac. 983; *State Ins. Co.* v. *Schreck*, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. R. 696. *Contra*, *McGowan* v. *Peoples M. F. Ins. Co.*, 54 Vt. 211; *Stevens* v. *Queen Ins. Co.*, 81 Wis. 335, 51 N. W. 555, 29 Am. St. R. 905.

[6] *Phœnix Ins. Co.* v. *Grimes*, 33 Neb. 340, 50 N. W. 168.

[7] *Essex Savings Bk.* v. *Meriden F. Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759 (citing many cases and holding that the risk on the whole might be increased by sale); *Barnes* v. *Union Mut. F. Ins. Co.*, 51 Me. 110, 81 Am. Dec. 562.

[8] *Clark* v. *New England M. F. Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44; *Loomis* v. *Rockford Ins. Co.*, 77 Wis. 87, 45 N. W. 813.

[9] *Hartford F. Ins. Co.* v. *Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Speagle* v. *Dwelling House Ins. Co.*, 97 Ky. 646, 31 S. W. 282; *Connecticut F. Ins. Co.* v. *Tilley*, 88 Va. 1024, 14 S. E. 851, 29 Am. St. R. 770. Vacancy as to house will not avoid as to barn, *Worley* v. *Des Moines, etc., Ins. Co.*, 91 Iowa, 150, 59 N. W. 16, 51 Am. St. R. 334; *contra*, *Herman* v. *Adriatic F. Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644; and see *Dohlantry* v. *Ins. Co.*, 83 Wis. 181, 53 N. W. 448 (vacancy in one was thought to affect the risk in another).

[10] *Southern F. Ins. Co.* v. *Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. R. 216 (breach as to stock avoided as to building); *Geiss* v. *Ins. Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. R. 324; *Taylor* v. *Anchor Mut. F. Ins. Co.*, 116 Iowa, 625, 88 N. W. 807, 93 Am. St. R. 261, 57 L. R. A. 328 (chattel mortgage on cattle does not avoid as to house and furniture); *Baldwin* v. *Hartford F. Ins. Co.*, 60 N. H. 422, 49 Am. Rep. 324 (alienation of one parcel avoids as to all unless court can rule that there has been no increase of risk); *Fire Asso.* v. *Williamson*, 26 Pa. St. 196 (gunpowder in one of three buildings endangered all); *Loomis* v. *Ins. Co.*, 77 Wis. 87, 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. R. 96. If premium is indivisible it has been

An excellent illustration of these distinctions is furnished by a recent New York case in which it was held that misstatements regarding title, liens and incumbrances avoided only as to the real estate, but a misstatement that insured had no reason to fear incendiarism was a breach of warranty affecting the entire contract.[1] So also a prohibited vacancy of the building is held to avoid the insurance as to its contents also.[2] And where the insurance company had a lien on the real estate for the entire premium the court concluded that a prohibited mortgage on the building avoided the insurance as to contents also.[3]

An iron safe clause calls for the keeping of an inventory and a complete set of account books by a merchant or manufacturer. Whether a violation of this special clause avoids the entire policy on building and contents, or only the item of goods, when insured at a separate amount, is a disputed point.[4]

The effect upon this rule of the phraseology of the New York standard fire policy "this entire policy shall be void," etc., will be hereinafter discussed. The primary rule, that any fraud on the part of the assured, though relating only to a single item of the subject-matter, defeats any recovery whatsoever, will not be forgotten.[5]

§ 116. Void Means Voidable.—Though the contract is said to be avoided by the violation on the part of the insured of any of the conditions or warranties inserted for the benefit of the insurer, this means that the contract is voidable at the option of the insurer.[6] The insurer, therefore, may waive the forfeiture and revive the contract or he may estop himself from taking advantage of the breach.[7]

§ 117. Burden on Insurer in Pleading and Proof.—Rules relating to pleading and burden of proof are so far local and peculiar to

held that contract is not severable, *Kahler* v. *Iowa State Ins. Co.*, 106 Iowa, 380, 76 N. W. 734.

[1] *Donley* v. *Glens Falls Ins. Co.*, 184 N. Y. 107, 76 N. E. 914.

[2] *Agricultural Ins. Co.* v. *Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. R. 457; *Hartshorne* v. *Agricultural Ins. Co.*, 50 N. J. L. 427, 14 Atl. 615; also as to barn and outbuildings, *Herman* v. *Adriatic F. Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644.

[3] *McGowan* v. *Peoples' Mut. F. Ins. Co.*, 54 Vt. 211, 41 Am. Rep. 843. Seizure by attachment of part avoids as to all the personal property, *Burr* v. *German Ins. Co.*, 84 Wis. 76, 54 N. W. 22, 36 Am. St. R. 905.

[4] *Coggins* v. *Ætna Ins. Co.* (N. C., 1907), 56 S. E. 506 (insurance both on storehouse and stock avoided. Cases cited *pro* and *con.*).

[5] See § 94.

[6] *N. Y. Life Ins. Co.* v. *Baker*, 83 Fed. 647; *Shearman* v. *The Niagara Fire Ins. Co.*, 46 N. Y. 526, 7 Am. Rep. 380; *Quebec Mar. Ins. Co.* v. *Bank* (1870), L. R. 3 P. C. 244; *Provincial Ins. Co.* v. *Leduc* (1874), L. R. 6 P. C. 243; Eng. Mar. Ins. Act (1906), § 34 (3).

[7] See following chapters.

the jurisdiction that no attempt will be made to deal with this subject exhaustively.

It may be stated, however, that fire and life policies, and to some extent marine, relate to such a multitude of minute particulars, many of them often having no bearing upon the case in hand, and many of the warranties being conditions subsequent, that the majority of courts place upon the insurance company the burden of specially pleading and proving any breach of warranty upon which it may rely in defense.[1] This practice prevails very generally where the breach is founded upon the violation of a condition subsequent, or upon an exception to the insurer's liability,[2] or upon a misstatement in the application.[3] But in some jurisdictions the assured must

[1] *Triple Link, etc., Assn.* v. *Williams*, 121 Ala. 138, 26 So. 19 (1899); *Indian River, etc., Bk.* v. *Hartford F. Ins. Co.* (Fla.), 35 So. 228; *Phœnix Ins. Co.* v. *Stocks*, 149 Ill. 319, 36 N. E. 408; *Benjamin* v. *Conn. Ind. Ass.*, 44 La. Ann. 1017, 11 So. 628, 32 Am. St. R. 362; *Hale* v. *Life Ind. & I. Co.*, 65 Minn. 548, 68 N. W. 182 (burden on company to prove invalidity of contract); *Dimick* v. *Met. Life Ins. Co.*, 67 N. J. L. 367, 51 Atl. 692 (special plea required); *Slocovich* v. *Orient Mut. Ins. Co.*, 108 N. Y. 56, 66, 14 N. E. 802 (after proof of loss by the peril named, burden is on defendant to show invalidity of contract); *Union Ins. Co.* v. *McGookey*, 33 Ohio St. 555. *Contra*, as to marine policy, *McLoon* v. *Ins. Co.*, 100 Mass. 472, 97 Am. Dec. 116.

[2] *Blasingame* v. *Ins. Co.*, 75 Cal. 633, 17 Pac. 925 (fall of building); (*contra*, *Phœnix Ins. Co.* v. *Boren*, 83 Tex. 97, 18 S. W. 484); *Phenix Ins. Co.* v. *Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. R. 393; *Russell* v. *Fidelity F. Ins. Co.*, 84 Iowa, 93, 50 N. W. 546; *Transatlantic F. Ins. Co.* v. *Bamberger* (Ky.), 11 S. W. 595 (fallen building); *Coburn* v. *Travellers' Ins. Co.*, 145 Mass. 226, 229, 13 N. E. 604 (holding that stipulation by way of defeasance added to principal contract must be pleaded and proved. General denial not sufficient); *Freedman* v. *Atlas Assur. Co.*, 133 Mich. 212, 94 N. W. 757 (burden on company to prove fallen building); *Malicki* v. *Chi. Guar. etc., Soc.*, 119 Mich. 151, 156, 77 N. W. 690; *Murray* v. *N. Y. Life Ins. Co.*, 85 N. Y. 236, 239; *Van Valkenburgh* v. *Am. Pop. L. Ins. Co.*, 70 N. Y. 605; *Ins. Co.* v. *Crunk*, 91 Tenn. 376, 23 S. W. 140 (exception of fallen building); *Johnston* v. *North W. Live Stock Ins. Co.*, 94 Wis. 117, 68 N. W. 868. The plaintiff need not allege performance of promissory warranties, that is of conditions subsequent, *Tillis* v. *L. & L. & G. Ins. Co.*, 46 Fla. 268.

[3] *Piedmont & A. L. Ins. Co.* v. *Ewing*, 92 U. S. 377, 23 L. Ed. 610 (next to impossible to prove negatives. Burden on company to prove affirmative if it relies on any misstatement); *American Cred. Ind. Co.* v. *Wood*, 73 Fed. 81, 84, 19 C. C. A. 264, 38 U. S. App. 583; *Continental Life Ins. Co.* v. *Rogers*, 119 Ill. 474; *Supreme Council* v. *Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. R. 244; *Chambers* v. *Ins. Co.*, 64 Minn. 495, 67 N. W. 367, 58 Am. St. R. 549. *Breese* v. *Met. Life Ins. Co.*, 37 App; Div. 152, 55 N. Y. Supp. 775. *Contra*, *Vincent* v. *Mut. Res. Fund, etc.*, 77 Conn. 281, 58 Atl. 963; *Johnson* v. *Maryland Cas. Co.*, 73 N. H. 259; *Bobbitt* v. *L. & L. & G. Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494; *Leonard* v. *State Mut. L. Assu. Co.*, 24 R. I. 7, 51 Atl. 1049 (general denial enough); *Sweeney* v. *Met. L. Ins. Co.*, 19 R. I. 171, 36 Atl. 9, 38 L. R. A. 297, 61 Am. St. R. 751. As to what plaintiff must allege and prove see *American Credit, etc., Co.* v. *Wood*, 73 Fed. 81, 19 C. C. A. 264; *Cowan* v. *Phœnix Ins. Co.*, 78 Cal. 181, 20 Pac. 408; *Vincent* v. *Mut. Res. Fund, etc.*, 77 Conn. 281, 58 Atl. 963; *O'Connell* v. *Supreme Conclave*, 102 Ga. 143, 28 S. E. 282, 66 Am. St. R. 159; *Phœnix Ins. Co.* v. *Stocks*, 149 Ill. 319, 36 N. E. 408 (fire insurance); *Continental Life Ins. Co.* v. *Rogers*, 119 Ill. 474 (life insurance); *Phœnix Ins. Co.* v. *Pickel*. 119 Ind. 155, 21 N. E. 546, 12

allege and prove a compliance with all conditions that are precedent to a valid inception of the contract.[1]

§ 118. Statutes Making Warranties Representations.—In spite, however, of the liberal rules of construction described in the last eight sections, the strict doctrine of warranty has often worked injustice especially in instances where the insured by reason of some inadvertent misstatement in his application for life or fire insurance has incurred a technical forfeiture of his policy, frequently possessing no knowledge or appreciation of the situation in good season to permit a correction of the fatal error.[2] To mitigate the severity of this rigid common-law rule, many states have passed statutes, varying somewhat in application and phraseology, but the dominant provision in most of which is that in the absence of fraud no statement by the insured shall effect forfeiture of his policy unless it relate to a matter material to the risk.[3] Some of the statutes go

Am. St. R. 393 (fire insurance); *McLoon* v. *Commercial Ins. Co.*, 100 Mass. 472, 1 Am. Rep. 129; *Johnson* v. *Maryland Cas. Co.*, 73 N. H. 259; *Bogardus* v. *N. Y. Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522; *McManus* v. *Western Assur. Co.*, 43 App. Div. 550, 60 N. Y. Supp. 1143, aff'd 167 N. Y. 602; *Sullivan* v. *Spring Garden Ins. Co.*, 34 App. Div. 128, 54 N. Y. Supp, 629; *Hersey* v. *Northern Assur. Co.*, 75 Vt. 441, 56 Atl. 95. But the burden rests upon plaintiff to bring himself within the terms of the main promise of the insurer, *Whitlach* v. *Fidelity & Cas. Co.*, 149 N. Y. 45, 43 N. E. 405 (death from external, violent and accidental means).

[1] *Phœnix Ins. Co.* v. *Pickel*, 119 Ind. 155, 21 N. E. 546; *Jones* v. *Acc. Assn.*, 92 Iowa, 652, 61 N. W. 485; *Johnston* v. *Northwestern, etc., Co.*, 94 Wis. 117, 68 N. W. 868. Other courts while theoretically adhering to this rule practically omit to enforce it against the assured by holding that far less will establish a *prima facie* case, *Vincent* v. *Mut. Res. F., etc.*, 77 Conn. 281, 58 Atl. 963; *Allen* v. *Phœnix Assur. Co.* (Idaho, Nov., 1906), 88 Pac. 245.

[2] *Continental Fire Ins. Co.* v. *Whitaker*, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451; *Hartford Life Ins. Co.* v. *Stallings*, 110 Tenn. 1, 72, S. W. 960; *Metropolitan L. Ins. Co.* v. *Rutherford*, 98 Va. 195, 35 S. E. 361. As to statutes providing that the policy must contain the entire contract, etc., see Appendix, ch. I.

[3] Appendix, ch. 1. Thus *Kenton Ins. Co.* v. *Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81 (misstatement as to ownership). Question of materiality is thus by statute relegated to the jury, *Keller* v. *Home Life Ins. Co*, 198 Mo. 440 (1906), 95 S. W. 903 (health, consumption); *Albert* v. *Mut. L. Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. R. 693; *Price* v. *Standard L. & A. Ins. Co.*, 90 Minn. 264, 95 N. W. 1118; unless the facts allow of only one inference, *Smith* v. *Mut. L. Ins. Co.*, 196 Pa. St. 314, 46 Atl. 426; *March* v. *Life Ins. Co.*, 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. R. 887. And in the face of the statutory provision the parties cannot withdraw the issue from the jury by agreeing in the policy that the matter is material, *Fidelity Mut. L. Assn.* v. *Miller*, 92 Fed. 63, 34 C. C. A. 211; *Germania Ins. Co.* v. *Rudwig*, 80 Ky. 223; *Hermany* v. *Assoc.*, 151 Pa. St. 17, 24 Atl. 1064. So also if the contract is really made in one state the parties must not, to evade such statutes of that state, agree in the policy that some different body of law shall apply, for instance, the statutes of another state, *McClain* v. *Provident Sav. L. Ass. Soc.*, 110 Fed. 80, 49 C. C. A. 31; *Franklin L. Ins. Co.* v. *Galligan*, 71 Ark. 295, 73 S. W. 102, 100 Am. St. R. 73; *Dolan* v. *Mut. R. Fund L. Ass.*, 173 Mass. 197, 53 N. E. 398; *Fidelity*

further and provide in substance that a breach of any condition in the policy itself shall not avoid unless loss occur during or by reason of it, or unless the risk be thereby materially increased.[1]

§ 119. Such Enactments Valid and Controlling.—Such statutory provisions are constitutional and obligatory;[2] and no matter what may be the language of the contract, they enter into and control all policies issued after the act goes into effect.[3]

The Missouri statute excluding suicide as a defense to the company in life insurance offers an impressive illustration of the rule. Although such a statute should be regarded by the highest federal court as inconsistent with public policy, or even with sound morality, nevertheless that court will give to it a controlling effect, and will not for that reason alone disregard its provisions.[4]

Mut. L. Assn. v. *Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Keatley* v. *Travelers' Ins. Co.*, 187 Pa. St. 197, 40 Atl. 808; *Sieders* v. *Merchants' Life Assn.*, 93 Tex. 194, 54 S. W. 753.

[1] For instance Maine R. S. (1883), c. 49, § 20; Mich. Comp. L. (1897), § 5180; Mo., 2 R. S. (1899), § 7974; N. H. Pub. St. (1901), c. 170, § 2; N. C. Acts (1893), c. 299, § 9; Ohio R. S., § 3643; Okla., 1 R. S. (1903), § 3202; So. Dak. R. Code (1903), § 1951.

[2] *John Hancock M. L. Ins. Co.* v. *Warren*, 181 U. S. 73, 21 S. Ct. 535, 45 L. Ed. 955; *McGannon* v. *Ins. Co.*, 127 Mich. 639, 87 N. W. 62, 54 L. R. A. 739. Thus a statutory provision that a breach shall not avoid unless contributing to the risk is not unconstitutional, *Northwestern Nat. L. Ins. Co.* v. *Riggs*, 27 S. Ct. 126 (Dec., 1906).

[3] *Christian* v. *Conn. Mut. L. Ins. Co.*, 143 Mo. 460, 45 S. W. 268; *Klostermann* v. *Germania L. Ins. Co.*, 6 Mo. App. 582. The word "representations" as used in statutes includes also statements warranted, *White* v. *Provident Sav. L., etc., Soc.*, 163 Mass. 108, 39 N. E. 771.

[4] *Whitfield* v. *Ætna L. Ins. Co.* (U. S., 1907), 27 S. Ct. 578.

CHAPTER VI

General Principles—Continued

Waiver and Estoppel

§ 120. Nature of Waiver and Estoppel in General.—Waiver is the voluntary relinquishment of a known right.[1] Estoppel *in pais* is the bar which equity raises, in the interest of fair dealing, to prevent the one party from enforcing, to the detriment of the other party, certain rights which it possesses under the letter of the contract, where, by its declarations, agreement, or conduct, it has induced the other party to rest secure in the belief that such rights have been relinquished.[2] While waiver, properly speaking, is the voluntary abandonment of a right, estoppel includes those cases where an abandonment is inferred or imposed by the court from the nature of the conduct of the party who would otherwise be entitled to the right. Waiver rests upon knowledge[3] of the right, and an intention to abandon it,[4] by the party waiving. Estoppel rests upon misleading conduct by one party to the prejudice of the other, and is forced upon the wrongdoer by the court, but only to prevent fraud, either actual or constructive.[5] The words waiver and estoppel, however, are often used interchangeably by the courts.[6]

[1] *Dale* v. *Continental Ins. Co.*, 95 Tenn. 38, 50, 31 S. W. 266; *Findeisen* v. *Metropole Fire Ins. Co.*, 57 Vt. 520.

[2] *Union Ins. Co.* v. *McGookey*, 33 Ohio St. 555. The United States Supreme Court says: "Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract," *Ins. Co.* v. *Eggleston*, 96 U. S. 572; *Georgia Home Ins. Co.* v. *Allen*, 128 Ala. 451, 30 So. 537; *Planters' Mut. Ins. Co.* v. *Loyd*, 67 Ark. 584, 56 S. W. 44 77 Am. St. R. 136.

[3] *Bennecke* v. *Conn. Mut. L. I. Co.*, 105 U. S. 355, 359, 26 L. Ed. 990; *Northwestern Mut. L. I. Co.* v. *Montgomery*, 116 Ga. 799, 43 S. E. 79; *Stringham* v. *Mut. Life Ins. Co.*, 44 Ore. 447, 75 Pac. 822.

[4] *Sullivan* v. *Prudential Ins. Co.*, 172 N. Y. 482, 485, 65 N. E. 268.

[5] *Thebaud* v. *Great Western Ins. Co.*, 50 N. E. 284, 155 N. Y. 516, 522.

[6] Waiver and estoppel distinguished, *Metcalf* v. *Phœnix Ins. Co.*, 21 R. I. 307, 43 Atl. 541. Implied waiver defined, *Astrich* v. *German-Am. Ins. Co.*, 131 Fed. 13 65 C. C. A. 251. The terms "implied waiver" and "estoppel" are used interchangeably,

The doctrine of implied waiver and estoppel, adopted with the design of evading unconscionable forfeitures,[1] moderates the rigor of the technical common-law rules relating to concealment, misrepresentation, and warranty, as set forth in the last two chapters, and, doubtless, in many individual cases, has accomplished an equitable result.[2]

The party that generally waives or is estopped in insurance law is the insurer, but the same doctrine may be applied in favor of the insurer,[3] and against the insured. Thus, where a policy provided that it should cease until a premium note was paid, the court held that, in an action by the insured upon the policy, he was estopped from setting up the claim that the note was unauthorized by the charter and *ultra vires*.[4]

§ 121. Election once Made is Final.—If with knowledge of the forfeiture the insurer elects to revive the contract, and evinces his election by an unequivocal and positive act of confirmation, or by conduct amounting to an estoppel, he cannot thereafter insist upon the past breach.[5]

§ 122. Whether New Consideration Required.—To support a waiver or an estoppel the insured need pay no fresh consideration for the indulgence granted, provided he can show that in reliance upon the statement or conduct of the insurers he has been misled to his detriment.[6] Mutual promises afford evidence of a sufficient con-

Bernhard v. *Rochester German Ins. Co.* (Conn.), 65 Atl. 134.

[1] *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252; *Kiernan* v. *Dutchess, etc., Co.*, 150 N. Y. 190, 44 N. E. 698.

[2] *Welch* v. *Fire Association*, 120 Wis. 456, 468, 98 N. W. 227 (though admitting that the doctrine of estoppel by parol testimony is exceptionally peculiar to insurance contracts, the court does not feel warranted, "in seriously questioning the wisdom of it").

[3] *Mut. Life I. Co.* v. *Hill*, 193 U. S. 551, 24 S. Ct. 538. Waiver or estoppel operates also in favor of privies in blood or estate, for example, an assignee of a life policy, *Meeder* v. *Provident Sav. L. A. Soc.*, 171 N. Y. 432, 64 N. E. 167; also in favor of the beneficiary, *Frank* v. *Mut. Life Ins. Co.*, 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807; and waiver in favor of assignee for creditors will enure to benefit of assured, *Mut. R. F. Life Assn.* v. *Cleveland Co. Mills*, 82 Fed. 508, 27 C. C. A. 212.

[4] *Hale* v. *Mich. F. Mut. F. Ins. Co.* (Mich., 1907), 111 N. W. 1068.

[5] *Masonic Mutual Benefit Asso.* v. *Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Brink* v. *Hanover Fire Ins. Co.*, 80 N. Y. 108. This is based upon the plainest principles of law, good faith, and fair dealing, *Grant* v. *Eliot & Kittery M. F. I. Co.*, 75 Me. 196, 203. But a waiver as to one breach does not of necessity imply a similar indulgence in future, *Thompson* v. *Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765.

[6] *Kiernan* v. *Dutchess Co. Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; approved in *Germania Fire Ins. Co.* v. *Pilcher*, 160 Ind. 392, 64 N. E. 921; *Walker* v. *Ins. Co.*, 156 N. Y. 628, 51 N. E. 392; *Dobson* v. *Hartford Ins. Co.* 86 App. Div. 115, aff'd 179 N. Y. 557

sideration; so also loss to a promisee is as effective in establishing consideration as advantage to a promisor.[1] And, if the act of waiver or estoppel occur before loss, it may be presumed that except for reliance upon it the insured might have protected himself by taking out other insurance.[2] So also if it have to do with formalities relating to the proofs of loss, or time for instituting action, it may be presumed that except for misleading conduct of the insurer the insured would have governed himself by the strict technicalities of the contract.[3] In case, however, there is no element of estoppel or of new consideration, then, by the weight both of reason and authority, the act of waiver, unless it be evidenced by an executed written statement or agreement,[4] is not binding upon the insurer.[5] Other-

[1] *De Frece* v. *National Life Ins. Co.*, 136 N. Y. 144, 151, 32 N. E. 556, citing many cases.

[2] *Manchester* v. *Guardian Assur. Co.*, 151 N. Y. 88, 92, 45 N. E. 381, 56 Am. St. R. 600 (citing cases); *Wing* v. *Harvey*, 5 De G., M. & G. 265, 268.

[3] *Dobson* v. *Hartford F. Ins. Co.*, 86 App. Div. 115, 83 N. Y. Supp. 456, aff'd 179 N. Y. 557; *Georgia Home Ins. Co.* v. *Kinnier*, 28 Grat. (Va.) 88.

[4] *Gibson El. Co.* v. *L. & L. & G. Ins. Co.*, 159 N. Y. 418, 426, 54 N. E. 23 (there must be either express waiver or estoppel); *Viele* v. *Germania Ins. Co.*, 26 Iowa, 9, 57, 96 Am. Dec. 83. Written waiver is effective if, like the standard, the policy so provides, *Nelson* v. *Traders' Ins. Co.*, 181 N. Y. 472, 476; since then the original consideration supports it. And a modification of a contract consisting of a present abandonment of a right by a party, if duly executed in writing, should be held binding though unsupported by fresh consideration, *Rice* v. *Fidel. & Dep. Co.*, 103 Fed. 427, 434, 43 C. C. A. 270; *Quebec Mar. Ins. Co.* v. *Bank*, L. R. 3 P. C. 234, 244; *Weir* v. *Aberdeen*, 2 B. & Ald. 320. The insurance company has an absolute right to abandon any of the many clauses inserted by it and framed solely for its benefit, *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, 338, 23 S. Ct. 126, 47 L. Ed. 204. No better or more orthodox evidence of the exercise of this option can be suggested than a written permit, executed and delivered to the insured; compare, *Larkin* v. *Hardenbrook*, 90 N. Y. 333; *Simons* v. *Supreme Council*, 178 N. Y. 263. In analogy to the law of gifts, a written permit should be held irrevocable from time of delivery, if granted without misapprehension of the facts, though without fresh consideration and without change of position on the part of the insured, *Opitz* v. *Karel*, 118 Wis. 527, 95 N. W. 948; *Rice* v. *Fidelity & Dep. Co.*, 103 Fed. 427, 43 C. C. A. 270. Thus, under the marine policy, though a vessel has not yet sailed, a permit to touch and stay should be held binding upon the underwriter, and irrevocable from delivery. So also, under the fire policy, the same rule should apply to a permit extending the time to begin action, though the limited period of twelve months has already expired before the permit is granted, see *Prentice* v. *Knickerbocker Life Ins. Co.*, 77 N. Y. 483, 33 Am. Rep. 651. But compare *Knickerbocker Life Ins. Co.* v. *Norton*, 96 U. S. 399. The permit, if delivered, may be actually attached to the policy at any time, *Bennett* v. *Western Underwriters' Assn.*, 130 Mich. 216.

[5] *Ins. Co.* v. *Wolff*, 95 U. S. 326, 333, 24 L. Ed. 387; *United Firemen's Ins. Co.* v. *Thomas*, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 450 (cited with approval, 183 U. S. 340); *Morris* v. *Orient Ins. Co.*, 106 Ga. 472, 475, 33 S. E. 430; *Northwestern Mut. L. Ins. Co.* v. *Amerman*, 119 Ill. 329, 10 N. E. 225, 59 Am. Rep. 799; *N. Y. Cent. Ins. Co.* v. *Watson*, 23 Mich. 486; *Burdick* v. *Life Assn.*, 77 Mo. App. 629, 636; *Armstrong* v. *Agricultural Ins. Co.*, 130 N. Y. 560, 568, 29 N. E. 991; *Underwood* v. *Farmers' Joint Stock Ins. Co.*, 57 N. Y. 500, 506; *Marvin* v. *Universal L. Ins. Co.*, 16 Hun, 494, aff'd, without deciding this point, 85 N. Y. 278

wise the sanction of the written contract is virtually destroyed by parol;[1] but, especially in matters of mere formality, like serving proofs of loss, there are, in some cases, *dicta* to the effect that even after breach and without any new consideration or estoppel the company may waive forfeiture, and that such waiver may be shown by parol; but, in most if not in all, elements of estoppel in fact existed.[2]

§ 123. Action Usually upon Contract: Not for Rescission or Reformation.—It will be observed that, as the question ordinarily arises in practice, the insured, when he claims a waiver or an estoppel, is not aiming at reformation of the policy in equity, nor at rescission for fraud or mistake. Rescission with restitution of premiums is in most instances an inadequate or unsatisfactory form of relief, and rather than apply to a judge for reformation of the contract the assured is apt to entertain a preference for a jury trial. Accordingly, he ordinarily brings his action upon the policy, and under the doctrine of waiver and estoppel, as applied by most courts, may be allowed to recover, although under the terms of the written contract, in conjunction, it may be, with the testimony of his own witnesses, no cause of action is established against the insurers.[3]

§ 124. Disturbance of Contract by Parol.—In most instances waiver or estoppel must be established by oral testimony. For example, the written application for the life policy is made part of the contract and its statements are warranted to be true. It declares that the age of the insured is thirty-five, or that he never had typhoid fever, or that he has taken out no other insurance; but, on the trial of the action brought by his representatives on the policy, the testi-

284; *Ripley* v. *Ætna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Lantz* v. *Vermont L. Ins. Co.*, 139 Pa. St. 546, 21 Atl. 80, 23 Am. St. R. 202, 10 L. R. A. 577; *Dale* v. *Continental Ins. Co.*, 95 Tenn. 38, 50, 31 S. W. 266; *Merchants' Mut. Ins. Co.* v. *Lacroix*, 45 Tex. 158; *McFarland* v. *Peabody Ins. Co.*, 6 W. Va. 425. *Contra*, other cases with *dicta* in substance that the company may voluntarily dispense with the condition, whether there is a new consideration or an estoppel or not and that its election may be shown by parol, *Alabama State Mut. Assur. Co.* v. *Long, etc., Co.*, 123 Ala. 667, 26 So. 655; *Home Fire Ins. Co.* v. *Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. R. 111; *Viele* v. *Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Kingman* v. *Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762; and see *Pratt* v. *Ins. Co.*, 130 N. Y. 206, 29 N. E. 117; *Roby* v. *Ins. Co.*, 120 N. Y. 510, 24 N. E. 808; *Titus* v. *Ins. Co.*, 81 N. Y. 410 (in which it is declared that there need be no estoppel and no new agreement).

[1] *Northern Assur. Co.* v. *Grand View Bldg. Asso.*, 183 U. S. 308, 361, 22 S. Ct. 133, 46 L. Ed. 213; *Conn. F. Ins. Co.* v. *Buchanan*, 141 Fed. 877, 889 (citing many cases).

[2] See *Prentice* v. *Knickerbocker Life Ins. Co.*, 77 N. Y. 483, 33 Am. Rep. 651.

[3] *Rowley* v. *Empire Ins. Co.*, 36 N. Y. 550; *Van Schoick* v. *Niagara Fire Ins. Co.*, 68 N. Y. 434.

mony shows that his age was forty, or that he *had* been afflicted with typhoid fever, or that he *had* taken out other insurance. Under the doctrine of parol waivers, however, the plaintiff is permitted to show by oral testimony that the agent of the company had knowledge of the truth of the circumstances misstated in the application, and closed the contract and received the premium or delivered the policy in full possession of such knowledge. The agent denies any such knowledge; the issue so raised goes to the jury, and if decided for the plaintiff, as it usually is, without much regard to weight of evidence, the plaintiff recovers.[1]

In like manner, the fire policy provides that it shall be void if the insured is not unconditional and sole owner,[2] or has other insurance,[3] or uses certain hazardous articles,[4] or if the insured building stands on leased ground,[5] or if the insured personal property is covered by a chattel mortgage,[6] without, in each case, written permit indorsed on the policy. There is no such permit, but on the trial the plaintiff is allowed to show that when he applied for the insurance he mentioned to the agent the circumstances constituting the breach. The agent denies this. The issue goes to the jury. The plaintiff recovers. The leading case of *Plumb* v. *Cattaraugus Ins. Co.*[7] is said to have changed the law for New York.[8] And this was conceded by the New York Court of Appeals in a later case.[9] But the doctrine of parol waivers in general as adopted by New York subsequently met with approval in most of the states.

§ 125. Effect of Doctrine on Common-Law Rules of Evidence.— It is often said that the doctrine of waiver and estoppel does not subvert the terms of the policy, and is not repugnant to the ordinary rules of evidence.[10] This may be true where the plaintiff brings his action to annul or to reform the contract, but where, as is usual, the action is brought to recover upon the policy, it would seem to be more sensible and accurate to concede, that, so far as this doctrine tolerates parol evidence of knowledge by the insurers, prior to the

[1] *Sternaman* v. *Met. Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. R. 625.

[2] *Virginia F. & M. Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429, 46 S. E. 463, 102 Am. St. R. 846.

[3] *Swain* v. *Macon Fire Ins. Co.*, 102 Ga. 96, 29 S. E. 147.

[4] *Hartley* v. *Penn. Fire Ins. Co.*, 91 Minn. 382, 98 N. W. 198, 103 Am. St. R. 512.

[5] *Bergeron* v. *Pamlico Ins., etc., Co.*, 111 N. C. 45, 15 S. E. 883.

[6] *Robbins* v. *Springfield F. Ins. Co.*, 149 N. Y. 477, 44 N. E. 159.

[7] 18 N. Y. 392, 72 Am. Dec. 526.

[8] *Dewees* v. *Manhattan Ins. Co.*, 6 Vroom. (N. J.) 374.

[9] *Rowley* v. *Empire Ins. Co.*, 36 N. Y 550.

[10] *Queen Ins. Co.* v. *Kline*, 17 Ky. L. R. 619, 32 S. W. 214 (1895); *Pitney* v. *Glens Falls Ins. Co.*, 65 N. Y. 25.

closing of the contract, of facts at variance with its stipulations, and permits the insured to give his oral version of antecedent and contemporaneous negotiations and transactions, it does constitute a substantial departure from the ordinary rule of evidence; since a doctrine which denies all force and effect to an unambiguous clause of a written contract, to all intents and purposes, expunges the clause from the contract altogether.[1]

§ 126. Considerations Favoring Doctrine of Parol Waivers.—The policy is prepared in the interest of the insurers. The applicant must take it or nothing. It is a general form framed for all instances and not for the particular instance. Its conditions are numerous and complex, and often the insured does not receive it until after the contract is closed. He may have no opportunity to compare it with the application, though the latter may constitute a part of the contract. It would not be consonant with fair dealing, indeed it would work actual fraud, to permit an insurer in return for the premium to deliver a pretended contract of insurance, while knowing all the time, from the very threshold of the transaction, that a forfeiture is already incurred, and that therefore the policy will be of no more avail to the insured than a piece of waste paper.[2]

With respect to another class of forfeitures, the contention is made that it would not be just to hold the insured responsible for erroneous answers in the application or policy, where the insertion or omission complained of is the act of the company or its representative, without connivance on the part of the insured, since in such a case the alleged breach of contract is not the act of the insured at all, or not mainly his act.[3]

Again, where the policy during its life, whether before or after loss, becomes voidable at the option and to the knowledge of the insurers, words or acts of the insurers, confirmatory of the continued validity of the contract, ought to be taken as good evidence of the exercise of this option to condone the default, if otherwise their effect would be to mislead the insured to his prejudice. To this last proposition substantially all the authorities agree, provided the representative of the insurer, acting on its behalf, has sufficient power to waive.

[1] See the important case of *Northern Assur. Co.* v. *Grand View Building Assn.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213; *Franklin Fire Ins. Co.* v. *Martin*, 40 N. J. L. 568.

[2] *Van Schoick* v. *Ins. Co.*, 68 N. Y. 434.

[3] *Wilkinson* v. *Ins. Co.*, 13 Wall. (U. S.) 222.

§ 127. Considerations Opposed to the Doctrine.—The contract of insurance should not be put outside the pale of common-law rules.[1] By its own terms it provides an exclusive, reasonable, and business-like method for making modifications in the contract by the employment of written consents called permits.[2] The instrument as written is the most reliable evidence of the agreement.[3] To go outside of it is to encourage falsehood and fraud to the certain injury of one or other of the parties and to the detriment of the public. The inevitable tendency will be toward a multiplication of fires and an increase of premium rates. Claimants, through lack of memory or by evil design, will, too often, fit oral testimony to the exigencies of their case. A material witness on one side or the other may die before trial. Since the written contract alone is reported to the company,[4] the applicant should know that the statements in the application and policy, whether right or wrong, must, in most instances, constitute all that the home office has before it in estimating risks and fixing rates of premium. He should know that the insurers have never wittingly given authority to their agents to distort or secrete from them any facts bearing upon these vital subjects. Under the doctrine of waiver and estoppel it sometimes happens that the insured is allowed to recover upon a policy in spite of forfeiture where, if the facts disclosed for the first time at the trial had been made known to the company in advance, it would have declined the risk altogether, and very frequently the undisclosed facts would affect the rate of premium. Thus, there is often thrust upon the insurers, by an anomalous doctrine of law, a contract which they neither have made, nor, if the facts had been disclosed to them, would have made.[5]

§ 128. Practical Operation of Doctrine.—The doctrine of parol waivers as applied to excuse breaches of warranties contained in policies is largely a development of recent years,[6] and may fairly be

[1] *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213.

[2] *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, *supra; Nelson* v. *Traders' Ins. Co.*, 181 N. Y. 472.

[3] *Dimick* v. *Met. Life Ins. Co.*, 69 N. J. L. 384, 55 Atl. 291.

[4] See § 75, *supra*.

[5] If the general form of the contract is unfair it is the function of legislature, not of court or jury, to change it, *Imperial F. Ins. Co.* v. *Coos Co.*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231. The United States Circuit Court says: "There is too much tendency on the part of judges to construe away valid provisions in contracts of insurance and indemnity and thus reach some more equitable conclusion. The result is much 'hard case' law, which is mostly bad law, and always variable law," *Jackson* v. *Fidelity & Cas. Co.*, 75 Fed. 359, 21 C. C. A. 394.

[6] Doctrine of allowing parol evidence that agent of company knew facts at variance with policy was for many years repudiated by substan-

called an American innovation in the law of insurance.[1] Its application has often fostered dishonest claims and encouraged perjury in sustaining them. The tendency of this has been to drive the companies into an illiberal policy in modifying their contracts and in adjusting their losses. Such action of the companies, in turn, has stimulated the courts to adopt a more and more rigorous application of the doctrine against the insurers, and has called forth frequent and varied interference by the legislatures of all the states;[2] thus this whole branch of the law in the United States has been thrown into confusion and uncertainty.[3] The cases upon this subject in this country constitute a considerable portion of the law of insurance,[4] and many of the opinions of our courts of last resort, as reported in them, are hopelessly at variance with one another. Nevertheless, all the courts recognize that there exists in the law of insurance an equitable doctrine of waiver and estoppel,[5] but when and how to apply it is the perplexing problem. Estoppel is a rule of law avowedly subverting and overriding the terms of the contract, but adopted for the purpose of preventing fraud.[6] The

tially all courts in actions on the contract, *Weston* v. *Emes*, 1 Taunt. 115, (Lord Mansfield with unerring judgment discriminates between matter of inducement and matter of contract). *Carpenter* v. *Providence Wash. Ins. Co.*, 16 Pet. (U. S.) 495; *Atherton* v. *Brown*, 14 Mass. 152; *Hartford F. Ins. Co.* v. *Davenport*, 37 Mich. 609; *Dewees* v. *Manhattan Ins. Co.*, 35 N. J. L. 366; *Jennings* v. *Chenango Co. Mut. Ins. Co.*, 2 Denio (N. Y.), 75.

[1] In the index to the last edition of Arnould, Mar. Ins. (1901), we look in vain for the subject "parol waiver or estoppel." According to last edition Bunyon, F. Ins. (1906), the following two cases furnish the only instances cited from English and Irish reports involving a variation in the terms of the policy by virtue of the doctrine of waiver and estoppel, *Wing* v. *Harvey*, 5 De G., M. & G. 265; *Armstrong* v. *Turquand*, 9 Ir. C. L. R. 32, in both of which renewal premiums were accepted with knowledge of facts constituting breach. A modification by agreement with fresh consideration to each party is, of course, allowed, *Supple* v. *Cain*, 9 Ir. C. L. R. 1, and credit for first premium inferred where the policy recites its prepayment, *Roberts* v. *Security Co.* (1897), 1 Q. B. 111, but in the last two cases there is no subverting of the written terms by parol. Nor is there in a marine case where the English court held that the underwriter might elect to waive forfeiture for an inducing misrepresentation made prior to the contract, *Morrison* v. *Universal Mar. Ins. Co.*, L. R. 8 Exch. 40, *id.* 197. The English court does not find waiver or estoppel, even where true answers are given to the company's solicitor and erroneous answers are written into the application by him, *Biggar* v. *Rock Life Assur. Co.* (1902), 1 K. B. 516. In striking contrast stand many thousands of American cases, reported and unreported, in which, on contradictory oral evidence extrinsic to the policy, the jury has been allowed to ignore an admittedly violated warranty.

[2] Appendix, ch. I.

[3] An experienced jurist says: "The insurance company is the sport of legislatures and its contract the football of the courts," Prof. Finch in Reports Am. Bar Assn., vol. 20, p. 496.

[4] Waiver and estoppel confront the insurance lawyer in court perhaps more frequently than any other issue.

[5] Even in England, see Mar. Ins. Act (1906), § 34 (3).

[6] *Security Ins. Co.* v. *Fay*, 22 Mich. 467, 473, 7 Am. Rep. 670, per Campbell, Ch. J. The statement, often made, that "waiver is a technical doctrine introduced and applied by courts for

meaning of the written contract may be plain. The effects of estoppel are as varied and multifarious as are the estimates among the various tribunals of what constitutes fraud.

§ 129. Difficulty in Applying Doctrine.—In attempting to make practical application of the doctrine of waiver and estoppel, in actions on the contract, we are apt to find that certain fundamental principles of law are brought into collision. Of these the following may be mentioned: first, it is the prerogative of a court, not of a jury, to construe an unambiguous written contract; second, the court must enforce the agreement, if at all, as it is made by the parties;[1] third, when its terms are plain, the agreement must not be varied by parol evidence;[2] fourth, either party may voluntarily abandon a clause of the contract inserted for his benefit,[3] or, by misleading conduct amounting to fraud, may estop himself from taking advantage of it;[4] but the testimony establishing a waiver or an estoppel in subversion of the written contract is almost always necessarily parol,[5] and whether such testimony is true presents a question for the jury.[6]

Besides the embarrassment arising from any effort to harmonize propositions so irreconcilable, a further and most serious difficulty presents itself in many instances of this class. Insurance companies can act only by personal representatives or agents, therefore they can accomplish waivers and estoppels only through the medium of agents,[7] and an agent to bind his principal must possess sufficient authority, either real or apparent.[8] The policy usually declares in substance that agents have no authority to waive any provisions of the policy except by written agreement indorsed thereon or attached thereto, and probably agents rarely receive

the purpose of defeating forfeitures," *Alabama State Mut. Assur. Co.* v. *Long, etc., Co.*, 123 Ala. 667, 26 So. 655; *People* v. *Manhattan Co.*, 9 Wend. (N. Y.) 381; *Kiernan* v. *Dutchess Co. Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698, is not so satisfactory as the statement that the doctrine of waiver and estoppel is applied solely for the purpose of preventing fraud. *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 361, 22 S. Ct. 133, 46 L. Ed. 213; *Ins. Co.* v. *Wolff*, 95 U. S. 326, 2 L. Ed. 387; *Northwestern Mut. L. Ins. Co.* v. *Amerman*, 119 Ill. 329, 336, 10 N. E. 225, 59 Am. Rep. 799; *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656; *Thebaud* v. *Gt. West. Ins. Co.*, 155 N. Y. 516, 522, 50 N. E. 284; *Armstrong* v. *Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991.

[1] *Elliott* v. *Farmers' Ins. Co.*, 114 Iowa, 153, 155 ("we cannot make a new contract for them nor refuse to enforce the contract they made").

[2] *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213.

[3] *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, 348, 23 S. Ct. 126.

[4] *Wilkinson* v. *Ins. Co.*, 13 Wall. (U. S.) 222.

[5] See § 124, *supra*.

[6] See § 93, *supra*.

[7] *Beebe* v. *Ohio Farmers' Ins. Co.*, 93 Mich. 514, 32 Am. St. R. 519, 18 L. R. A. 481, 53 N. W. 818.

[8] *Kilborn* v. *Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861.

affirmative instructions to waive in any other way. Under such circumstances, what is the apparent power of the agent to bind the company, in matters of waiver and estoppel? Shall the limit of authority, as defined by instructions and as described in the policy to which the assured is a party, be regarded as the true measure,[1] or shall the court gauge the extent of authority by the rule that the power of the agent is coextensive with the reasonable requirements and natural incidents of the transaction which he is employed to conduct in the interest of the company?[2] Is the insured justified in assuming that the contract terms as written may be thus ignored or evaded? Is such an irregular disturbance of the contract to be considered a reasonable or natural incident of the transaction?

To these questions different answers have been given, according as one or another of these considerations has been uppermost and controlling in the mind of the court, and the different answers have ramified into very divergent results in multitudes of cases decided in the many independent jurisdictions of this country.[3] A maze of conflicting rulings, which do not all fall within concise and logical formulæ, must engage our strict and patient attention in the two chapters next succeeding.

[1] *Northern Ass. Co.* v. *Grand View Building Assn.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213.

[2] *Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222.

[3] See ch. VIII, *infra*, and Cooley Ins. (1905), pp. 2455–2787.

CHAPTER VII

General Principles

Waiver and Estoppel—Continued

§ 130. What Cannot be Waived.—Parties to a contract of insurance made within a state cannot avoid the provisions of a general statute of that state, adopted as matter of public policy, unless the statute authorizes it.[1] The rule requiring an insurable interest, whether prescribed by statute or not, being adopted out of regard to the welfare of the state, may not be altogether waived by the parties.[2]

A corporation cannot in general do an act *ultra vires* or beyond its corporate powers as defined by its charter, and every one dealing with the corporation is presumed to be cognizant of the nature and extent of such power.[3]

Thus if a fire insurance company organized in New York should

[1] *St. Paul F. & M. Ins. Co.* v. *Sharer*, 76 Iowa, 282; *Emery* v. *Piscataqua F. & M. Ins. Co.*, 52 Me. 322; *Chamberlain* v. *N. H. Fire Ins. Co.*, 55 N. H. 249. Thus, that there shall be no forfeiture of a life policy for nonpayment of premiums, etc., without a notice of at least fifteen days, duly mailed, N. Y. Ins. L., § 92; *Mut. Life Ins. Co.* v. *Cohen*, 179 U. S. 262; *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y. 450, 23 N. E. 1048 (statute governs rights and obligations). Nor can the parties waive other remedial provisions regarding forfeiture, *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 389. And rule applies to foreign company making contract in the state, *Equitable Life Assur. Soc.* v. *Clements*, 140 U. S. 226, 11 S. Ct. 822; *Knights Templars, etc., Co.* v. *Jarman*, 187 U. S. 204 (Missouri statute making life company liable despite suicide of insured). So also as to provisions of standard policy prescribed by statute, *Wild-Rice L. Co.* v. *Royal Ins. Co.*, 99 Minn. 190, 108 N. W. 871; or of statutes in substance transforming warranties into mere representations, *Hancock Mut. Life Ins. Co.* v. *Warren*, 181 U. S. 76; or declaring a policy valued as to buildings, *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Reilly* v. *Franklin Ins. Co.*, 43 Wis. 449; or making a solicitor the agent of the insurance company, *McMaster* v. *N. Y. Life Ins. Co.*, 183 U. S. 25; *Continental Life Ins. Co.* v. *Chamberlain*, 132 U. S. 304, 10 S. Ct. 87, 33 L. Ed. 341; or providing that license shall be revoked if company removes a case to federal court, *Security Mut. L. Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288. A corporation cannot abrogate such laws by attempted contract stipulations, *National, etc., Assoc.* v. *Brahan*, 193 U. S. 635, 650, 24 S. Ct. 532.

[2] *Auctil* v. *Mfrs. L. Ins. Co.* (1899), App. Cas. 604; and see *Gedge* v. *Royal Exch.* (1900), 2 K. B. 214.

[3] *Jemison* v. *Citizens' Savings Bank*, 122 N. Y. 140; *Gibbs* v. *Richmond Co. Mut. Ins. Co.*, 9 Daly (N. Y.), 203.

attempt to make a contract of life or ocean-marine insurance, the contract would be void.[1] So also a policy of a mutual company is void as to a class of property not included within the privileges of its charter;[2] or if issued to one not a member of the company;[3] or if upon property located outside the territory of its operations as defined by statute.[4]

Especially in the federal courts the doctrine of *ultra vires* is strictly enforced;[5] but in the interest of justice premiums will be returned to an innocent party upon disaffirmance of the contract; or other equitable reinstatement will, if practicable, be allowed.[6]

Many of the state courts, however, have adopted the rule that after a contract *ultra vires* has become executed by the one party, the other party is estopped from asserting its own wrong, and cannot be excused from performance upon the plea that the contract was beyond its power.[7] With the aid of this doctrine, apparently, contracting parties may largely ignore the limits which are imposed by statutes and charters for the security of the stockholders, and also, it may be, for the benefit of the public generally.

[1] *Re Arthur Average Assoc.*, 32 L. T. N. S. 525. But any directions of the charter as to the internal management of the affairs of the corporation are not in general binding upon outsiders, *In re Athenæum Life Assur. Co.*, 27 L. J. Ch. 829. Nor are charter provisions binding upon third persons which extend to the directors' discretionary powers to do a certain act, *Ernest* v. *Nicholls*, 6 H. L. Cas. 401; as, for example, where, by the regulations of the company, insurance is to be made only to three-fourths of the value of property, but the officers of the company are to decide what is the value, *Jones* v. *Bangor Mut. S. Ins. So.*, 61 L. T. N. S. 727. And, in general, for a deviation from the prescribed method of doing a valid corporate act, the corporation will not be discharged from liability to an innocent person, and therefore in such matters of informality or of inaccuracy, directions whether of the charter or by-laws may be waived, *Relief Ins. Co.* v. *Shaw*, 94 U. S. 574; *First Bapt. Church* v. *Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *In re County Life Assur. Co.*, L. R. 5 Ch. App. 288. Thus a by-law barring applications from persons engaged in certain occupations, *Coverdale* v. *Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; or a by-law limiting membership to persons below a certain age, *Wiberg* v. *Minn., etc., Assoc.*, 73 Minn. 297, 76 N. W. 37.

[2] *Geraghty* v. *Washtenaw Mut. F. Ins. Co.* (Mich., 1906), 108 N. W. 1102 (citing many cases pro and con).

[3] *In re Mutual Guaranty F. Ins. Co.* (Ia., 1899), 77 N. W. 868; *Corey* v. *Sherman* (Ia.), 60 N. W. 232. Compare *Coulson* v. *Flynn*, 181 N. Y. 62, 73 N. E. 507.

[4] *Eddy* v. *Ins. Co.*, 72 Mich. 651.

[5] *California Bank* v. *Kennedy*, 167 U. S. 362 (citing many cases, English and American); *Central Transp. Co.* v. *Pullman's P. C. Co.*, 139 U. S. 24, 59; *First Nat. Bank* v. *Converse*, 200 U. S. 425; *Ashbury Railway C. & Iron Co.* v. *Riche*, L. R., 7 H. L. 653.

[6] *Pullman's Car Co.* v. *Transp. Co.*, 171 U. S. 138.

[7] *Vought* v. *Eastern Bldg. & L. Assn.*, 172 N. Y. 508, 518; *Bowers* v. *Ocean Acc. & Guaranty Corp.*, 110 App. Div. 691, aff'd 187 N. Y. 561; *Brisay* v. *Star Co.*, 13 Misc. (N. Y.), 349; *Denver F. Ins. Co.* v. *McClelland*, 9 Colo. 11, 9 Pac. 771; *Matt* v. *Society*, 70 Iowa, 455, 30 N. W. 799; and see many cases cited in dissenting opinion, *Garaghty* v. *Washtenaw Mut. F. Ins. Co.* (Mich.), 108 N. W. 1102. But on the other hand the New York Supreme Court has recently followed the federal rule, *Appleton* v. *Cit. Cent. Nat. Bk.*, 116 App. Div. 404

§ 131. What can be Waived—Stock Companies.—Any condition or provision of the policy inserted for the benefit of the insurers, even those stipulations which provide that there shall be no waiver, or that no waiver shall be made except in a certain manner as by writing, or that certain classes of persons shall be deemed to have no authority to waive, may be waived by the insurers through such representatives as in fact have the requisite authority.[1] This is put upon the ground that parties having power to make a contract have power by mutual consent to abrogate or alter it to any extent at their pleasure, unless restrained by statute.[2]

§ 132. New Subject not to be Introduced by Waiver.—The doctrine of waiver and estoppel, it is said, is not to be extended so far as to introduce into the contract an entirely new subject-matter.

Thus if by the terms of the policy a designated house is the subject of insurance, the insured will not be permitted to show by parol that in consequence of the representations or conduct of the insurers another house ought to be substituted.[3] Neither can a new peril or cause of loss be added to the contract by application of this doctrine.[4]

§ 133. Waiver—Mutual Companies.—By some courts, especially those of Massachusetts, it has been held that the officers and agents of a mutual insurance company have no authority to waive such of its charter regulations or by-laws as relate to the essential terms of the contract.[5]

[1] *Phœnix Ins. Co.* v. *Hart*, 149 Ill. 513, 36 N. E. 990; *Glasscock* v. *Des Moines Ins. Co.*, 125 Iowa, 170, 100 N. W. 503.

[2] Thus in a late case, *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, 348, the Federal Supreme Court says: "A forfeiture, of course, may be waived, for the obvious reason expressed in *Ins. Co.* v. *Norton*, 96 U. S. 235, a party always has the option to waive a condition or stipulation made in his own favor, and an agent can be given such power, and whether it has been given or not may be proved by parol." *Phœnix Ins. Co.* v. *Caldwell*, 187 Ill. 73, 58 N. E. 314; *Hunt* v. *State Ins. Co.*, 66 Neb. 121, 92 N. W. 921. Waivers of specific conditions enumerated in Cooley Ins., pp. 2464-2465. Inducing fraud or misrepresentations prior to contract may also be waived, *Bigler* v. *N. Y. Cent. Ins. Co.*, 22 N. Y. 402, 411; *Morrison* v. *Universal Mar. Ins. Co.*, L. R. 8 Exch. 40, *id.* 197.

[3] *Sanders* v. *Cooper*, 115 N. Y. 279, 22 N. E. 212; *Birnstein* v. *Stuyvesant Ins. Co.*, 83 App. Div. (N. Y.) 436, 82 N. Y. Supp. 140; *Northrup* v. *Porter*, 17 App. Div. 80, 44 N. Y. Supp. 814. Remedy, if any, in such a case is by reformation, *Le Gendre* v. *Scottish Union & Nat. Ins. Co.*, 95 App. Div. (N. Y.) 562, 565, 88 N. Y. Supp. 1012.

[4] *McCoy* v. *Northwestern, etc., Assoc.*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681.

[5] *McCoy* v. *Metrop. Life Ins. Co.*, 133 Mass. 85; *Brewer* v. *Chelsea Mut. Fire Ins. Co.*, 14 Gray (Mass.), 203; *Mulrey* v. *Shawmut Mut. Fire Ins. Co.*, 4 Allen (Mass.), 116, 81 Am. Dec. 689; *Belleville Mut. Ins. Co.* v. *Van Winkle*, 1 Beasley, 333.

This distinction is put upon the ground that policyholders in a mutual company are members of the company, and that the by-laws are binding upon all, and that the officers and other representatives of the company are special agents appointed to enforce the by-laws and mutual arrangements, and not to disregard them in favor of one of the members as against his associates.

Even in Massachusetts the limitation extends only to provisions that are of the essence of the contract. Technical requirements in regard to the form and the contents of the proofs of loss, or limitation of time to sue, may be waived.[1]

And the tendency among the courts seems to be to deny the distinction between mutual and stock companies altogether, in respect to the power of the officers and agents to waive conditions and estop the company from insisting upon forfeitures.[2]

§ 134. What Amounts to Waiver or Estoppel—Doctrine Amplified.—Any unequivocal and positive act by the insurers recognizing the policy as valid and inconsistent with the notion that the company proposes to avail itself of a breach—as, for example, the acceptance of a premium or assessment, the delivery of the policy or a renewal receipt, or the levying of an assessment, or the indorsement of any permit on the policy—constitutes a waiver of all known grounds of forfeiture, and the company is said to be estopped from setting them up in defense, provided the insured can show that by such act he has been misled to his injury.[3] Thus though the assured made a transfer of the property so that he no longer had any insurable interest as owner, nevertheless as the company continued

[1] *Priest* v. *Citizens' Mut. Fire Ins. Co.*, 3 Allen (Mass.), 602; *Jennings* v. *Metropolitan Life Ins. Co.*, 148 Mass. 61, 18 N. E. 601.

[2] *Relief Ins. Co.* v. *Shaw*, 94 U. S. 574; *Railway, etc., Assn.* v. *Tucker*, 157 Ill. 194, 42 N. E. 398; *Nat. Mut. Ben. Asso.* v. *Jones*, 84 Ky. 110; *Gunther* v. *New Orleans, etc., Asso.*, 40 La. Ann. 776, 5 So. 65, 2 L. R. A. 118, 8 Am. St. R. 554; *Ormsby* v. *Laclede Farmers', etc., Co.*, 98 Mo. App. 371, 72 S. W. 139; *Miller* v. *Hillsborough Mut. Fire Assur. Asso.*, 44 N. J. Eq. 224; *Pratt* v. *D. H. M. F. Ins. Co.*, 130 N. Y. 206, 29 N. E. 117; *Kister* v. *Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 18 Atl. 447; *Stylow* v. *Wis. Odd Fellows' Mut. Life Ins. Co.*, 69 Wis. 224, 34 N. W. 151. So though the by-laws of an association provide for forfeiture upon failure of a member to pay his assessments at certain stipulated times, a waiver of such provision may be shown by a course of conduct inducing the members to believe that the assessment would be received thereafter, *Foresters of America* v. *Hollis*, 70 Kan. 70, 78 Pac. 160. Doctrine of waiver is applicable to each underwriter to a Lloyd's policy, *Ralli* v. *White*, 21 Misc. 285, 47 N. Y. Supp. 197.

[3] *Bevin* v. *Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Rathbone* v. *City Fire Ins. Co.*, 31 Conn. 194; *Jones* v. *Bangor Mut. Life Ins. Co.*, 61 L. T. N. 727 (1890); *Hartford Fire Ins. Co.* *Landfare*, 63 Neb. 559, 88 N. W. 779, *Weed* v. *London & L. Fire Ins. Co.*, 116 N. Y. 106; *Armstrong* v. *Turquand*, 3 Irish C. L. 32.

to levy assessments upon him with full knowledge of the facts, he was permitted to recover, and the company was held to be estopped from setting up lack of insurable interest at the time of loss.[1]

It is very important, however, to observe that an oral consent or promise made to the insured at or before the execution of the contract, to the effect that he may in future violate the terms of the policy as written, is not binding, and cannot be shown by parol, because the oral promise becomes merged in the contract.[2] Thus an antecedent promise by an agent, that a premium note need not be paid when due, cannot be shown by parol.[3] So also knowledge by the agent of the company at the time the contract is made, that the assured intends to take out other insurance, though coupled with the statement that the policy is correct, cannot avail to excuse a breach of warranty prohibiting the taking out of other insurance without written consent.[4]

But some courts in their anxiety to avoid forfeiture do not give adherence to this sound rule.[5]

§ 135. The Same—Acceptance of Premium.—Acceptance by the company of payment of premiums or assessments is a waiver of known forfeitures.[6] So the acceptance of a note for the first pre-

[1] *Light* v. *Mut. Fire Ins. Co.*, 169 Pa. St. 310, 32 Atl. 439, 47 Am. St. R. 904. So also payment of a small loss by fire revives the policy for the balance of its term and for any future loss, *Westchester Fire Ins. Co.* v. *McAdoo* (Tenn. Ch. App), 57 S. W. 409 (1899).

[2] *Ins. Co.* v. *Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Ins. Co.* v. *Lyman*, 15 Wall. (U. S.) 664; *Walton* v. *Agricultural Ins. Co.*, 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677. *Worachek* v. *New Denmark Mut. Home F. I. Co.*, 102 Wis. 81, 78 N. W. 165; Doctrine cannot apply to intended violations, *United Firemen's Ins. Co.* v. *Thomas*, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 457.

[3] *Thompson* v. *Knickerbocker Life Ins. Co.*, 104 U. S. 252.

[4] *Gray* v. *Germania Fire Ins. Co.*, 155 N. Y. 180, 184, 49 N. E. 675.

[5] Oral consent to subsequent other insurance, *Havens* v. *Home Ins. Co.*, 111 Ind. 90, 93, 12 N. E. 137, 60 Am. Rep. 689; *Ind. School District* v. *Fidelity Ins. Co.*, 113 Iowa, 65, 84 N. W. 956; *Woolpert* v. *Franklin Ins. Co.*, 42 West Va. 647, 26 S. E. 521; oral extension of time to complete house, *Queens Ins. Co.* v. *Kline*, 17 Ky. L. R. 619, 32 S. W. 214; oral consent to future increase of risk, *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339.

[6] *Phœnix L. I. Co.* v. *Raddin*, 120 U. S. 183; *Hennessey* v. *Met. Life Ins. Co.*, 74 Conn. 699, 52 Atl. 490; *Fitzgerald* v. *Hartford Life & A. I. Co.*, 56 Conn. 116, 13 Atl. 673, 7 Am. St. R. 288; *Rice* v. *New England Mutual Aid Soc.*, 146 Mass. 248; *Schrieber* v. *Ins. Co.*, 43 Minn. 367, 45 N. W. 708; *Magner* v. *Mutual Life Assn.*, 17 App. Div. 13, 44 N. Y. Supp. 862, aff'd 162 N. Y. 657, 57 N. E. 1116; *Schwarzbach* v. *Ohio Valley Prot. Union*, 25 W. Va. 622, 52 Am. Rep. 227; *McKinney* v. *German Mutual F. I. Co.*, 89 Wis. 653, 666, 62 N. W. 413, 46 Am. St. R. 861. This rule has been applied in the case of a violation of the provisions of the policy as to other insurance, *Phœnix Ins. Co.* v. *Covey*, 41 Neb. 724, 60 N. W. 12; as to the premises being vacant, *Germania Fire Ins. Co.* v. *Klewer*, 129 Ill. 599, 22 N. E. 489; as to title or interest, *Whited* v. *Germania Fire Ins. Co.*, 13 Hun (N. Y.), 191, aff'd 76 N. Y. 415, 32 Am. Rep.

mium waives a provision that the policy shall not take effect until the first premium has been paid.[1] The acceptance and retention, however, of a premium or assessment, if in ignorance of the facts constituting forfeiture, will not operate as a waiver, since knowledge of the facts is an essential element of waiver and estoppel.[2]

§ 136. **The Same—Receipt of Overdue Premiums.**—The acceptance by the insurer of the amount of an overdue premium will operate as a waiver of its rights to forfeit the policy for failure to pay the premium when due.[3]

§ 137. **The Same—Consent to Assignment of Policy.**—Where an assignment of a policy and the transfer of the property covered thereby are consented to by the insurer with knowledge of forfeiture already incurred, it will be estopped, in an action by the assignee for a loss subsequently occurring, to avail itself of the forfeiture.[4]

§ 138. **The Same—Renewal of Policy.**—A renewal of a policy by the company with knowledge of a prior breach of warranty,[5] or misrepresentations originally made,[6] constitutes a waiver.

§ 139. **Effect of Prior Course of Dealing.**—An insurance company may be estopped from enforcing a breach for non-payment of a premium when due, by a uniform course of dealing with the insured which justifies a belief that a forfeiture will not be enforced therefor. Such an estoppel may arise from the continued acceptance of pre-

330; as to change of residence of insured in a life policy, *Garber* v. *Globe Mut. Life Ins. Co.*, Fed. Cas. No. 5,214; *Germania Ins. Co.* v. *Rudwig*, 80 Ky. 223; as to misrepresentation regarding pregnancy, *Chicago Guaranty F. L. Assn.* v. *Ford*, 104 Tenn. 533, 58 S. W. 239.

[1] *Lawrence* v. *Penn. Mut. L. I. Co.* 113 La. 87, 36 So. 898. Compare *London & L. Assur. Co.* v. *Fleming* (1897), App. Cas. 499. Receiving assessments waives defense that beneficiary does not belong to class specified in by-laws, *Coulson* v. *Flynn*, 181 N. Y. 62, 73 N. E. 507.

[2] *Miller* v. *Head Camp*, 45 Oregon, 192, 77 Pac. 83; *Diehl* v. *Adams County Mut. I. Co.*, 58 Pa. St. 443, 98 Am. Dec. 302. A mere demand by an agent for payment of premium, unheeded, constitutes no waiver of forfeiture, *Neal* v. *Gray*, 124 Ga. 510, 52 S. E. 622; *Sullivan* v. *Conn. Indemnity Assn.*, 101 Ga. 809, 29 S. E. 41 (especially where agent has no authority to waive); *Elliott* v. *Lycoming County Mut. I. Co.*, 66 Pa. St. 22, 5 Am. Rep. 323.

[3] *Globe Mutual Life Ins. Co.* v. *Wolff*, 95 U. S. 326, 24 L. Ed. 387; *White* v. *McPeck*, 185 Mass. 451, 70 N. E. 462; *James* v. *Mut. Res. Fund L. Ass.*, 148 Mo. 1; *Tripp* v. *Vermont Life Ins. Co.*, 55 Vt. 100.

[4] *Home Mutual Ins. Co.* v. *Nichols* (Tex. Civ. App., 1903), 72 S. W. 440.

[5] *Allen* v. *Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; *Mechler* v. *Phœnix Ins. Co.*, 38 Wis. 665.

[6] *Witherell* v. *Marine Ins. Co.*, 49 Me. 200. Compare *Agricultural S. & L. Co.* v. *L. & L. & G. Ins. Co.*, 32 Ont. 369.

miums after they are due.[1] Occasional indulgences or acts of leniency, however, will not be construed as a permanent waiver or an agreement to extend the same indulgence for the future.[2]

§ 140. Subsequent Parol Permits.—A consent, oral or written, by the insurers or their duly authorized agent, given to the insured after the execution of the contract, permitting him to deviate from the requirements of the policy, will operate as a waiver or estoppel if the insured has relied upon it in such a way that he would sustain injury in case the consent were repudiated by the insurers.[3] Thus where such an agent, upon being requested to make the required indorsement giving permit for other insurance, replied that he had "fixed it all right," the court held, that though no indorsement was ever made upon the policy, an estoppel was established since no limitation upon the agent's authority was contained in the policy.[4]

Under this rule of law it became the common occurrence on the trial for an unscrupulous claimant to testify, in excuse of a breach of warranty, that he had gone to some officer or agent of the company, told him the facts, and received the reply "all right." This sort of testimony, coupled with the practice frequently adopted by

[1] *Hartford Life Annuity Ins. Co.* v. *Unsell*, 144 U. S. 439, 36 L. Ed. 496; *United States L. I. Co.* v. *Lesser*, 126 Ala. 568, 28 So. 646; *Neal* v. *Gray* 124 Ga. 510, 52 S. E. 622, *Cotton States L. I. Co.* v. *Lester*, 62 Ga. 247, 35 Am. Rep. 122; *Illinois Life Assn.* v. *Wells*, 102 Ill. App. 544, aff'd 200 Ill. 445, 65 N. E. 1072; *Mudd* v. *German Ins. Co.*, 22 Ky. L. R. 308, 56 S. W. 977; *Appleton* v. *Phœnix Mut. L. I. Co.*, 59 N. H. 541, 47 Am. Rep. 220; *Schwller* v. *Grand Lodge*, 110 App. Div. (N. Y.) 456; *Bryan* v. *National L. I. Assn.*, 21 R. I. 149, 42 Atl. 513. Where the insurer allows a person on several occasions to solicit life insurance and deliver policies without cash premiums, but for notes, it is estopped from denying due receipt of premium, *Tooker* v. *Security Trust Co.*, 26 App. Div. 372, aff'd 165 N. Y. 608, 58 N. E. 1093; *De Frece* v. *N. L. Ins. Co.*, 136 N. Y. 144, 32 N. E. 556. Company is estopped to claim forfeiture for non-payment of premium where its general agent has written requesting the insured to hold the amount until called for, and on several occasions the premium had not been called for until several days after maturity, *Etna Life Ins. Co.* v. *Fallow*, 110 Tenn. 720, 77 S. W. 937. So an instruction to agents, recited in a letter of a general agent, that if the premium is paid more than thirty days after it is due there must be a health certificate, is evidence against the company that credit is allowed, *Kendrick* v. *Mutual Ben. L. I. Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. R. 592. And the continued acceptance of checks for several years will waive a right to forfeit the policy for failure to pay as directed by the usual notices, *Hallowell* v. *Life Ins. Co.*, 126 N. C. 398, 35 S. E. 616.

[2] *Thompson* v. *Ins. Co.*, 104 U. S. 252, 259, 26 L. Ed. 765; *Schmertz* v. *United States L. I. Co.*, 118 Fed. 250, 55 C. C. A. 104; *Haydel* v. *Mutual Res. F. L. A.*, 104 Fed. 718, 44 C. C. A. 169. Permit to store fireworks for a certain period is a waiver of a known forfeiture but will not operate beyond the period named, *Betcher* v. *Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971.

[3] *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, 348, 23 S. Ct. 126; *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339; *Batchelder* v. *Queen Ins. Co.*, 135 Mass. 449; *Pechner* v. *Ins. Co.*, 65 N. Y. 195.

[4] *Kotwicki* v. *Thuringen Ins. Co* 134 Mich. 82, 95 N. W. 976.

trial judges of allowing proof of waiver and estoppel under general allegation of full performance, placed insurance companies largely at the mercy of dishonest claimants.[1] In consequence, the New York standard fire policy, and often other policies, fire, life, and accident, provide in substance that no officer or agent shall have power to waive except by written agreement indorsed upon or attached to the policy. Such limitations upon the authority of agents, thus brought to the attention of the assured by the policy itself and sometimes by the terms of the application, powerfully affect the decisions in many jurisdictions and have rendered practically obsolete a large number of earlier cases.

§ 141. **Knowledge of Breach—When a Waiver.**—If at the time of closing the contract the insurers have knowledge of the existence of a cause of forfeiture which would invalidate the policy from the time of its inception, they are held, by accepting the premium or delivering the policy, to waive the forfeiture, or to be estopped from insisting upon it. This is the rule in most of the state courts.[2] The rule has also been extended to the case where though the agent had no knowledge of the facts relating to incumbrances the assured expressly left it to him to ascertain, and the company was held to have waived forfeiture since the company had assumed the burden of ascertaining the facts.[3] Constructive knowledge of the fact of a former application growing out of the circumstance that if the company had searched its records it might have found it, however, is not sufficient to excuse a breach of warranty by reason of an un-

[1] *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 364, 22 S. Ct. 133, 46 L. Ed. 213.

[2] *Loring* v. *Dutchess Ins. Co.*, 1 Cal. App. 186, 81 Pac. 1025 (1905); *Johnson* v. *Ætna Ins. Co.*, 123 Ga. 404, 51 S. E. 339 (1905); *German Ins. Co.* v. *Shader* (Neb.), 93 N. W. 972, 60 L. R. A. 918 (citing cases from some twenty-seven states to same effect); *Lewis* v. *Guardian F. Ins. Co.*, 181 N. Y. 392. For full consideration of this subject see §§ 173–175. As to contrary rule in federal and other courts see § 142. This doctrine is applicable to the implied warranty of seaworthiness in a marine policy. Knowledge of unseaworthy condition at the time of its issuance works estoppel, *Hoxie* v. *Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240; *Thebaud* v. *Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284.

[3] *Skinner* v. *Norman*, 165 N. Y. 565, 571, 59 N. E. 309, 80 Am. St. R. 776 (in which the court said: "When a person has sufficient information to lead him to a fact he shall be deemed conversant with it"). A line of cases holds that insurer has waived warranties regarding title and sole ownership if he issues standard policy without making specific inquiries, *Sharp* v. *Scottish Union Ins. Co.*, 136 Cal. 542, 69 Pac. 253, 615; *National F. Ins. Co.* v. *Lumber Co.*, 217 Ill. 115, 127; *Glens Falls Ins. Co.* v. *Michael* (Ind.), 79 N. E. 905; *Miotke* v. *Mil. & M. Ins. Co.*, 113 Mich. 166; *Phila. Tool Co.* v. *Brit.-Am. Assur. Co.*, 132 Pa. St. 236. Such decisions are unsatisfactory. The policy itself pointedly demands a true disclosure, *Parsons* v. *Lane*, 97 Minn. 98, 106 N. W. 485; *Westchester F. Ins. Co.* v. *Ocean View P. Pier Co.* (Va., 1907), 56 S. E. 584.

true statement in the application since the company has not undertaken or agreed to investigate.[1]

But mere knowledge by the insurers at any time of the existence of facts amounting to cause of forfeiture does not of itself accomplish a waiver or estoppel. If it did, the company could never take advantage of a forfeiture, for the moment it became aware of it, it would be debarred from insisting upon it. There must exist, in addition to a knowledge of the breach and in conjunction with it, some positive act of recognition or confirmation of the continuing validity of the insurance, such, for example, as delivering the policy, or accepting the premium, or indorsing a permit, upon which, in connection with the knowledge, a waiver may be predicated, and by force of which the contract otherwise avoided may be said to be acquiesced in or revived.[2]

But in finding a waiver the court must not extend the insurer's act of indulgence to other transactions, though relating to the same policy, unless some practice or continued course of dealing warranting it is shown. The insurer alone has the power to do that. Thus, where a waiver of forfeiture for other insurance on the same property, without written permit, was inferred because the defendant's agent had knowledge of the other insurance at the time he issued the defendant's policy, the court held that a subsequent increase in the amount of the other insurance, procured by the plaintiff without the defendant's consent, vitiated its policy and defeated recovery upon it.[3] In like manner, though the court infer from the coinsurance clause a consent to other insurance, this consent will not by implication be extended to a permit for excessive or overinsurance.[4]

§ 142. Rule in Federal Courts—Massachusetts—New Jersey.—The federal courts and those of Massachusetts and New Jersey adhere more closely to the doctrine of the common law,[5] and hold that in an action on contract a waiver of a forfeiture existing at the inception of the contract cannot be established by parol testimony

[1] *Rhode* v. *Met. Life Ins. Co.*, 129 Mich. 112, 88 N. W. 400; *Hackett* v. *Supreme Council*, 44 App. Div. 524, aff'd 168 N. Y. 588, 60 N. E. 1112. *Contra, O'Rourke* v. *John Hancock Mut. Life I. Co.*, 23 R. I. 457, 50 Atl. 834, 91 Am. St. R. 643.

[2] *Clemans* v. *Supreme Assembly Royal Soc., etc.*, 131 N. Y. 485, 30 N. E. 496; *Weed* v. *London & Lan. Ins. Co.*, 116 N. Y. 106; *Merchants' Ins. Co.* v. *Mexico Lumber Co.*, 10 Colo. App. 223, 236, 51 Pac. 174. See § 143, *infra*.

[3] *Kelly* v. *L. & L. & G. Ins. Co.* (Minn., 1907), 111 N. W. 395.

[4] *Cutler* v. *Royal Ins. Co.*, 70 Conn. 566; *Woolford* v. *Phœnix Ins. Co.*, 190 Mass. 233, 76 N. E. 722; but see *Pool* v. *Milwaukee Mech. Ins. Co.*, 91 Wis. 530; *Catoosa Springs* v. *Linch*, 18 Misc. (N. Y.) 210.

[5] *Weston* v. *Emes*, 1 Taunt. 115.

of what was said and done at or before the closing of the contract.[1] In all jurisdictions a sufficient ground of estoppel may be shown by parol, but the practice is not uniform as to when recourse must be had to an equity forum.[2]

§ 143. **Silence not a Waiver.**—Mere silence or inaction on the part of the company after knowledge of a forfeiture by the insured will not in general operate as a waiver. The company has not contracted to search out the insured and advise him as to the legal effect of the provisions of the policy.[3] To hold the contrary is to make a new agreement for the parties. But this rule is modified with respect to irregularities in the proofs of loss which upon notice might be corrected.[4] Mere failure to reply to a letter from the insured stating that at some future date he will pay a premium about to fall due is no waiver.[5] Nor is failure to answer a letter from the insured an admission that a person, calling on the insured in respect to a loss under the policy, has authority to adjust the loss or waive proofs.[6]

In connection with the cancellation clause of the fire policies in common use a very practical illustration of this general rule is furnished. By the weight of authority and reason the right to cancel under the clause imposes no duty upon the insurers, upon learning of a forfeiture, to do so, nor does the mere failure to cancel furnish a sufficient ground for claiming a waiver or an estoppel. The sound-

[1] *Allen* v. *Mass. Mut. Acc. Ass.*, 167 Mass. 18; *Thomas* v. *Commercial Union Ass. Co.*, 162 Mass. 29; *Dimick* v. *Met. Life Ins. Co.*, 69 N. J. L. 384, 401, 55 Atl. 291; *Martin* v. *Ins. Co., of No. Am.* 57 N. J. L. 623, 31 Atl. 213; *Northern Assur. Co.* v. *Grand View Building Assn.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213. Referring to that case the same court has since said: "There is no attempt, by parol testimony, to contradict any stipulations of the policy, something which we have recently held cannot be done," *Hartford F. Ins. Co.* v. *Wilson*, 187 U. S. 467, 478, 23 S. Ct. 189.

[2] *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, 348, 23 S. Ct. 126; *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 361, 22 S. Ct. 133; *Metropolitan Life Ins. Co.* v. *McTague*, 49 N. J. L. 587, 60 Am. Rep. 661; *Carson* v. *Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584.

[3] *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, where at pp. 350, 351 the court says, "Did this court intend to approve the proposition that to cause a forfeiture some affirmative action was necessary by the company—a declaration to that effect and the surrender of the premium notes? To hold the latter would be to hold that this court intended to reverse a number of decisions made upon careful consideration." Mere silence or neglect to act is no waiver, *Rundell* v. *Ins. Co.*, 128 Iowa, 575; *Betcher* v. *Capital Fire I. Co.*, 78 Minn. 240, 80 N. W. 971; *Keith* v. *Ins. Co.*, 117 Wis. 531, 94 N. W. 295; *Sun Mut. Ins. Co.* v. *Dudley*, 65 Ark, 240, 248, 45 S. W. 539; *Gibson El. Co.* v. *L. & L. & G. Ins. Co.*, 159 N. Y. 418, 427, 54 N. E. 23; *Armstrong* v. *Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991.

[4] See § 144, *infra*.

[5] *Dale* v. *Continental Ins. Co.*, 95 Tenn. 38, 31 S. W. 266.

[6] *Parker* v. *Farmers' Fire Ins. Co.* 188 Mass. 257, 74 N. E. 286.

ness of this conclusion becomes the more apparent when it is noted that the contract makes the right to cancel an option, not an obligation.[1]

There are, however, many cases in which courts have adopted the opposite view, holding that a failure affirmatively to assert a forfeiture within a reasonable time after acquiring knowledge is a waiver by the company.[2] These cases create for the insurer a new obligation, and without new compensation they practically impose upon him the intolerable burden of investigating every rumor of forfeiture, and, if it turns out to be based upon fact, of looking up the assured and serving upon him notice of cancellation with proportionate return of premium. In other cases the court concluded that special circumstances had thrust upon the insurer the duty of affirmative action. Thus where the assured wrote the company that the policy was at a certain bank, that he did not remember its conditions, that he had taken out additional insurance and further said, "if there is anything that conflicts with your policy, advise me," the company was held estopped.[3]

§ 144. Proofs of Loss—Technicalities.—Technical requirements as to the form and contents of the proofs of loss, or time of their service, or time for bringing suit, will more readily be held to be waived than essential elements of the contract which more vitally affect the risk.[4] Thus waiver of service of proofs within the specified

[1] *Betcher* v. *Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971; *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 421, 77 N. W. 752. *Contra, Phœnix Ins. Co.* v. *Grove*, 215 Ill. 299, 74 N. E. 141; *Pollock* v. *German F. Ins. Co.*, 127 Mich. 460, 473, 86 N. W. 1017.

[2] *Cassimus* v. *Scottish Union & Nat. Ins. Co.*, 135 Ala. 256, 33 So. 163; *Glens Falls Fire Ins. Co.* v. *Michael* (Ind., 1905), 74 N. E. 964; *Swedish-Am. Ins. Co.* v. *Knutson*, 67 Kan. 71, 72 Pac. 526, 100 Am. St. R. 382; *Kalmutz* v. *Northern Mut. Ins. Co.*, 186 Pa. St. 571, 40 Atl. 816; *Morrison* v. *Ins. Co.*, 69 Tex. 353; see *Norris* v. *Hartford Fire Ins. Co.*, 57 S. C. 358, 35 S. E. 572 (failure to cancel policy, and return unearned premium is evidence for jury to consider upon question of an intention to waive).

[3] *Rauch* v. *Millers' Mut. F. Ins. Co.*, 131 Mich. 281; *Everett* v. *London, etc., Ins. Co.*, 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. R. 499, in which the court concluded that upon receiving proofs of loss, the company should have affirmatively objected to the other insurance lest the insured should settle with other companies to his prejudice.

[4] *Cleaver* v. *Traders' Ins. Co.*, 40 Fed. 711; *Searle* v. *Dwelling House Ins. Co.*, 152 Mass. 263; *Eastern R. R. Co.* v. *Relief Ins. Co.*, 105 Mass. 570; *Jennings* v. *Metropolitan Life Ins. Co.*, 148 Mass. 61; *Trippe* v. *P. F. Society*, 140 N. Y. 23, 28, 35 N. E. 316, 37 Am. St. R. 529; *Goodwin* v. *Mass. Mut. Life Ins. Co.*, 73 N. Y. 480. As to agent's authority to waive see ch. VIII, *infra*. It is held that a manifest distinction should be observed in giving construction to the two classes of conditions, those that operate upon the parties and the contract prior to the loss, and those which have for their general object to define the mode in which an accrued loss is to be established, adjusted, and recovered after the reciprocal rights and liabilities of the parties have become fixed by the occurrence of the peril insured against,

in ? may be found by the jury from evidence fairly tending to show it, though without written agreement on the policy.[1]

§ 145. **Denial of all Liability.**—A positive denial by the insurer of al liability under the policy, it has often been held, relieves the insured from the duty of furnishing notice or proofs of loss,[2] or of death,[3] or correcting proofs already furnished,[4] or submitting to a personal examination, or to an appraisal under the terms of the policy. In such a case, it is said, the proofs do not tend to induce the insurer to pay and are useless.[5] The argument is that, if the insurer declares the policy annulled upon other grounds, the insured need not go to the unnecessary trouble and expense of a further compliance with the terms of the contract intended to supply the insurer with evidence of the nature and extent of its liability.[6]

McNally v *P. Ins. Co.*, 137 N. Y. 389, 398, 33 N. E. 475.

[1] "The New York court said: "It is well settled that when liability has become fixed by the capital fact of loss within the range of the responsibility assumed in the contract, courts are reluctant to leprive the insured of the benefit of that liability by any narrow or technical construction of the conditions and stipulations which prescribe the formal requisites by means of which the accrued right is to be made available for his indemnification," *Sergent* v. *L. & L. & G. Ins. Co.*, 155 N. Y. 349, 355, 49 N. E. 935, Bartlett, J.; *Gray* v. *Blum*, 55 N. J. Eq. 553, 38 Atl. 643; *Snyder* v. *Ins. Co.*, 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. R. 625. But see *Travelers' Ins. Co.* v. *Myers*, 62 Ohio St. 529, 57 N. E. 458, and cases cited.

[2] *Royal Ins. Co.* v. *Martin*, 192 U. S. 149, 48 L. Ed. 385, 24 S. Ct. 247; *Con. Ins. Co.* v. *Parkes*, 142 Ala. 650, 39 So. 204; *Frost* v. *No. Brit. & Mer. Ins. Co.*, 77 Vt. 407, 60 Atl. 803; *Continental Ins. Co.* v. *Daniel*, 25 Ky. Law. Rep. 1501, 78 S. W. 866; *Prudential Ins. Co.* v. *Devoe*, 98 Md. 584, 56 Atl. 809; *Gerringer* v. *North Carolina Home Ins. Co.* 133 N. C. 407, 45 S. E. 773; *Scottish Union & Nat. Ins. Co.* v. *Moore* (Tex. Civ. App.), 81 S. W. 573; *Cooper* v. *Ins. Co.*, 96 Wis. 362, 71 N. W. 606.

[3] *Iona Life Ins. Co.* v. *Lewis*, 187 U. S. 335; *Knickerbocker Life Ins. Co.* v. *Pendleton*, 112 U. S 696, 5 S. Ct. 314.

[4] *Virginia F. & Mar. Ins. Co.* v. *Goode*. 95 Va. 762, 30 S. E. 370, 371.

[5] *Phœnix Ins. Co.* v. *Kerr*, 129 Fed. 723. As to waiving service of proofs of loss by conduct of the agent see *Sergent* v. *Liverpool, L. & G. Ins. Co.*, 155 N. Y. 349, 355, 49 N. E. 935; *Bishop* v. *Agri. Ins. Co.*, 130 N. Y. 488, 29 N. E. 844; *Frost* v. *No. Brit. & Merc. Ins. Co.*, 77 Vt. 407, 60 Atl. 803. As to not waiving see *Hicks* v. *Brit.-Am. Ass.*, 162 N. Y. 284, 56 N. E. 743. And as to agent's authority to waive, see also *Dobson* v. *Hartford Fire Ins. Co.*, 86 App. Div. 115, aff'd 179 N. Y. 557, 71 N. E. 1130; *Smaldone* v. *Ins. Co. of North Am.* 162 N. Y. 580, 57 N. E. 168; *Germania Fire Ins. Co.* v. *Pitcher*, 160 Ind. 392, 64 N. E. 921; *Snyder* v. *Ins. Co.*, 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. R. 625.

[6] On principle this rule is not clear or satisfactory, *Armstrong* v. *Ins. Co.*, 130 N. Y. 560, 29 N. E. 991. It is based on the assumption that if some agent of the company has denied liability the company has no occasion to investigate the facts or to commit the insured to the sworn statement provided for by the policy. If the contract methods of investigation were aimed solely at ascertaining the amount of loss, and if the company was surely right in its opinion that a fatal breach had occurred, the justice of the rule would be more apparent. But where the company turns out to be wrong in its opinion and ultimately is required to pay the claim, the question arises, ought it to have been deprived of the benefit of important contract provisions for ascertaining the nature and amount of loss, a compliance with

§ 146. **Demanding Proofs of Loss.**—Demanding the usual verified proofs of loss in itself effects no waiver or estoppel. No matter how many grounds of forfeiture the company may suspect or believe to exist, it is entitled to insist upon the contract provisions framed for the very purpose of enabling it to pass upon and estimate intelligently the nature and amount of the loss.[1] Among these, many legislatures have seen fit to prescribe that as a preliminary to any action the assured must make up and swear to a statement of the particulars of the loss.[2] Manifestly no intention to waive can be gathered from a mere request for a fulfillment of this reasonable requirement, and as to estoppel the essential element of injury or prejudice to the insured is lacking, since the insured is bound by his contract to do the very same thing though the company make no affirmative request at all.[3] The request may benefit the insured by calling his attention to a condition precedent which might

which, by the terms of the contract, is made an absolute condition precedent to any right of recovery, and a fulfilment of which on the part of the assured naturally precedes an intelligent and final answer by the company to the claim thus presented against it, *Boruszweski* v. *Middlesex Mut. Ins. Co.*, 186 Mass. 589. Simply because the assured is believed to have violated one condition precedent why should the court permit him to violate with impunity another condition precedent? Again, assume that the adjuster or other agent of the company has been led to believe that the claim of the assured is fraudulent, and is induced by the assured, as frequently occurs during the preliminary investigation, to make some admission to that effect, it is by no means clear either under the law of contracts or with regard to considerations of equity and public policy that a court is justified in ruling that, while the plaintiff is entitled to enforce the policy, the company cannot pursue provisions of the same contract devised expressly for the purpose of enabling it when suspecting fraud to thoroughly ventilate the facts. This is obviously the main purpose of the contract requirement for verification of proofs or statements and also for personal examination under oath. The truth is that the company usually desires and reasonably demands proofs of loss verified by the claimant, except as the claim is either recognized by itself or abandoned by the assured. In any other event, if the policy is to be construed like other contracts, the company would seem entitled to them without submitting to the penalty of forfeiting its rights. No implication of waiver can arise from acts done in accordance with the contract, *Parker* v. *Knights Templars*, 70 Neb. 268, 97 N. W. 281; *Hare* v. *Headley*, 54 N. J. Eq. 545, 555, 35 Atl. 445. So far from involving the notion of waiver, the English court concludes that it is a natural incident of any insurance contract that the insured must furnish full information after loss, even though there be no express promise to do so, *Harding* v. *Bussell* (1905), 2 K. B. 83; *Boulton* v. *Houlder Bros.* (1904), 1 K. B. 784. Some cases go so far as to hold that denial of liability is a waiver of the clause giving the company sixty days after notice in which to pay loss and that suit may be brought at once, *Edwards* v. *Firemen's Ins. Co.*, 43 Misc. 354, 87 N. Y. Supp. 507; *Frost* v. *North British Mercantile I. Co.*, 77 Vt. 407, 60 Atl. 803. The soundness of this rule is doubtful.

[1] *Boruszweski* v. *Middlesex Mut. Ins. Co.*, 186 Mass. 589.

[2] *Boulton* v. *Houlder* (1904), 1 K. B. 784; *Harding* v. *Bussell* (1905), 2 K. B. 83; *Hicks* v. *Brit.-Am. Assn.*, 162 N. Y. 284, 56 N. E. 743 (N. Y. standard fire policy, used generally throughout the country, with the exception of a few states).

[3] *Peabody* v. *Satterle*, 166 N. Y. 174,

otherwise be overlooked. It cannot cause him unreasonable prejudice.[1]

It must be observed also that one great difficulty with all parol waivers is that written terms of the contract are sought to be set

59 N. E. 818; *Perry* v. *Caledonian Ins. Co.*, 103 App. Div. (N. Y.) 113.

[1] As Vice Chancellor Emery says: "If the act relied on as indicating the intention is referable to other causes or reasons than a waiver of a right, it should not be construed to be such waiver," *Hare* v. *Headley*, 54 N. J. Eq. 545, 555, 35 Atl. 445; *Parker* v. *Knights Templars*, 70 Neb. 268, 97 N. W. 281. The argument that the company ought not to put the insured to any further trouble if the contract is to be forfeited is more than offset by the consideration that a rule of construction must not be applied which may result in depriving the company of some of its most reasonable contract rights in the event that it shall decide or be compelled to fulfill the contract upon its part. Most of the cases that have held or intimated that asking for the usual proofs of loss estops the company from subsequently setting up a prior known forfeiture have invoked the rule of the New York court as stated in the *Titus* case, *Titus* v. *Glens Falls Ins. Co.*, 81 N. Y. 410; see § 147, *infra*, in which additional and unusual requirements were demanded by the company involving considerable trouble and expense to the assured. That rule when applied to other cases may well receive modifications which the same court subsequently engrafted upon it. Thus in a later case, *held*, without dissent, that calling for proofs of loss will not establish waiver or estoppel, *Armstrong* v. *Agricultural Ins. Co.*, 130 N. Y. 560, 567, 29 N. E. 991. The court says of the defendant: "It needs no argument to show that it was justified in standing upon its legal rights and asserting them in the ordinary way and at the proper time, so long as in doing so it did not mislead the plaintiff to his own harm. It had a right to base its defense to any claim made upon it upon the violation prior to the fire of any provision of the contract, and to require performance by the assured after the fire of those conditions which he had contracted to perform and which were essential to his cause of action and preliminary to the assertion of any claim upon the policy. And in demanding strict compliance with such condition it did not waive any of its rights under the contract," Brown, J., all concurring. This case is cited with approval in *Phœnix Ins. Co* v. *Flemming*, 65 Ark. 54, 44 S. W. 464, in which it is held that a demand for proofs or books of account will effect no waiver of a known forfeiture "the elements of estoppel must exist." See also *McCormick* v. *Springfield F. & M. Ins. Co.*, 66 Cal. 361, 5 Pac. 617. In a later case the New York court says, by Landon, J., all concurring: "It was a condition precedent to the maturity of the claim of the plaintiff that proofs of death specified in the contract should be furnished. The acts of the defendant in furnishing blanks in the first instance and giving instructions as to the manner of filling them were acts of courtesy. . . . All the papers constituting the proofs of death and its cause were part of the evidence proper for the defendant to ask and for the plaintiff to give in order to impart to the defendant that full knowledge of the facts which under the circumstances was material to the reserved question of Ronald's reinstatement as a member and also a condition precedent to any further acts to be relied upon as a waiver of forfeiture," *Ronald* v. *M. R. F. L. Assn.*, 132 N. Y. 378, 384, 30 N. E. 739. See also *Matthie* v. *Globe Fire Ins. Co.*, 174 N. Y. 489, 67 N. E. 57. In the last two cases, to be sure, there was in effect an express reservation of rights or denial of liability by the company, but the policies to which the assured themselves are parties contain a clearer reservation of rights than does an *ex parte* declaration, and if a demand for preliminary formal proofs, with an intent not to abandon a known forfeiture, were so clear a fraud as to demand the interposition of the doctrine of estoppel, an *ex parte* reservation must have little bearing on the result. In a Pennsylvania case the agent, with knowledge of a ground of forfeiture, said to the assured: "Go on and make out your proofs of loss." He also de-

aside by testimony which at best is uncertain and unreliable.[1] A claimant often asks the adjuster or agent some question in regard to proofs of loss. The adjuster may simply give his best impression in response. He can with courtesy do no less. The incident, really harmless and often trivial, figures at the trial as a demand for proofs of loss with knowledge of prior grounds of forfeiture.[2]

Opposed to the formidable array of authorities upon this practical point as cited in the notes, we find, however, numerous court opinions and text-books in which the statement is made broadly that calling for proofs of loss waives any known forfeiture, or estops the insurer from insisting upon it, but in most of such opinions by the judges it will be found that the remark was a mere *dictum*, and that in the facts of the case the company was shown to have put the assured to an unreasonable burden of trouble and expense by calling for additional or extraordinary proofs over and above what the policy prescribes as necessary without special demand.[3]

§ 147. Demanding Additional Proofs of Loss.—If with full knowledge of facts constituting forfeiture and without denying liability the insurer demands the additional proofs, to obtain which under

manded a magistrate's certificate and bills or duplicates showing the property, but the court said: "He did nothing to mislead her, to place her in a worse position or to cause her to incur any expense which she would not have been obliged to incur had he remained silent," and the court held that no waiver or estoppel had been made out, *Freedman* v. *Ins. Co.*, 175 Pa. St. 350, 34 Atl. 730. So also *McCormick* v. *Ins. Co.*, 86 Cal. 260, 24 Pac. 1003, in which the court says: "It is an essential element of estoppel by conduct that the party claiming the estoppel should have relied upon the conduct of the other, and was induced by it to do something which he otherwise would not have done." Quoted, with approval, in *First Nat. Bk.* v. *Maxwell*, 123 Cal. 360, 367, 55 Pac. 980, 69 Am. St. R. 64; *Wheaton* v. *Ins. Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. R. 216 n.; *Boyd* v. *Vanderbilt*, 90 Tenn. 212, 16 S. W. 470, 25 Am. St. R. 676. The Iowa court says of the agent: "He left word for them that they should send in their proofs but this it was their duty to do in order to establish a right of recovery regardless of any suggestions on his part," *Rundell* v. *Anchor F Ins. Co.*, 128 Ia. 575, 101 N. W. 517, 519; *Phœnix Ins. Co.* v. *Stevenson*, 78 Ky. 150. So also the federal court holds that a request for a carpenter's estimate of cost of rebuilding as a proof of loss which put the assured to an expense of $5.00 would not estop the company, *Firemen's Fund Ins. Co.* v. *McGreevy*, 118 Fed. 415, 55 C. C. A. 543.

[1] *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 22 S. Ct. 733.

[2] The Tennessee court says: "It is inconceivable that there should be authority for the position that if the insurer, after a loss, requires proof of loss, it thereby waives all right to set up as a defense that it is not liable by reason of the fact that it never had a valid contract at all," *Boyd* v. *Ins. Co.*, 90 Tenn. 212, 219.

[3] See, for example, *Georgia Home Ins. Co.* v. *Goode*, 95 Va. 751, 30 S. E. 366, 369, where copies of invoices were demanded; *Planters' Mut. Ins. Co.* v. *Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. R. 136; *German Fire I. Co.* v. *Grunert*, 112 Ill. 68; *Phœnix Assur. Co.* v. *Munger, etc., Mfg. Co.* (Tex. Civ. App.), 49 S. W. 271; *Reiner* v. *Dwelling House Ins. Co.*, 74 Wis. 89, 42 N. W 208.

the policy an affirmative request is necessary, as, for example, a magistrate's certificate, an appraisal, or examination of the assured under oath, or other information, to furnish which involves trouble or expense to the assured, in many cases the insurer is held to be estopped from relying upon the forfeiture, unless the policy, like the standard fire policy, expressly provides that such acts shall not constitute a waiver.[1] It should be stated, however, that this rule, to say the least very dubious in principle,[2] has in practice worked badly, since a jury rarely discriminates between full knowledge and mere suspicion, and the companies through fear of waiving their defenses are often induced to forego the benefit of contract methods of investigating, to which they are justly entitled.[3]

§ 148. Where Policy Provides that Such Acts Shall Not be a Waiver.—The standard and other policies often provide that requirements by the company regarding appraisal and examination of the insured under oath and of his papers, shall not be deemed a waiver. This constitutes a non-waiver agreement.

By the weight of authority full effect is to be given to this restriction, and if an appraisal or examination of the assured, or of his books and bills, is demanded in good faith, no waiver or estoppel will result, since the company has a contract right to postpone its act of final election until these methods of investigation have been pursued.[4]

[1] The rule invoked, originally laid down in *Titus* v. *Glens Falls Ins. Co.*, 81 N. Y. 410, 419, but slightly revised by the same court in *McNally* v. *Phœnix Ins. Co.*, 137 N. Y. 389, 397, 33 N. E. 475; *Carpenter* v. *German-Am. Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015; *Roby* v. *Am. Cent. Ins. Co.*, 120 N. Y. 510, 24 N. E. 808 (no one of these cases involved the standard fire policy which contains a limitation upon the power of the agent to waive), is stated as follows: "When an insurance company, with knowledge of all the facts constituting a breach of a condition or a warranty, requires the assured by virtue of the contract to do some act or incur some trouble or expense, the forfeiture is deemed to have been waived, as such requirement is inconsistent with the position that the contract has ceased to exist, and consistent only with the theory that the obligations of the contract are still binding upon both parties," *Planters' Mut. Ins. Co.* v. *Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. R. 136; *Smith* v. *St. Paul F. & M. I. Co.*, 3 Dak. 80, 13 N. W. 355; *Replogle* v. *American Ins. Co.*, 132 Ind. 360, 31 N. E. 947; *Grubbs* v. *North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. R. 62; *Cannon* v. *Home Ins. Co.*, 53 Wis. 585, 11 N. W. 11. *Contra, e. g.*, *Freedman* v. *Ins. Co.*, 175 Pa. St. 350. The question may easily be one for the jury, *Walter* v. *Mutual City & V. F. I. Co.*, 120 Mich. 35, 78 N. W. 1011; *Home Ins. Co.* v. *Phelps*, 51 Neb. 623, 71 N. W. 303.

[2] *Phœnix Ins. Co.* v. *Flemming*, 65 Ark. 54; *Boruszweski* v. *Ins. Co.*, 186 Mass. 589; *Boyd* v. *Ins. Co.*, 90 Tenn. 212; *London & L. Ins. Co.* v. *Honey*, 2 Vict. L. R. 7.

[3] Unless the companies suspect fraud they rarely ask for the examination of the insured under oath, as provided for by the policy. They must furnish the stenographer, and the proceeding usually is much more expensive to them than to the assured.

[4] *Phœnix Ins. Co.* v. *Flemming*, 65

§ 149. Non-waiver Agreement.—In order to prevent the acceptance of proofs of loss or other acts in connection with an investigation of loss from operating as a waiver of a forfeiture, a non-waiver agreement is frequently entered into between the insurer and insured by which it is provided that such acts shall not waive the rights of either party. Such a special agreement, executed by the parties after the loss, will be binding in accordance with its terms.[1]

§ 150. Taking Part in Adjustment.—If the company sends its adjuster to investigate the facts and to take part in an effort to ascertain the extent and nature of the loss before determining the proper course to pursue, the court ought not to be eager to infer a waiver of forfeiture, although the insured may have been put to some slight trouble or expense in connection with the investigation.[2]

Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. R. 900 (examination of books); *Phenix Ins. Co.* v. *Searles*, 100 Ga. 97, 27 S. E. 779; *Boyd* v. *Ins. Co.*, 90 Tenn. 212 (estimates of loss and value); *City Drug Store* v. *Scottish Union & Nat. Ins. Co.* (Tex. Civ. App., 1898), 44 S. W. 21 (examination of insured); *Oshkosh Match Works* v. *Manchester Fire Ass. Co.*, 92 Wis. 510, 66 N. W. 525 (examination of insured); *Walker* v. *Phœnix Ins. Co.*, 89 Hun (N. Y.), 333, 35 N. Y. Supp. 374, reversed on another point, 156 N. Y. 628, 633, where the Court of Appeals, without committing itself on this point, said: "Assuming that whatever was said or done between the representative of the insurance company and the owner of the property which related solely to an appraisal is not to be regarded as evidence of waiver owing to the provision in the policy relating to that subject" (but compare *Gibson Elec. Co.* v. *L. & L. & G. Ins. Co.*, 159 N. Y. 418, 426, 54 N. E. 23); *Johnson* v. *American Ins. Co.*, 41 Minn. 396, 43 N. W. 59 (arbitration); *Queen Ins. Co.* v. *Young*, 86 Ala. 424, 5 So. 116, 11 Am. St. R. 51 n. (appraisal); *Briggs* v. *Firemen's Fund*, 65 Mich. 52, 31 N. W. 616 (arbitration); *Holbrook* v. *Baloise Fire Ins. Co.*, 117 Cal. 561, 49 Pac. 555 (appraisal); *London & L. Ins. Co.* v. *Honey*, 2 Vict. L. R. 7 (arbitration of loss). As to what facts do not constitute waiver of failure to serve proofs of loss see *Riker* v. *President, etc., F. Ins. Co.*, 90 App. Div. (N. Y.) 391, 83 N. Y. Supp. 546; *Fournier* v. *German-Am. Ins. Co.*, 23 R. I. 36, 49 Atl. 98; but as to arbitration compare *Elliott* v. *Merchants', etc., Ins. Co.*, 109 Iowa, 39, 79 N. W. 452.

[1] *Fletcher* v. *Minneapolis F. & M. M. I. Co.*, 80 Minn. 152, 83 N. W. 29; *Keet-Rountree, etc., Co.* v. *Merchants', etc., Co.*, 100 Mo. App. 504, 74 S. W. 469; *Hayes* v. *U. S. Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404. But see *Corson* v. *Anchor Mut. F. I. Co.*, 113 Iowa, 641, 85 N. W. 806. It is construed strongly against the company and liberally in favor of the insured, *Pennsylvania Fire Ins. Co.* v. *Hughes*, 108 Fed. 497, 47 C. C. A. 459. The policy imposes upon the parties no obligation to enter into such an agreement.

[2] *Matthie* v. *Globe Fire Ins. Co.*, 174 N. Y. 489, 67 N. E. 57; *Young* v. *St. Paul Fire & M. I. Co.*, 68 S. C. 387, 47 S. E. 681. So conversations and transactions between the parties which indicate simply an attempt to obtain information which might lead to a possible adjustment will not operate as a waiver of the defense of fraudulent concealment, *Firemen's Fund Ins. Co.* v. *McGreevy*, 118 Fed. 415, 55 C. C. A. 543; or of the condition of the policy as to proofs of loss, *Riker* v. *Fire Ins. Co. of North America*, 90 App. Div. 391, 85 N. Y. Supp. 546; or of the limitation clause for bringing action, *Allen* v. *Dutchess Co. Mut. Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530. An adjustment, however, and an agreement to pay the amount due will operate as a waiver of any right to defeat recovery on the policy for breach of its conditions, *Tillis* v. *Liverpool & L. & G. I. Co.* (Fla., 1904), 35 So. 171; *Wagner* v.

§ 151. Company May Defend on Other Grounds Than Those First Named.—Stating to the assured after loss certain reasons or grounds for refusing payment is in general no waiver of other grounds of forfeiture, nor will the company be thereby estopped when it subsequently comes to litigation from setting up any other defenses that it may have.

A number of decisions to the contrary, especially in Michigan,[1] are opposed to the weight of authority and find slender support in reason.[2]

Elements of estoppel are generally lacking in such a case. There is no breach of contract obligation by the insurer, nor is there any misleading conduct to the prejudice of the assured. In no one of the cases here cited on this subject, on the one side or the other, was it established that the assured would have abandoned his claim and refrained from instituting action if the insurer had remained altogether silent until litigation. The company owes no duty, until it interposes its defenses in a lawsuit, to assign its reasons for not paying. An assignment of reasons is not only gratuitous, but often largely a matter of lay opinion. The claimant generally knows more about the facts than the company does at all stages of the preliminary investigation, and much more at the outset.[3] And if he has not undertaken the litigation solely as a result of fraudulent or deceitful misrepresentations of fact by some agent duly authorized to stand in the place of the company, it is difficult to see how any adequate basis of estoppel has been established.

This rule in favor of the insurance company, however, must not

Dwelling House Ins. Co., 143 Pa. St. 338, 22 Atl. 885; *Levy* v. *Peabody Ins. Co.*, 10 W. Va. 560, 27 Am. Rep. 598, unless the settlement is procured by fraud on the part of the insured. The insurer cannot urge payment by mistake from want of knowledge of a breach, it being its duty when claim is made to ascertain the facts as to any breach, *Smith* v. *Glens Falls Ins. Co.*, 62 N. Y. 85.

[1] For example see *Taylor* v. *Supreme Lodge*, 135 Mich. 231, 97 N. W. 680; *Douville* v. *Farmers' Mut. Ins. Co.*, 113 Mich. 158, 71 N. W. 517; *Smith* v. *German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; *Towle* v. *Ionia, Eaton & B. F. M. F. I. Co.*, 91 Mich. 219, 51 N. W. 987; *Castner* v. *Farmers' Mut. Ins. Co.*, 50 Mich. 273, 275, 15 N. W. 452; *Continental Ins. Co.* v. *Waugh*, 60 Neb. 348, 83 N. W. 81; *Home Life Ins. Co.* v. *Pierce*, 75 Ill. 426.

[2] *Armstrong* v. *Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991; *McCollum* v. *Mut. Life Ins. Co.*, 55 Hun, 103, aff'd 124 N. Y. 642; *Devens* v. *Mechanics' & T. Ins. Co.*, 83 N. Y. 168, 173; *Cassimus* v. *Scottish Union & Nat. Ins. Co.*, 135 Ala. 256, 269, 33 So. 163; *Lackmann* v. *Kearney*, 142 Cal. 112, 115, 75 Pac. 668; *Welsh* v. *London Assur. Corp.*, 151 Pa. St. 607, 619, 25 Atl. 142, 31 Am. St. R. 786; *National Ins. Co.* v. *Brown*, 128 Pa. St. 386, 18 Atl. 389; *Findlay* v. *Union Mut. F. Ins. Co.*, 74 Vt. 211, 52 Atl. 429, 93 Am. St. R. 885.

[3] *Devens* v. *Mechanics' & Traders' Ins. Co.*, 83 N. Y. 168, 173 ("They may refuse to pay without specifying any ground and insist upon any available ground").

be extended to apply to an undisclosed defense which might upon timely notice after loss have been met and remedied.[1] Nor does the rule apply to the subject of amendments of pleadings after action is begun and after the issues therein have been framed. Every court exercises its own discretion to withhold the privilege of setting up new defenses, or to grant it, and with or without the imposition of terms, as seems to it reasonable.[2]

§ 152. Claimant not Concluded by Statements in Proofs of Loss.—Statements in the proofs of loss are evidence against the claimant because they are in the nature of admissions,[3] but by virtue of the line of reasoning described in the last section he may contradict and correct them on the trial.[4] The essential elements of estoppel are lacking, except in the very rare instance in which the company might prove that it defended solely because of some error in the proofs.

A striking instance of the general rule is furnished by the *Van Tassel* case, where after taking the defendant to the court of appeals the plaintiff was allowed to increase his claim from five thousand to ten thousand dollars and ultimately to recover judgment for the latter amount.[5] It will be observed, however, that proofs of loss are not evidence on behalf of the claimant to prove the truth of their contents, but simply to prove his compliance with the clause of the policy requiring the preparation and service of proofs.[6]

§ 153. Retention of Proofs Waives Defects That Might Have Been Remedied.—For the insurers to retain the proofs of loss or death, without pointing out, within a reasonable time, any objection to their form or contents constitutes a waiver of such mistakes and defects as the insured could have remedied upon notice. Here is a clear ground of estoppel.[7] Silence in such a case would be unrea-

[1] See § 153.

[2] *Pennsylvania Fire Ins. Co.* v. *Hughes*, 108 Fed. 497, 502, 47 C. C. A. 459; *Widdey Cas. Co.* v. *Sheppard*, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650; *Hutton* v. *Patrons' Mut. F. I. Co.*, 191 Pa. St. 369, 43 Atl. 219; *Nat. Ins. Co.* v. *Brown*, 128 Pa. St. 386, 18 Atl. 389; *Phenix Ins. Co.* v. *Caldwell*, 85 Ill. App. 104.

[3] *Ins. Co.* v. *Newton*, 22 Wall. (U. S.) 32, 35; *Antes* v. *West. Ins. Co.*, 84 Iowa, 355, 51 N. W. 7.

[4] *Supreme Lodge* v. *Beck*, 181 U. S. 49; *Conn. Ins. Co.* v. *Schwenk*, 94 U. S. 593; 24 L. Ed. 294, *White* v. *Royal Ins. Co.*, 149 N. Y. 485, 44 N. E. 77; *Bentley* v. *Standard Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *Names* v. *Union Ins. Co.*, 104 Iowa, 612, 74 N. W. 14.

[5] *Underwood*, as *Ex'r*, v. *Greenwich Ins. Co.*, 28 App. Div. (N. Y.) 163, 151 N. Y. 130, 45 N. E. 365.

[6] *Lundvick* v. *Ins. Co.*, 128 Iowa, 376, 104 N. W. 429; *Scottish Union & Nat. Ins. Co.* v. *Keene*, 85 Md. 263, 37 Atl. 33; *Tucker* v. *Colonial Ins. Co.*, 58 W. Va. 30, 51 S. E. 86.

[7] *Sutton* v. *Am. Ins. Co.*, 188 Pa. St.

sonably misleading. The affirmative act of keeping the proofs indicates acceptance and satisfaction with their form.[1] Such objections must be made promptly [2] and the insured must be allowed a reasonable time to make corrections.[3]

§ 154. **Waiver or Estoppel Must be Pleaded.**—The prime purpose of a pleading is to inform the opponent in advance of trial of the precise point of controversy. When the plaintiff relies upon waiver or estoppel in place of due performance of conditions precedent, he must, as a general rule, plead the facts either in the complaint or in some jurisdictions in the replication. This seems to be the sounder rule,[4] and certainly is the safer practice. There are, however, many cases announcing a contrary rule,[5] and they have to support them the argument that a plaintiff ought not to be required to allege what he is not compelled to prove in order to make out his affirmative or *prima facie* case. Logically all the warranties of the policy must be shown to be fulfilled before the assured establishes his right to

380, 41 Atl. 537; *First Nat. Bank* v. *Am. Cent. Ins. Co.*, 58 Minn. 492, 60 N. W. 345; *Faulkner* v. *Manchester Assur. Co.*, 171 Mass. 349, 50 N. E. 529; *Virginia F. & M. Ins. Co.* v. *Goode*, 95 Va. 762, 30 S. E. 370; *Brock* v. *Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683; *Weed* v. *Hamburg-Bremen*, 133 N. Y. 394, 31 N. E. 231; *Cummer Lumber Co.* v. *Manufacturers' M. F. I. Co.*, 67 App. Div. (N. Y.) 151, 73 N. Y. Supp. 668.

[1] *Kiernan* v. *Insurance Co.*, 150 N. Y. 198.

[2] *Welsh* v. *London Assur. Co.*, 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. R. 786; *De Witt* v. *Agri. Ins. Co.*, 157 N. Y. 353, 51 N. E. 977.

[3] *Cummins* v. *German-Am. Ins. Co.*, 197 Pa. St. 61, 46 Atl. 902. The insurance company is under no obligation to furnish blanks unless imposed by statute and its refusal to do so is no waiver, *Continental Ins. Co.* v. *Dorman*, 125 Ind. 189, 25 N. E. 213. An adjustment as to amount of loss waives proofs, *Gerhart* v. *Northern Ass. Co.*, 86 Mo. App. 596.

[4] For example, *Hennessey* v. *Met. Life Ins. Co.*, 74 Conn. 699, 52 Atl. 490; *McCoy* v. *Iowa State Ins. Co.*, 107 Iowa, 80, 77 N. W. 529; *Eiseman* v. *Hawkeye Ins. Co.*, 74 Iowa, 11, 36 N. W. 780; *Dwelling House Ins. Co.* v. *Johnson*, 47 Kan. 1, 27 Pac. 100; *Phenix Ins. Co.* v. *Bachelder*, 32 Neb. 490, 29 Am. St. R. 443; *Victors* v. *Nat. Prov. Union* 113 App. Div. 715 (cannot show waiver under allegation of full performance); *Allen* v. *Dutchess Co. Mut. Ins. Co.*, 95 App. Div. (N. Y.) 86, 87, 88 N. Y. Supp. 530; *Ryer* v. *Prudential Ins. Co.*, 85 App. Div. 7, 9, 82 N. Y. Supp. 971; *Todd* v. *Union Cas. & Surety Co.*, 70 App. Div. 52, 55, 74 N. Y. Supp. 1062; *Meeder* v. *Prov. Sav. Life Assur. Soc.*, 58 App. Div. 80, 83, aff'd 171 N. Y. 432, 64 N. E. 167 (in which a trivial exception to general rule was allowed); *Smith* v. *Wetmore*, 167 N. Y. 234, 237, 60 N. E. 419, *Elting* v. *Dayton*, 70 App. Div. 52, 43 N. Y. St. Rep. 363, aff'd 144 N. Y. 644, 39 N. E. 493; *Pioneer Mfg. Co.* v. *Phœnix Assur. Co.*, 110 N. C. 176, 28 Am. St. R. 673, 14 S. E. 731; *St. Paul F. & M. Ins. Co.* v. *Hodge*, 30 Tex. Civ. App. 257, 71 S. W. 386.

[5] For example, *N. J. Rubber Co.* v. *Commercial Union Assur. Co.*, 64 N. J. L. 580, 46 Atl. 777, 64 L. J. L. 51; *Nickell* v. *Phœnix Ins. Co.*, 144 Mo. 420, 46 S. W. 435; *Andrus* v. *Fidelity Mut. L. Ins. Ass.*, 168 Mo. 151, 161; *McManus* v. *Western Assur. Co.*, 43 App. Div. 550, aff'd, without opinion, 167 N. Y. 602; *Bogardus* v. *N. Y. Life Ins. Co.*, 101 N. Y. 328, 334 (*dictum*); *Johnston* v. *Northwestern Live Stock I. Co.*, 94 Wis. 117, 68 N. W. 868; and see 169 N. Y. 310.

recover,[1] but the warranties of the life and fire policies are so intricate and numerous, and, to prove so many of them, would involve testimony of a negative character, that most courts hold, as matter of justice and convenience alike, that plaintiff need only allege and prove the fulfillment of certain essential affirmative conditions of the contract, for instance, the existence of insurable interest, the occurrence of the peril, the amount of loss, the service of proofs, and perhaps the amount of other contributing insurance.[2]

The defendant also must allege any defense of waiver or estoppel upon which it relies.[3]

The Connecticut court, however, has declared broadly that a party need not plead an estoppel *in pais*.[4] On the other hand, the Kansas court has declared as broadly that the plaintiff must plead and prove the performance of all conditions precedent to his right of recovery, or a waiver by the insurer.[5]

[1] *Leonard* v. *State Mut. Life Assur. Co.*, 24 R. I. 7, 51 Atl. 1049, 96 Am. St. R. 698; *Hennessey* v. *Ins. Co.*, 74 Conn. 699, *supra*.

[2] See § 117, *supra*.

[3] *Grant* v. *Pratt*, 87 App. Div. 490, 84 N. Y. Supp. 983.

[4] *Bernhard* v. *Rochester German Ins. Co.* (Conn.), 65 Atl. 134.

[5] *Shawnee F. Ins. Co.* v. *Knerr*, 72 Kan. 385, 83 Pac. 611.

CHAPTER VIII

General Principles—Continued

Waiver and Estoppel by Agents

§ 155. **Introductory.**—A corporation or association, though a legal entity, can transact business only by personal representatives. Therefore it is only through the medium of agents that an insurance company can make or modify a contract.[1] Whatever a policy or an application may declare as to lack of authority, the company's agent, by virtue either of express or implied instructions, is and must in fact and in law be vested with certain powers in performing the duties actually intrusted to him by the principal. Indeed to appoint him to the position is to clothe him with some measure of authority.[2]

It is obvious, then, that the phraseology used by the companies or current in the trade to describe an insurance agent is not of necessity controlling. More significant is it to ascertain the real or apparent grant of power as defined by the requirements of the act or the demands of the business, which the agent has been employed by the company to perform or to conduct on its behalf and in its interest.[3] Within the jurisdiction of many courts this circumstance is deemed more potent in determining the contract rights of the parties under the policy than any general stipulation regarding a limit to the agent's authority expressed in the printed policy itself.[4]

§ 156. **Ostensible Authority.**—If the company holds out its agent to the public as authorized to do a particular act, or to transact a particular kind of business, this carries with it an authority to adopt the ordinary means, and do and say the appropriate things, to accomplish the object for which the agent is employed.[5]

[1] *Sternaman* v. *Met. Life Ins. Co.*, 170 N. Y. 13, 19, 62 N. E. 763, 88 Am. St. R. 625; *Imperial Fire Ins. Co.* v. *Dunham*, 117 Pa. St. 460, 12 Atl. 668.

[2] *Union Mut. L. Ins. Co.* v. *Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Fire Assn.* v. *Masterson* (Tex. Civ. App.), 83 S. W. 49.

[3] *Wilder* v. *Continental Cas. Co.* (U. S. C. C., Jan., 1907), 36 Ins. L. J. 426.

[4] *Kilborn* v. *Prudential Ins. Co.* (Minn., 1906), 108 N. W. 861 (containing excellent discussion).

[5] *Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222, 20 L. Ed. 617; *Indian*

To determine the extent of the authority, then, regard must be had not only to the actual instructions given by the principal, which are seldom disclosed to the insured, but also to the character of the particular business involved [1]—whether, for example, it be simply that of soliciting for insurance, superintending the execution of the application and forwarding it to the home office; or whether it be that of investigating losses and reporting the result to the company; or whether it involve the ampler powers and wider discretions of making and modifying contracts, and of adjusting and settling losses.[2]

§ 157. Undisclosed Instructions not Binding upon the Insured.—If the natural and ordinary demands of the business actually intrusted to the agent invest him with the power to adopt a certain course of action or representation, the principal is bound thereby, and may not be permitted to show that his undisclosed instructions of a different tenor and effect have been violated by the agent.[3]

Hence, it often happens that an agent has power to bind his principal in flat disobedience of his express instructions.[4]

For the agent's wrongful or fraudulent acts of commission or omission, and for his material misrepresentations or trickery within the scope of his ostensible authority as thus defined, the company is liable. Thus, where the soliciting agent of a life company, in filling up the application, fraudulently misstated the age of the assured, and filled out a physician's certificate, and forged the name of the examining physician thereto, and while the policy was in his hands for delivery changed the age of the assured as stated therein, so as to show his real age, and then delivered it, and neither the assured nor the company knew anything of these fraudulent acts, it was held, that the company was liable.[5]

River State Bank v. *Hartford Fire Ins. Co.*, 46 Fla. 283, 35 So. 228; *Hahn* v. *Guardian Assur. Co.*, 23 Ore. 576, 32 Pac. 683, 37 Am. St. R. 709; *Medley* v. *German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101; *Alexander* v. *Continental Ins. Co.*, 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869.

[1] *Ins. Co.* v. *Edwards*, 122 U. S. 457; *Eastern R. R. Co.* v. *Relief Ins. Co.*, 105 Mass. 570.

[2] *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, 23 S. Ct. 126; *American Ins. Co.* v. *Gallatin*, 48 Wis. 36, 3 N. W. 772.

[3] *Forward* v. *Continental Ins. Co.*, 142 N. Y. 382, 389, 37 N. E. 615, 25 L. R. A. 637.

[4] *Ruggles* v. *Am. Central Ins. Co.*, 114 N. Y. 415, 11 Am. St. R. 674; *Walsh* v. *Hartford Fire Ins. Co.*, 73 N. Y. 5, 9; *Sanford* v. *Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. R. 358.

[5] *McArthur* v. *Home Life Ass.*, 73 Iowa, 336, 5 Am. St. R. 684. But the English court apparently regards the acts of the company's solicitor in writing answers in the application as done on behalf of the applicant who is held bound to read his application and see to it that the answers are correct under penalty of forfeiture if his warranties

§ 158. Agency Determined by Facts of Each Case.—Who are agents of the company, and whether brokers and agents are the representatives of the insured or of the insurers,[1] and what is the extent of their authority,[2] are questions of fact to be determined by the circumstances of each case, and may be proved by parol whatever the policy says.[3] As matter of law the principal is responsible for the acts of his agent within the scope of his actual authority whatever the policy may say.[4] Nor can a by-law of an order or mutual company change the rule of law in this respect.[5]

By the prevailing rule in this country, a person employed by an insurance company to solicit the public to take insurance, and sign applications as a preliminary step, is to be regarded as the company's agent, although he aid the insured in filling up the application blank, and although he is paid by a commission out of the premium.[6] The obvious reasons for this rule are forcibly explained by the United States Supreme Court in the leading case of the *Union Mutual Insurance Company* v. *Wilkinson*.[7]

are not fulfilled, *Biggar* v. *Rock Life Assur. Co.* (1902), 1 K. B. 516.

[1] *Knights of Pythias* v. *Withers*, 177 U. S. 260, 20 S. Ct. 611.

[2] *Frost* v. *North. Brit. & Mer. Ins. Co.*, 77 Vt. 407, 60 Atl. 803.

[3] *Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222, 20 L. Ed. 617; *Commercial Ins. Co.* v. *Ives*, 56 Ill. 402; *Kausal* v. *Minn. Farmers' Mut. Fire Ins. Co.*, 31 Minn. 17, 47 Am. Rep. 776; *Sternaman* v. *Met. Life Ins. Co.*, 170 N. Y. 13, 19, 62 N. E. 763, 88 Am. St. R. 625, 57 L. R. A. 318. Often a question is presented for the jury, *Milwaukee Mechanics' Ins. Co.* v. *Schallman*, 188 Ill. 213, 59 N. E. 12; *Lewis* v. *Guardian Fire & L. A.*, 181 N. Y. 392, 74 N. E. 224; *Frost* v. *North. Brit. & Mer. Ins. Co.*, 77 Vt. 407, 60 Atl. 803. But, if the facts are undisputed, the relationship of agency may become a question of law, *Allen* v. *German-Am. Ins. Co.*, 123 N. Y. 6, 25 N. E. 309.

[4] *Knights of Pythias* v. *Withers*, 177 U. S. 260, 20 S. Ct. 611; *Sternaman* v. *Met. Life Ins. Co.*, 170 N. Y. 13, 19, 62 N. E. 763, 88 Am. St. R. 625, 57 L. R. A. 318.

[5] *Matter of Brown* v. *Order of Foresters*, 176 N. Y. 132, 68 N. E. 145.

[6] *State Ins. Co.* v. *Taylor*, 14 Colo. 499, 24 Pac. 333, 20 Am. St. R. 281; *Continental Ins. Co.* v. *Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. R. 557 (actual relationship of agency cannot be subverted by any device of words in the policy). *Medley* v. *Ins. Co.*, 55 W. Va. 342, 47 S. E. 101. See, however, *Reed* v. *Ins. Co.*, 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496; *Biggar* v. *Rock Life Assur. Co.* (1902), 1 K. B. 516.

[7] 13 Wall (U. S.),222, 20 L. Ed. 617, in which the court by Justice Miller said: "If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto. It is in precisely such cases as this that

§ 159. Effect of Stipulations in the Contract itself as to who are, or are not, Agents of the Company.—Policies of fire insurance frequently contain either one of these two stipulations: (1) That any

courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal. Although the very well-considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, 'Whose agent was Ball in filling up the application?' This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured; and if left to himself, or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known—so well that no court would be justified in shutting its eyes to it—that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations received the benefits, and the parties supposing

person, other than the assured, who may have procured the insurance to be taken shall be deemed to be the agent of the assured, and not of the company, in any transaction relating to the insurance; (2) that in any matter relating to the insurance no person, unless duly authorized in writing, shall be deemed the agent of the company.

And life policies often contain a provision, in substance, that agents are not authorized to make, alter, or discharge contracts, or to waive forfeitures, or to grant permits, or to receive for premiums anything but cash, or that certain designated officers are the only persons so authorized.

These stipulations are not necessarily illegal or against public policy, and are held to be of binding force upon the insured if the recital as to agency contained in them is not untrue.[1] Such stipulations, however, are not conclusively binding, because the relationship between the company and its agents is not created or determined by the policy but exists independent of the policy. This extrinsic fact, therefore, may always be shown by extraneous evidence whenever such evidence is available.[2]

themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *prima facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." This opinion has been quoted with approval by many state courts. See also *Follette* v. *Mut. Acc. Asso.*, 110 N. C. 377, 14 S. E. 923, 15 L. R. A. 668, 28 Am. St. R. 697.

[1] *Ins. Co.* v. *Norton*, 96 U. S. 234; *Conway* v. *Phœnix Mut. Life Ins. Co.*, 140 N. Y. 79, 35 N. E. 420; *Allen* v. *German-Am. Ins. Co.*, 123 N. Y. 6; *Whited* v. *Germania Fire Ins. Co.*, 76 N. Y. 415, 32 Am. Rep. 330; *Merserau* v. *Phœnix Mut. Life Ins. Co.*, 66 N. Y. 274.

[2] Thus the New York court says: "The power to contract is not unlimited. . . . Parties cannot . . . by agreement change the laws of nature or of logic or create relations physical, legal or moral which cannot be created. . . . The parties . . . could agree that the person who filled out part A of the application was the agent of the insured and not of the company. . . . It is quite different, however, with the work of the medical examiner because that requires professional skill and experiance and the insurer permits it to be done only by its own appointee," *Sternaman* v. *Met. Life Ins. Co.*, 170 N. Y. 13, 19, 62 N. E. 763; *Matter of Brown* v. *Order of Foresters*, 176 N. Y. 132, 137, 68 N. E. 145, 88 Am. St. R. 625, 57 L. R. A. 318, by O'Brien, J., *Knights of Pythias* v. *Withers*, 177 U. S. 260, in which the court says: "The position of the secretary must be determined by his actual power and authority and not by the name which the defendant chooses to give him," and held that agency must be determined by the facts of the case and not by the stipulations of the policy. Power may be inferred from parol evidence of acts or course of dealing, *Stewart* v. *Union Mut. Life Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147; *Quinlan* v. *Providence Wash. Ins. Co.*, 133 N. Y. 356, 364 *et seq.*, 31 S. E. 31, 28 Am. St. R. 645; *U. S. Life Ins. Co.* v. *Lesser*, 126 Ala. 568, 28 So. 646; *Thompson* v. *Traders' Ins. Co.*, 169 Mo. 12, 23, 68 S. W. 889.

So also it is obvious that after the inception of the contract the company may, as matter of fact, change the scope of the authority of the persons employed by it, or alter the manner of bestowing authority upon them; therefore extrinsic evidence, if any there be, of such facts, must be competent.[1]

As to how far the relationship of agency, existing between the insurer and his representative, may be affected by a stipulation in the contract between the insurer and the insured, authorities do not agree. The New York court seems to have settled upon the distinction that a lay solicitor of the insurer, in his work of filling up the application, may by stipulation in the policy, subsequently delivered, be converted into the agent of the insured, while a medical examiner cannot.[2]

To neutralize the effect of such stipulations, or prohibit them altogether, many states have passed statutes on the subject.[3]

§ 160. Effect of Stipulations as to the Manner of Waiving.—Where

[1] *Ins. Co.* v. *Norton*, 96 U. S. 234; *Wilber* v. *Williamsburgh City Fire Ins. Co.*, 122 N. Y. 443; *Frost* v. *North Brit. & Mer. Ins. Co.*, 77 Vt. 407, 60 Atl. 803. Thus an agent of an insurance company may be shown to have an actual authority to waive a forfeiture for non-payment of premiums, although the policy itself declare that he has no such authority, *Wyman* v. *Phœnix Mut. Ins. Co.*, 119 N. Y. 274, 23 N. E. 907. So, also, if the agent has in fact an authority broad enough, he may by his acts, if done within the scope of his actual employment, estop the company from claiming that an alleged violation of the letter of the contract really brought about by the agent himself shall constitute a defense, *Messelbach* v. *Norman*, 122 N. Y. 578, 26 N. E. 34. Certain states, by statute, have adopted the rule in effect that the soliciting agent and others shall be deemed agents of the insurers, no matter what the policy provides; see Appendix, ch. I and N. Y. Ins. L. § 59; such statutes are constitutional, *Continental Life Ins. Co.* v. *Chamberlain*, 132 U. S. 304, 10 S. Ct. 87. Under these statutes acts and knowledge by such agents are imputed to company and may avail to estop it, despite the stipulation in the policy to the contrary, *Noble* v. *Mitchell*, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238; *John Hancock Mut. L. Ins. Co.* v. *Schlink*, 175 Ill. 284, 51 N. E. 795; *Fred Miller Brewing Co.* v. *Council Bluffs Ins. Co.*, 95 Iowa, 31, 66 N. W. 565; *Bliss* v. *Potomac F. Ins. Co.*, 134 Mich. 212, 95 N. W. 1083; *Bankers' L. Ins. Co.* v. *Robbins*, 55 Neb. 117, 75 N. W. 585; *Norris* v. *Hartford F. Ins. Co.*, 57 S. C. 358, 35 S. E. 572; *Wis. Cent. R. Co.* v. *Phœnix Ins. Co.*, 123 Wis. 313, 101 N. W. 703; *Speiser* v. *Phœnix Life Ins. Co.*, 119 Wis. 530, 97 N. W. 207.

[2] *Sternaman* v. *Mut. Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, 88 Am. St. R. 625; *Wilber* v. *Williamsburgh City F. Ins. Co.*, 122 N. Y. 443, in which the court citing earlier New York cases said, "it was entirely competent for the parties to agree that a third person participating in the negotiations should, for the purpose of procuring the policy, be deemed an agent of the assured." Apparently the English court would take the same view as regards the work of transcribing into the application the oral answers of the insured, *Biggar* v. *Rock Life Assur. Co.* (1902), 1 K. B. 516; *Contra*, *Kausal* v. *Minn. Farmers' M. F. Ins. Co.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776. And see cases § 158 which hold in substance that a matter of fact cannot be disturbed by any device of words in a policy.

[3] Appendix, ch. I and N. Y. Ins. L. § 59, and cases under this section, *supra*.

the policy by its terms permits a waiver of its conditions, it generally provides that such waiver shall be made only by written agreement, indorsed upon the policy, or attached thereto.

The declaration that a solicitor is not the company's agent or is not to be so regarded unless he holds a written commission, is of no avail, as before shown, unless true,[1] and is subject for a notice more properly than for a stipulation, but an exclusive method of undoing or altering an important contract is fit subject for the mutual engagements of the parties. Indeed to provide that a waiver must be evidenced by writing is eminently reasonable and business-like, and full force and effect ought to be given to such a clause.[2] The great majority of courts, however, decided that notwithstanding this clause agents having general powers to accept risks and close contracts, including the ordinary local or countersigning agents of fire companies, could waive this clause as well as any other clause.[3]

§ 161. The Same—Restriction on Agents' Authority in Standard Fire Policy and other Policies.—The clause last described having thus been nullified in most of the state courts by judicial interpretation and by the application to it of the very doctrine of parol waivers which its object was to eliminate, the committee appointed to frame a standard fire policy for New York adopted a further clause, in substance that no officer, agent or other representative had or should be deemed to have *power* to waive, except by written agreement indorsed or attached to the policy.[4]

[1] See § 159, *supra*.

[2] *Assur. Co.* v. *Building Asso.*, 183 U. S. 308, 361, 22 S. Ct. 133; *Gladding* v. *Ins. Co.*, 66 Cal. 6; *O'Leary* v. *Merchants' & D. & M. I. Co.*, 100 Iowa, 173, 69 N. W. 420, 62 Am. St. R. 555. The Massachusetts court says: "A company which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the insured has assented to be bound," *Kyte* v. *Commercial Union Assur. Co.*, 144 Mass. 46, 10 N. E. 518. And note that the insurance company itself acquires knowledge of the terms of its contract only as they are written, since the "daily report" contains nothing else, § 75, *supra*.

[3] §§ 173, 175, *infra*. The New York court voiced the prevailing opinion when it said: "Notwithstanding the provisions of the policy that anything less than a distinct specific agreement, clearly expressed and indorsed on the policy, should not be considered as a waiver of any printed or written condition or restriction therein, the court recognize and affirm the law as settled in this state that such condition can be dispensed with by the company or its general agents by oral consent as well as by writing," *Weed* v. *London & Lancashire Fire Ins. Co.*, 116 N. Y. 117, 22 N. E. 229; *Phœnix Ins. Co.* v. *Hart*, 149 Ill. 513, 36 N. E. 990; *Ins. Co.* v. *Sheffy*, 71 Miss. 919, 16 So. 307; *Knarston* v. *Manhattan L. I. Co.*, 124 Cal. 74, 76, 56 Pac. 773; *St. Paul F. & M. I. Co.* v. *Parsons*, 47 Minn. 352, 50 N. W. 240. The reasons for this doctrine were much more persuasive as applied to older forms of policies in use prior to the adoption of uniform and statutory fire policies.

[4] Its phraseology was based upon a New York decision, *Walsh* v. *Hartford*

In some jurisdictions this clause also, when invoked by the insurers, amounts to nothing.[1] In many it amounts to little or nothing as applied to forfeitures occurring at the inception of the contract,[2] and in some it amounts to little or nothing as applied to warranties relating to proceedings after loss.[3] But the clear trend of the later decisions in many courts is in the direction of giving to this and similar clauses full force and effect in actions brought upon the contract, and of referring the assured to the equity branch of the court when he asks for what, as before shown, is always equivalent to a reformation of the contract as written.[4]

Other courts ignore such stipulations, either holding that a company cannot deprive itself of its inalienable authority to modify its contracts as it may choose, in writing or by parol,[5] or else deciding that the limitation specified in the policy is applicable only to express waivers and not to estoppel incurred by misleading conduct.[6]

Fire Ins. Co., 73 N. Y. 5. To make the provision of practical avail against dishonest claimants it was necessary to include in the restriction "officers" as well as "agents." A somewhat similar clause appears in many life policies.

[1] See cases note 5, *infra*.

[2] For example, *German-Am. Ins. Co.* v. *Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. R. 297; *Beebe* v. *Ohio Farmers' Ins. Co.*, 93 Mich. 514, 32 Am. St. R. 519, 18 L. R. A. 481, 53 N. W. 818; *Wood* v. *American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. R. 733; *Medley* v. *German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101; *Welch* v. *Fire Assn. of Phila.*, 120 Wis. 406, 98 N. W. 227.

[3] For example, *Indian River State Bk.* v. *Hartford Fire Ins. Co.*, 46 Fla. 283, 35 So. 228; *Snyder* v. *Ins. Co.*, 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. R. 625; *Dibbrell* v. *Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. 783, 28 Am. St. R. 678. See recent case of *Bernhard* v. *Rochester German Ins. Co.* (Conn.), 65 Atl. 134.

[4] For example, see these notable decisions from six influential courts in the United States and England, *Northern Assur. Co.* v. *Grand View Bldg. Assoc.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213 (standard policy gives measure of agent's authority, and stipulations are not to be contradicted by parol); *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656 (limit of authority named must prevail and agent has no authority to waive cash payment of first premium by delivering the life insurance policy); *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424 (countersigning agent has no power to waive service of proofs of loss under standard fire policy); *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 77 N. W. 752 (such agent has no power to make subsequent parol waiver of prohibited increase of risk). Untrue statements in application or policy avoid the contract though the company's agent knew the truth when delivering the policy, *Batchelder* v. *Queen Ins. Co.*, 135 Mass. 449; *McCoy* v. *Met. Life Ins. Co.*, 133 Mass. 82; *Dimick* v. *Met. Life Ins. Co.*, 69 N. J. L. 384, 55 Atl. 291; *Biggar* v. *Rock Life Assur. Co.* (1902), 1 K. B. 516.

[5] An attempted illegal restriction upon corporate action, *Beebe* v. *Ohio F. Ins. Co.*, 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481 n., 32 Am. St. R. 519; *St. Paul F. & M. Ins. Co.* v. *Parsons*, 47 Minn. 352, 50 N. W. 240; *Home Ins. Co.* v. *Gibson*, 72 Miss. 58, 17 So. 13: *Burdick* v. *Security Life Assn.*, 77 Mo. App. 629; *James* v. *Mut. Res., etc., Ass.*, 148 Mo. 1, 49 S. W. 978; *Ætna Life Ins. Co.* v. *Fallow*, 110 Tenn. 720 77 S. W. 937; *Home Ins. Co.* v. *Nichols* (Tex. Civ. App.), 72 S. W. 440; *Kahn* v. *Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. R. 47.

[6] *Met. Life Ins. Co.* v. *Sullivan*, 112 Ill. App. 500.

§ 162. Policy Restrictions, when Operative.—Provisions in the policy as to who shall or shall not be deemed to be agents of the company for purposes of waivers or declaring how agency shall be evidenced, are in general binding upon the insured only from the time when he receives them.[1] Such provisions are in their essence notices by the insurer rather than engagements by the insured. Therefore if not contained in the application they do not apply to transactions prior to the issuance of the policy.[2] But the important stipulation that waivers can only be effected by written agreement indorsed on the policy has been held operative from date of the contract, no matter when the policy itself may be delivered, and though the insurance rest only in a binder.[3]

§ 163. Authority of Officers of the Company.—Unless restricted by legislature, charter, or action of the directors, officers have, in general, authority to make and alter contracts, waive conditions and forfeitures, give permits, cancel policies, adjust losses, and compromise claims in their discretion.[4]

It is, however, well within the power of a legislature or of a board of directors to prescribe a form of policy stipulating that no officer or agent shall have, or be deemed to have, power to waive except in

[1] *Mutual Ben. Life Ins. Co.* v. *Robison*, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325. As to exclusive method of waiving, to wit, by written agreement, see § 161.

[2] *Kausal* v. *Ins. Co.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776 (see cases cited in *Shotliff* v. *Modern Woodmen*, 100 Mo. App. 138); *Kister* v. *Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 18 Atl. 447, 15 Am. St. R. 696, 5 L. R. A. 646; *South Bend, etc., Co.* v. *Dakota F. & M. Ins. Co.*, 2 So. Dak. 17, 48 N. W. 310 (citing cases *pro* and *con*). *Contra*, *McCoy* v. *Met. Life Ins. Co.*, 133 Mass. 82; *Biggar* v. *Rock Life Assur. Co.* (1902), 1 K. B. 516. But if notice or agreement of restriction upon agent's authority is in the application it is binding from date of execution of application, *Kenyon* v. *Knights Templars*, 122 N. Y. 247, 25 N. E. 299. And in some cases it has been held that an agreement in the policy that the solicitor shall be deemed the agent of the insured is binding as to transactions prior to receipt of policy, *Wilber* v. *Williamsburg City Fire Ins. Co.*, 122 N. Y. 443, 25 N. E. 926; *Rohrback* v. *Germania F. Ins. Co.*, 62 N. Y. 47; *Alexander* v. *Germania F. Ins. Co.*, 66 N. Y. 464; *Wood* v. *Firemen's Ins. Co.*, 126 Mass. 316; but the better view is that the policy cannot change the facts and convert the company's agent into an agent for the assured, *Knights Pythias* v. *Withers*, 177 U. S. 260; *Wilder* v. *Continental Cas. Co.*, 150 Fed. 92.

[3] *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424. And see *Hartford Fire Ins. Co.* v. *Wilson*, 187 U. S. 467, 478. *Contra*, *Crouse* v. *Hartford F. Ins. Co.*, 79 Mich. 249, 44 N. W. 496. Binders are usually taken out through brokers who are perfectly familiar with the terms of the policy. A clause in a policy limiting the authority of the agent is held by Maryland court to apply only to waivers after policy goes into effect, *Dulaney* v. *Fidelity & Cas. Co.* (Md.), 66 Atl. 614.

[4] Such matters are seldom attended to by boards of directors. The president or other general officer of a corporation has power, *prima facie*, to do any act which the directors could authorize or ratify, *Hastings* v. *Brooklyn L. I. Co.*, 138 N. Y. 473, 34 N. E. 289.

writing. The clause is reasonable and calculated to protect and benefit both parties. Its recital would seem to be *prima facie* true and binding even as to acts of officers, and, according to the view of the United States Supreme Court, it imposes upon the assured the burden of proving by extrinsic evidence any actual authority to waive by parol in any given instance.[1]

§ 164. Authority of Managers.—General managers of foreign insurance companies and of domestic fire or marine companies, with regard to the doctrine of waiver and estoppel, in the absence of express restrictions upon their authority made known to the insured, stand substantially in the place and stead of officers.[2]

§ 165. Limited Authority of Solicitors—Life.—Solicitors or canvassing agents of life insurance companies have as a rule no express authority to make, alter, or discharge contracts, or to waive forfeitures, or to grant permits. In this regard they are essentially special agents and, with few exceptions, there is no reason why, in the ordinary course of business, they should be assumed by those dealing with them to have such authority.[3]

§ 166. The Same—Exception as to First Premium.—A local agent of a life company, who is intrusted with the business of taking applications and closing the transaction by delivering the policy and collecting the premium, is held to have an implied authority to determine how the premium then due shall be paid, whether by cash or, as is sometimes done, by giving credit, provided the application does not contain in substance notice that he has no *power* to waive.[4]

By the weight of authority the agent is held to have this discretionary power, although the policy expressly provide that the

[1] *Northern A. Co.* v. *Grand View B. A.*, 183 U. S. 308, 361, 22 S. Ct. 133; *Hagan* v. *Scottish U. & N. I. Co.*, 186 U. S. 423, 433, 22 S. Ct. 862, in which the court declared that "a general agent" has no power to waive by parol under standard fire policy. *Farmers' Mut. Ins. Asso.* v. *Price*, 112 Ga. 264, 267, 37 S. E. 427; *McSparran* v. *Ins. Co.*, 193 Pa. St. 184, 193, 44 Atl. 317. *Contra*, *Lamberton* v. *Connecticut Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; *Home Ins. Co.* v. *Gibson*, 72 Miss. 58, 17 So. 13.

[2] *Ins. Co.* v. *Mahone*, 21 Wall. (U. S.) 152; *Mut. Life Ins. Co.* v. *Abbey*, 76 Ark. 328, 88 S. W. 950; *McGurk* v. *Metropolitan Life*, 56 Conn. 528, 1 L. R. A. 563n.; *Van Werden* v. *Equitable Life A. Soc.*, 99 Iowa, 621, 68 N. W. 892; *Eastern R. R. Co.* v. *Relief Ins. Co.*, 105 Mass. 570; *Stuart* v. *Reliance Ins. Co.*, 179 Mass. 434, 60 N. E. 929; *Frost* v. *North British Mercantile I. Co.*, 77 Vt. 407, 60 Atl. 803; see *Phœnix Ins. Co.* v. *Bowdre*, 67 Miss. 620, 7 So. 596, 19 Am. St. R. 326.

[3] *Cotton States Life Ins. Co.* v. *Scurry*, 50 Ga. 48.

[4] *Boehen* v. *Williamsburg City Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787.

first premium shall be paid in cash;[1] but this conclusion is based upon his possession of the document for purposes of delivery, and his instructions to deliver it, and consequently his power does not extend to subsequent premiums or premium notes.[2]

But where the application or policy gives notice that the agent has no *authority* to waive or to accept anything but cash and stipulates that the policy will not be binding until the first premium has been paid in cash, the contract restriction will prevail,[3] though some courts take a different view.[4] A soliciting agent has no implied authority to take in payment personal property, as, for instance, a horse,[5] or services.[6]

§ 167. Erroneous Answers Written into Application by Agent.—Where the company's soliciting agent by mistake or evil design inserts erroneous answers in the application in place of correct oral answers of the applicant, by the weight of authority the company is estopped from relying upon forfeiture occasioned by the error, provided no restriction upon the agent's authority to waive is recited in the application.[7]

[1] *Mut. Life Ins. Co.* v. *Abbey*, 76 Ark. 328, 88 S. W. 950; *Peck* v. *Wash. Life Ins. Co.*, 91 App. Div. 597, 600, aff'd 181 N. Y. 585.

[2] *Critchett* v. *Am. Ins. Co.*, 53 Iowa, 404, 5 N. W. 543; *Roehner* v. *Knick. Life Ins. Co.*, 63 N. Y. 160; *Life Ass. Co.* v. *Ward*, 17 C. B. 645.

[3] For example, *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656.

[4] For example, *State Ins. Co.* v. *Hale* (Iowa, 1901), 95 N. W. 473.

[5] *Hoffman* v. *John Hancock Mut. I. Co.*, 92 U. S. 161, 23 L. Ed. 539.

[6] *Carter* v. *Cotton States L. I. Co.*, 56 Ga. 237; but see *Willcuts* v. *Northwestern Mut. M. L. I. Co.*, 81 Ind. 300.

[7] *Ins. Co.* v. *Wilkinson*, 13 Wall. 222, 20 L. Ed. 617 (age of mother); *Southern Ins. Co.* v. *Hastings*, 64 Ark. 253, 41 S. W. 1093 (mortgage); *Parno* v. *Iowa M. M. Ins. Co.*, 114 Iowa, 132, 86 N. W. 210 (incumbrance); *Ins. Co.* v. *Weeks*, 45 Kan. 751, 26 Pac. 410 (watchman, etc.); *Otte* v. *Hartford Life Ins. Co.*, 88 Minn. 423, 93 N. W. 608, 97 Am. St. R. 532 (health of insured); *Nute et al.* v. *Hartford Fire Ins. Co.* 109 Mo. App. 585, 83 S. W. 83 (title); *Jacobs* v. *Northwestern Life Assurance Company*, 30 App. Div. 285, 51 N. Y. Supp. 967, aff'd 164 N. Y. 582, 58 N. E. 1088 (rejected application for other insurance); *O'Brien* v. *Home Benefit Society*, 117 N. Y. 310, 22 N. E. 954 (diseases of insured and medical attendance); *Miller* v. *Phœnix Mutual Life Insurance Co.*, 107 N. Y. 292, 14 N. E. 271 (age); *Prudential Ins. Co.* v. *Haley*, 91 Ill. App. 363 (age). *Contra*, for example, *Biggar* v. *Rock Ins. Co.* (1902), 1 K. B. 516; *McCoy* v. *Met. Life Ins. Co.*, 133 Mass. 82; *Martin* v. *Ins. Co.*, 57 N. J. L. 623, 31 Atl. 213; *Franklin F. Ins. Co.* v. *Martin*, 40 N. J. L. 568, 29 Am. Rep. 271. The last cases hold in accordance with the usual rule of law that if plaintiff is entitled to reformation, he must sue in equity. The mistake, however, is really the act of the agent, done in the course of his employment. He is the expert and largely dominates the transaction. The application is usually sent to the company before the policy issues and, except where statutes compel, the applicant may have no copy or any opportunity to compare it with the policy itself, which usually declares the truth of the answers to be warranted. Until action is begun the claimant may be ignorant of the existence of any breach of contract. A detailed application, however, is now rarely used in fire insurance, see § 75, but is usually part

Thus, where the applicant for life insurance, formerly a slave and not knowing the age at which her mother had died, had told the local agent that she could not tell what it was, and the agent from other sources of information erroneously stated the age at 40 years instead of 23, the court held, that the agent was the representative of the company and not of the applicant in transcribing the answers, and that the company was estopped from relying upon the breach of warranty contained in the application.[1]

Many courts, however, hold that if the error occurs because the applicant, though able, and having the opportunity, to read the application, neglects to do so, no estoppel will result. Pursuant to this view the breach of warranty is to be enforced, though the act of writing the erroneous answer is done by the agent of the company, and relief, if any, must be had in equity.[2]

In an English case, Biggar, the insured, was canvassed by the insurance company, and was induced to send in a proposal for insurance against accidents. Cooper, the soliciting agent of the company, instead of consulting Biggar as to the answers to be given, filled them in as best he might, and then invited Biggar to sign the paper, which he did without reading it. The answers inserted by Cooper were false in many particulars, but Biggar did not know it. The proposal contained a declaration by which the applicant agreed

of the life insurance contract, see § 77. There can be no question as to the justice of the principal rule, no matter what may be the stipulation of the policy, when the agent fills out and also signs the application in the name of the assured without the latter's knowledge. Then the document though labeled an application is not the applicant's proposal, but the agent's. This is true both of fire insurance and of life, *Benninghoff* v. *Agricultural Ins. Co.*, 93 N. Y. 495; *Mowry* v. *Agricultural Ins. Co.*, 64 Hun, 137, 18 N. Y. Supp. 834, aff'd 138 N. Y. 642; *Lycoming Ins. Co.* v. *Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Baker* v. *Ohio Farmers' Ins. Co.*, 70 Mich. 199, 38 N. W. 216, 14 Am. St. R. 485; *Van Houten* v. *Metropolitan L. Ins. Co.*, 110 Mich. 682, 68 N. W. 982; *Wells* v. *Metropolitan L. Ins. Co.*, 19 App. Div. 18, 46 N. Y. Supp. 80, aff'd 163 N. Y. 572; *Leonard* v. *New England Mut. L. Ins. Co.*, 22 R. I. 519, 48 Atl. 808. Whether the false answer is to be attributed to the fault of the agent is usually a question for the jury, *Schaeffer* v. *Anchor Mut. F. I. Co.*, 113 Iowa, 652, 85 N. W. 985; *Smith* v. *People's Mutual Live Stock I. Co.*, 173 Pa. St. 15, 33 Atl. 567; *Brown* v. *Metropolitan L. I. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. R. 894 (collusion, a question for jury); *Speiser* v. *Phœnix Mut. L. I. Co.*, 119 Wis. 530, 97 N. W. 207.

[1] *Union Mut. Ins. Co.* v. *Wilkinson*, 13 Wall. 222, 20 L. Ed. 617 (opinion of the court given in note § 158, *supra*).

[2] *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519, 6 S. Ct. 837; *Ryan* v. *World Mut. L. I. Co.*, 41 Conn. 168, 19 Am. Rep. 490; *Kansas, etc., Ins. Co.* v. *Central Nat. Bk.*, 60 Kan. 630, 57 Pac. 524; *Mercer Co., etc.*, v. *State Ins. Co.*, 61 Mo. App. 597; *Virginia F. & M. Ins. Co.* v. *Morgan*, 90 Va. 290, 18 S. E. 191; *Biggar* v. *Rock Ins. Co.* (1902), 1 K. B. 516. Other courts make the distinction that if the applicant is deterred from reading the application by representations or misleading conduct of the agent the company will be estopped, *Van Houten* v. *Met. Life I. Co.*, 110 Mich. 682, 68 N. W. 982.

that its statements should form the basis of the policy, and the policy contained the usual proviso that it was granted on the condition of their truthfulness. The King's Bench Division in rendering judgment for the company, decided that the company's solicitor, in filling up the application, acted as agent for Biggar. The English court also approved and adopted the views of the United States Supreme Court as expressed in *New York Life Insurance Co.* v. *Fletcher*,[1] and held, that the insured, in allowing another to fill up his proposal, and in neglecting to read it, became responsible for its contents.[2]

But, on the other hand, it is clear that if the company's agent, without the consent or knowledge of the applicant, makes any addition or alteration in the proposals, after their execution or after the applicant supposes them to be complete, the company cannot predicate forfeiture upon the failure of the applicant to read the paper before delivering or forwarding it.[3]

If, however, the erroneous statements in the application are the result of fraud on the part of the insured or collusion with the agent, or if the insured knows that the answers are falsely transcribed, the company will not be estopped from insisting upon the letter of the contract.[4]

§ 168. **Agent's Interpretation of the Contract.**—Many courts hold the insurance company to the solicitor's interpretation of the meaning of the questions in the application or terms of the contract as explained by him to the applicant.[5]

[1] 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934.

[2] *Biggar* v. *Rock Life Assur. Co.* (1902), 1 K. B. 516. Compare *Contra, German Ins. Co.* v. *Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. R. 150 (cases cited); *Follette* v. *Mut. Acc. Asso.*, 110 N. C. 377, 14 S. E. 923, 15 L. R. A. 668, 28 Am. St. R. 693.

[3] *McMaster* v. *Ins. Co.*, 183 U. S. 25, 22 S. Ct. 10, 46 L. Ed. 64.

[4] *Ketcham* v. *Am. Mut. Acc. Ass.*, 117 Mich. 521, 76 N. W. 5. *Contra, Keystone Mut. Ben. Asso.* v. *Jones*, 72 Md. 363 (age misrepresented). Thus where the insured told the agent he could write the answer as he liked, policy was held avoided, *Blooming Grove Mut. Ins. Co.* v. *McAnerney*, 102 Pa. St. 335, 48 Am. Rep. 209; and see *Lewis* v. *Phœnix Mut. Life Ins. Co.*, 39 Conn. 100.

[5] *McMaster* v. *New York Life Ins. Co.*, 183 U. S. 25, 38, 22 S. Ct. 10; *Equitable Life Ins. Co.* v. *Hazelwood*, 75 Tex. 338, 12 S. W. 621, 16 Am. St. R. 893, 7 L. R. A. 217 (what constitutes a previous application for insurance); *Continental Ins. Co.* v. *Chamberlain*, 132 U. S. 304, 10 S. Ct. 87 (what constitutes "other insurance"); *Hotchkiss* v. *Phœnix Ins. Co.*, 76 Wis. 269, 44 N. W. 1106, 20 Am. St. R. 69 (what constitutes occupancy); *Jacobs* v. *St. Paul F. & M. Ins. Co.*, 86 Iowa, 145, 53 N. W. 101 (what constitutes "incumbrance"). So also where the agent has written into the application his construction of the answers and not the answers themselves as given by the applicant, the company is estopped, *N. J. Mutual Life Ins. Co.* v. *Baker*, 94 U. S. 610; *Am. Life Ins. Co.* v. *Mahone*, 21 Wall. (U. S.) 152; *Malleable Iron Works* v. *Phœnix Ins. Co.*, 25 Conn. 465; *Hewey* v. *Met. Life Ins. Co.*, 100 Me. 523, 62 Atl. 600; *O'Brien* v.

§ 169. Mere Knowledge of Solicitor Works no Estoppel.—A solicitor or canvasser has, in general, no authority, either real or apparent, to countersign the policy, change its terms or give permits. The mere possession of knowledge by him of facts constituting grounds of forfeiture, though at the inception of the contract, works no estoppel.[1]

Thus, where the written answers to the questions of the medical examiner regarding past ailments and medical attendance were incorrect, the policy was held avoided for breach of warranty, although the jury found that the facts had been truly disclosed to the company's solicitor, who, however, had nothing to do with transcribing into the application the answers relating to the medical branch of the inquiry. And the unanimous judgment of the court below was reversed.[2]

§ 170. Notice of Restriction upon Solicitor's Authority.—Where the application or premium note contains a notice or stipulation that the soliciting agent has no authority to waive or change the terms of the contract, or where the assured stipulates that the written statements of the application shall be the only statements upon which the contract is made, such notice or stipulation is by the weight of authority and reason held controlling, errors of the agent in trans-

Home Benefit Society, 117 N. Y. 310, 22 N. E. 954 (health); *Ins. Co.* v. *Hancock*, 106 Tenn. 513, 52 L. R. A. 665, 62 S. W. 145 (title); *Equitable Life Ins. Co.* v. *Hazlewood*, 75 Tex. 338, 16 Am. St. R. 893, 7 L. R. A. 217 (health and medical advice). The insurance company is responsible for the falsehood if its medical examiner incorrectly transcribes into the application true oral answers of the applicant, since the medical examiner must be regarded as agent for the company only, *Prudential Ins. Co.* v. *Haley*, 91 Ill. App. 363; *Butler* v. *Mich. Mut. L. Ins. Co.*, 184 N. Y. 337, 340; *Sternaman* v. *Met. L. Ins. Co.*, 170 N. Y. 13; *Ames* v. *Manhattan L. Ins. Co.*, 40 App. Div. 465, 58 N. Y. Supp. 244, aff'd 167 N. Y. 584; *Leonard* v. *State Mut. L. A. Co.*, 24 R. I. 7, 51 Atl. 1049, 96 Am. St. R. 698.

[1] *Butler* v. *Mich. Mut. L. Ins. Co.*, 184 N. Y. 337, 77 N. E. 398; *Jacobs* v. *Northwestern L. Ins. Co.*, 30 App. Div. 285, 51 N. Y. Supp. 967, aff'd 164 N. Y. 582; *Clemans* v. *Supreme Assembly*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Ketcham* v. *Assoc.*, 117 Mich. 521, 76 N. W. 5. *Contra*, *Bœtcher* v. *Hawkeye Ins. Co.*, 47 Iowa, 253. The acquisition of knowledge of a ground of forfeiture does not in itself enlarge the powers of a special agent, though if he already had authority to alter the terms of the contract it might then in conjunction with authorized acts of sufficient gravity become a factor in operating an estoppel. If knowledge by a special agent of a ground of forfeiture could work an estoppel simply because he was doing something for the company when he acquired it, then the knowledge of his office or errand boy might accomplish the same result, and the conclusion would be reached that the binding obligation of a solemn written contract may be destroyed by the casual information acquired or found by a jury to be acquired by a subordinate agent employed to do some trivial act for the company without the connivance or knowledge of any of its responsible or commissioned representatives.

[2] *Butler* v. *Michigan Mut. L. Ins Co.*, 184 N. Y. 337, 77 N. E. 398.

cribing the answers will not in general estop the company and the assured, unless illiterate, must stand upon his contract as written, since, in reality, such agent has no power to alter the written contract and notice of his limited authority is thus brought home to the assured.[1]

Applying the doctrine that notice to an agent is notice to the principal and that the principal is responsible for any carelessness or misconduct of his agent in transacting the business in fact intrusted to him, other courts, however, have thrown the door wide open for the introduction of parol evidence to contradict the written policy, and where, as is usual, there is dispute as to what occurred, have submitted the issues of fact thus raised to the jury, irrespective of stipulations in the application or policy. This view is based mainly on the ground that the act complained of is really the act of the company's agent, hence of the company, and that an estoppel derives its sanction from a paramount rule of law and not at all from the contract itself which indeed its ostensible object is to subvert.[2]

§ 171. **Illiterate Applicants.**—If the assured cannot read or is ignorant and illiterate and has given correct oral answers, the company, regardless of policy stipulations, is held responsible for errors of its agent in transcribing.[3]

[1] *Biggar* v. *Rock Ins. Co.*, 1 K. B. 516 (1902); *North. Assur. Co.* v. *Grand View Build. Assn.*, 183 U. S. 308, 363, 364, 22 S. Ct. 133 (cited and defined in *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423, 433, 22 S. Ct. 862); *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S. 519, 6 S. Ct. 837; *Ins. Co.* v. *Norton*, 96 U. S. 240; *Ins. Co.* v. *Wolff*, 95 U. S. 326; *Dimick* v. *Met. Life I. Co.*, 69 N. J. L. 384, 55 Atl. 291, 66 L. R. A. 774; *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656; *Stewart* v. *Union Mut. L. Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147; *McCollum* v. *Mut. L. Ins. Co.*, 55 Hun, 103, 8 N. Y. Supp. 249, aff'd 124 N. Y. 642, 27 N. E. 412; *Kenyon* v. *K. T. & M. M. A. Assoc.*, 122 N. Y. 247, 25 N. E. 299; *Hamilton* v. *Fid. Mut. Ins. Co.*, 27 App. Div. 480, 50 N. Y. Supp. 526; *Bernard* v. *United Life Assoc.*, 14 App. Div. (N. Y.) 142, 43 N. Y. Supp. 527; *Allen* v. *Mass. Mut. Acc. Asso.*, 167 Mass. 18, 44 N. E. 1053; *Batchelder* v. *Queen Ins. Co.*, 135 Mass. 449; *McCoy* v. *Met. L. Ins. Co.*, 133 Mass. 82; *Fitzmaurice* v. *Mut. L. Ins. Co.*, 84 Tex. 61, 19 S. W. 301; *Ryan* v. *World Mut. L. Ins. Co.*, 41 Conn. 168, 171, 172, 19 Am. Rep. 490; *Rinker* v. *Ætna Life Ins. Co.*, 214 Pa. St. 608, 64 Atl. 82 (evidence of correct answer and omission to read application inadmissible). But if in fact the agent has general powers, his acts will estop the company, *German Ins. Co.* v. *Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. R. 150.

[2] *Lynchburg Fire Ins. Co.* v. *West*, 76 Va. 575, 44 Am. Rep. 177; *Stone* v. *Hawkeye Ins. Co.*, 68 Iowa, 737, 28 N. W. 47, 56 Am. Rep. 870; *Germania Ins. Co.* v. *Wingfield*, 22 Ky. Law R. 455, 57 S. W. 456; *Improved Match Co.* v. *Mich. Mut. Fire Ins. Co.*, 122 Mich. 256, 80 N. W. 1088; *Welch* v. *Fire Assn. of Phila.*, 120 Wis. 456, 98 N. W. 227; *Globe Mut. Life Ins. Assoc.* v. *Ahern*, 191 Ill. 167, 60 N. E. 806.

[3] *Capital F. Ins. Co.* v. *Montgomery* (Ark., Jan., 1907), 100 S. W. 749; *LaMarche* v. *New York Life I. Co.*, 126 Cal. 498, 58 Pac. 1053; *Dryer* v. *Security Fire Ins. Co.* (Iowa), 82 N. W. 494; *Rogers* v. *Phœnix Ins. Co.*, 121 Ind. 570, 23 N. E. 498; *State Ins. Co.* v.

The ability to read and understand is the only defense which the applicant has against the wrongful act of the company's agent in failing to write the answers as given; and, especially where no copy of the application is furnished to the insured, the claimant is likely to know nothing of the mistake until after his action has been commenced upon the policy. The equities in such a case are all against the company. The popularity of life insurance among the lower classes in this country gives[1] special importance to this doctrine.

A good illustration is furnished in the New York reports. One Peter O'Brien, on becoming a member of a benefit society, signed the usual application, and by it, among other things, asserted that he had never had rheumatism and had never been attended by a physician. Both these answers were untrue, but O'Brien could neither read nor write, and the application, which was warranted to be the basis of the contract, and full, complete, and true, whether written by his own hand or not, was filled in by an agent of the society. The defendant's witnesses testified that the answers, as written, correctly recorded O'Brien's statements, but there was some testimony to the contrary which carried that issue to the jury. The verdict for the plaintiff was unanimously affirmed by the New York Court of Appeals.[2]

The last case and others like it were cited with approval by the California court in an action by La Marche, an illiterate farmer of foreign birth, who had received a visit from the defendant's solicitor, Eaton. In consideration of a promissory note of La Marche for $430.50 in payment of the first premium, and of fourteen annual premiums of like amount to be paid during the years to come, Eaton promised him an endowment policy of $10,000, payable at the end of fifteen years or sooner. Eaton received the promissory note from La Marche, also his proposals signed in blank; but, before forwarding them to the company, Eaton filled up the application with terms calling for a policy of much less liberal purport than that promised. The policy, executed in accordance with the written application, was sent to the plaintiff by mail; he returned it to the defendant with his objections, and, after having paid the promissory note, he

Gray, 44 Kan. 731, 25 Pac. 197; *Mullen* v. *Ins. Co.*, 182 Pa. St. 150, 37 Atl. 988; *Hayes* v. *Saratoga & W. Fire I. Co.*, 81 App. Div. 287, 80 N. Y. Supp. 888, aff'd 179 N. Y. 535; *O'Brien* v. *Home Benefit Soc.*, 117 N. Y. 310, 22 N. E. 954.

[1] Industrial policies very largely outnumber all other kinds of life insurance policies.

[2] *O'Brien* v. *Home Benefit Society*, 117 N. Y. 310, 22 N. E. 954. And see *Clemans* v. *Supreme Assembly*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Sternaman* v. *Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. R. 625.

sued the defendant for damages sustained. The nonsuit granted on the trial was reversed on appeal; the court holding that the insurer, and not La Marche, was responsible for the errors in the application.[1]

§ 172. Authority of Commissioned Agents—Fire.—The regular local or commissioned agents of fire insurance companies are said to be general agents, and except as restrictions upon their authority are inserted in the application or policy, or otherwise made known to the insured, they are held to have power to waive conditions and forfeitures, and to estop the company, without written permit.[2] This conclusion is based largely upon the extent of their actual authority, which embraces such acts as accepting or rejecting proposals, countersigning, delivering, canceling, renewing policies, giving written permits, and fixing rates of premiums.[3]

The fire policy in common use in this country does not make the payment of the premium a condition precedent to the validity of the contract, and the countersigning agent may extend credit to the insured, or not, as he chooses.[4] The general custom where credit is given is for the agent to do so on his own responsibility. But in case the agent should make default in accounting to the company the policy will nevertheless be valid.[5] And though the policy provide that it shall not take effect until the premium is paid in cash, the

[1] *La Marche* v. *N. Y. Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053.

[2] *Silverberg* v. *Phœnix Ins. Co.*, 67 Cal. 36, 7 Pac. 38; *Walsh* v. *Hartford Fire Ins. Co.*, 73 N. Y. 5; *Alexander* v. *Continental Ins. Co.*, 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869. A party taking premium and delivering policy is presumed to be agent of the company with authority, *Walker* v. *Lyon F. Ins. Co.*, 175 Pa. St. 345, 34 Atl. 736.

[3] Commissioned or countersigning agents hold a written commission, granting them "full power to receive proposals for insurance [in a certain locality], to fix the rates of premiums, to receive moneys, and to countersign, issue, and renew policies of insurance signed by the president and attested by the secretary (or signed by the manager), subject to the rules and regulations of the company and to such instructions as may from time to time be given by the officers." The court says: "It appears that Mandeville was a general agent of the defendant, clothed with power to make contracts of insurance and to issue policies, and was furnished with printed forms which he filled up as occasion required," *Carpenter* v. *German-Am. Ins. Co.*, 135 N. Y. 298, 302, 31 N. E. 1015; *Pitney* v. *Glens Falls*, 65 N. Y. 6. The United States Supreme Court calls the countersigning agent a general agent in *Hagan* v. *Scottish Union Ins. Co.*, 186 U. S. 423, 433, 22 S. Ct. 862, though not strictly such in that or in most cases. Another court says: "Possession of blank policies and renewal receipts signed by the president or secretary is evidence of such general agency," *Grabbs* v. *Farmers' Mut. F. Ins. Assoc.*, 125 N. C. 389, 397, 34 S. E. 503.

[4] *Kollitz* v. *Equitable Mut. Fire Ins. Co.*, 92 Minn. 234, 99 N. W. 892. If the insured give a note for the premium he cannot defend against payment of the note on the ground that the note is without consideration or that the policy is void; only the company can raise that point, *Doyle* v. *Hill* (S. C., Oct., 1906), 55 S. E. 446; *Kimbro* v. *N. Y. Life Ins. Co.* (Iowa), 36 Ins. L. J. 57.

[5] *Miller* v. *Life Co.*, 12 Wall. (U. S.) 286, 20 L. Ed. 398.

general agent has power to waive the provision and give credit, and will be held to have waived it if he deliver the policy without enforcing payment,[1] provided the application or policy does not give notice that he has no such power.[2]

§ 173. **The Same—Restrictions upon Authority Coupled with Knowledge of Forfeiture when Policy Issues.**—Most of the standard [3] and other forms of fire policies now in use provide in substance that no officer or agent shall have, or be deemed to have, authority to waive orally. Most of the state courts, however, have continued to apply the rule that if the countersigning agent when he issues a policy has knowledge of facts constituting forfeiture the company will be estopped from taking advantage of the breach.[4]

Since the notable decision of the United States Supreme Court in the *Northern Assur. Co.* case [5] repudiating this doctrine as unsound, at variance with the primary rule of evidence, and opposed by the weight of authority in England and in this country, many state courts and text-writers have nevertheless, with the federal decision before them, reiterated their former opinion.[6]

[1] *Bodine* v. *Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Boehen* v. *Williamsburgh City Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Walsh* v. *Hartford Fire Ins. Co.*, 73 N. Y. 5.

[2] *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656.

[3] All, probably, at date of writing in 1907, except Maine, New Hampshire, Massachusetts, Minnesota, Iowa and South Dakota. The Wisconsin standard policy has a further special provision that before the delivery of the policy and also after loss, knowledge of the agent of the company shall be knowledge of the company, *Welch* v. *Fire Asso.*, 120 Wis. 456. See appendix of statutes, ch. I.

[4] The reasons are set forth in many cases, for example, in *Forward* v. *Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637. The court declares that the rule is well settled in that state, *Lewis* v. *Guardian F. Ins. Co.*, 181 N. Y. 392, 74 N. E. 224. The New York courts "are anchored to the proposition," *Wisotzkey* v. *Niagara Fire Ins. Co.*, 112 App. Div. 599, 602, 98 N. Y. Supp. 760, citing other late cases in highest court. Similar views have been expressed by many courts. See for example, the following late cases, *German-Am. Ins. Co.* v. *Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. R. 297 (chattel mortgage); *Allen* v. *Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138 (sole ownership); *Swain* v. *Macon F. Ins. Co.*, 102 Ga. 96, 29 S. E. 147 (other insurance); *Hartford F. Ins. Co.* v. *Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. R. 499; *Beebe* v. *Ohio Farmers' Ins. Co.*, 93 Mich. 514, 53 N. W. 818, 32 Am. St. R. 519, 18 L. R. A. 481; *Andrus* v. *Maryland Cas. Co.*, 91 Minn. 358, 98 N. W. 200; *Assur. Co.* v. *Phelps*, 77 Miss. 625, 27 So. 745; *Grabbs* v. *Farmers' M. F. I. Assn.*, 125 N. C. 389, 34 S. E. 503; *Spalding* v. *New Hamp. F. I. Co.*, 71 N. H. 441, 52 Atl. 858 (other insurance); *Gandy* v. *Orient Ins. Co.*, 52 S. C. 224, 29 S. E. 655; *Welch* v. *Fire Assn. of Phila.*, 120 Wis. 456, 98 N. W. 227 (title).

[5] 183 U. S. 308, 22 S. Ct. 862, 46 L. Ed. 213, and approved or followed in *Hagan* v. *Scottish Union & N. I. Co.*, 186 U. S. 423, 433, 22 S. Ct. 862; also in 187 U. S. 467, 478; 151 Fed. 961; 141 Fed. 877, 889; 138 Fed. 497; 133 Fed. 909; 129 Fed. 610 (cannot waive proofs of loss); 117 Fed. 369, and other cases.

[6] *German Ins. Co.* v. *Shader* (Neb., 1903), 93 N. W 972, 60 L. R. A. 918

In the famous federal case referred to, the plaintiff had received from the defendant its policy in standard form for $2,500, upon his household effects. On this policy an action was brought to recover for a loss by fire. The standard policy provides that it shall be avoided by other insurance without written consent, also that waivers shall be given only by written agreement and that no agent shall be deemed to have authority to waive in any other way. At the time the insurance was effected, plaintiff had a policy for $1,500 on the same property, issued by another company. According to the plaintiff's testimony, which was flatly contradicted, this circumstance was mentioned at the time to the local countersigning agent of the defendant, who nevertheless signed and delivered the policy of the defendant without objection, and without attaching a written permit for other insurance. The plaintiff's parol testimony was received over the defendant's objection and exception Judgment on the

(citing corroborating decisions from some twenty-seven states); *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339 (future increase of hazard); *Chismore* v. *Anchor F. Ins. Co.* (Iowa, July, 1906), 108 N. W. 230 (vacancy; court considers the "overwhelming weight of authority" to be on its side); *German-American Ins. Co.* v. *Yellow Poplar Lumber Co.* (Ky.), 84 S. W. 551 (clear space clause); *Parsons* v. *Lane*, 97 Minn. 98 (Minnesota standard policy now resembles the Massachusetts form); *Hartley* v. *Penn. F. Ins. Co.*, 91 Minn. 382, 98 N. W. 198, 103 Am. St. R. 512 (use of gasoline); *Thompson* v. *Traders' Ins. Co.*, 169 Mo. 12 (other insurance); *Spalding* v. *New Hampshire F. Ins. Co.*, 71 N. H. 441, 52 Atl. 858 (other insurance); *Benjamin* v. *Palatine Ins. Co.*, 80 App. Div. 260, 80 Supp. 256, aff'd, on opinion below, 177 N. Y. 589, 70 N. E. 1095 (pendency of foreclosure); *Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429, 46 S. E. 463, 102 Am. St. R. 846 (sole ownership); *Medley* v. *Ins. Co.*, 55 West. Va. 342, 47 S. E. 101, 105 (title); *Welch* v. *Fire Asso. of Phila.*, 120 Wis. 456, 468, 98 N. W. 227, 231, in which, however, the court admitted that as an original proposition of law it would be difficult to sustain the rule, but thought that the legislature alone could interfere in that state. Ranged in general on the side of the federal courts we find the courts of England, *Weston* v. *Emes* (1803), 1 Taunt. 115 (parol conversations to show knowledge or intent not admissible); and see *Biggar* v. *Rock Ins. Co.* (1902), 1 K. B. 516 (answers erroneously inserted by agent not read by applicant). Canada: *Shannon* v. *Gore Mut. Ins. Co.*, 2 Ont. App. 396 (other insurance). Massachusetts: *Harris* v. *North Am. Ins. Co.*, 190 Mass. 361 (unoccupancy); *Thomas* v. *Commercial Union Ass. Co.*, 162 Mass. 29, 37 N. E. 672; and see *Allen* v. *Mass. Mut. Acc. Assoc.*, 167 Mass. 18; *Batchelder* v. *Queen Ins. Co.*, 135 Mass. 449. New Jersey: *Dewees* v. *Manhattan Ins. Co.*, 35 N. J. L. 366 (character of occupancy); *Martin* v. *Ins. Co. of North Am.*, 57 N. J. L. 623 (leased ground); *Franklin F. Ins. Co.* v. *Martin*, 40 N. J. L. 568, 29 Am. Rep. 271 (misdescription); and see *Dimick* v. *Met. Life Ins. Co.*, 69 N. J. L. 384. Oklahoma: *L. & L. & G. Co.* v. *Richardson Lumber Co.*, 11 Okla. 585, 69 Pac. 938 (clear space clause). Possibly Connecticut: *Sheldon* v. *Hartford Fire Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420 (but see *McGurk* v. *Ins. Co.*, 56 Conn. 528, 540). And, assuming its earlier standard policy like the New York standard to be constitutional, Minnesota: *Anderson* v. *Manchester F. Assur. Co.*, 59 Minn. 182, 59 Am. St. R. 400, 28 L. R. A. 639 (other insurance). With West Virginia swinging from one side to the other, *Maupin* v. *Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003 (iron safe clause), reversed by *Medley* v. *Ins. Co.*, 55 W. Va. 342, 47 S. E. 101 (sole ownership).

verdict for the plaintiff was affirmed by the circuit court of appeals on the ground of waiver, Judge Sanborn writing a powerful dissenting opinion; but the judgments were reversed by the United States Supreme Court by a vote of six to three, in a decision of perhaps greater practical moment than any other rendered in the law of insurance within a half century; the court holding that the plaintiff's conversation with the agent, at variance with the policy, was inadmissible and should have been rejected.[1]

The recently expressed views of many state courts in opposition to the federal court lack consistency and cohesion; and, remarkable to relate, nowhere among their opinions is the vital question satisfactorily met and answered, whether the desirable result, sought to be accomplished by the doctrine of parol waivers, might not, as in all other cases, be better worked out in the equity branch of the courts. Indeed, the opinion of the West Virginia court, though not having that object in view, is a cogent argument in favor of sending

[1] *Northern Assur. Co.* v. *Grand View Bldg. Asso.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213, in which the court by Justice Shiras sums up as follows: "What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it a matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeitures caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observation of the condition; that where the waiver relied on is an act of the agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent. . . . The plaintiff's case, at its best, is based on the alleged fact that the agent had been informed, at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defense and escape from the operation of the condition, is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen

this class of complainants into equity for reformation of their contracts.[1]

The Iowa court frankly has this to say: "The doctrine is peculiar to the law of insurance, and is founded on the laudable design of preventing the perpetration of a fraud through obtaining a premium by the issuance of a policy known to be void *ab initio*. As an original proposition, it would be difficult to defend this exception to the general rule that he who becomes a party to a contract is presumed to have knowledge of its contents and is bound thereby, unless prevented from ascertaining them by some artifice or deception. But such contracts are so common and of such universal use in the business world that they are ordinarily spoken of as commodities rather than individual agreements. Insurance is bought and sold, accord-

entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court. This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts, and by approving the conduct of agents and persons applying for insurance in disregarding the express limitations put upon the agents by the principal to be affected. It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form, is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses." In the lower court Judge Sanborn, dissenting, closed with the following terse statements: "There seems to me to be no ground for waiver, by, or an estoppel of, the insurance company in this case, for several reasons: 1. Because the company expressly limited the power of its solicitor to make waivers or work estoppels of the character here invoked to those made in writing by indorsements upon the policy, and it brought notice of this limitation home to the insured by an express stipulation in the policy, which the insured accepted. 2. Because an indispensable element of an estoppel is some act, statement, or representation which tends to deceive the insured, and thereby induces it to adopt a course of action or a state of inaction that it would not otherwise have taken, and this case contains no such elements. The insured knew that there was other insurance. It knew that it was not indorsed on the policy. It knew that the solicitor had no power to deliver a valid policy without such an indorsement, and it knew that it agreed that, without this indorsement, its policy should be void; for all these things were written in the contract and the insured was charged with knowledge of its contents. 3. Because there can be no waiver without an intent to waive, and no intent to waive can be deduced or inferred from the mere fact of knowledge, in the face of an express written stipulation to the contrary, made and delivered at the time. 4. Because no estoppel or waiver based on acts or knowledge prior to, or contemporaneous with, the making of an express written agreement on the subject, can prevail over the express terms of that contract, which as conclusively merges and supersedes all prior and contemporaneous negotiations and understandings by estoppel and by waiver as by words."

[1] *Medley* v. *Ins. Co.*, 55 W. Va. 342 47 S. E. 101.

ing to the speech of the people. To omit reading the application before signing it or the policy upon its receipt is not deemed negligence as matter of law, as would be the case with other instruments."[1]

If this opinion is to prevail, there is little left to those many reasonable requirements of the American statutory policies which are laid upon the insured for the protection of the underwriter and the safety of the public. It is submitted that "the universal use" of the standard policy, mentioned by the court, might seem to be an added reason for presuming that the insured is acquainted with its contents, rather than an excuse for ignorance and carelessness; and such is the declaration of a neighboring court in the west.[2]

The New York court differs widely from the Iowa court and conclusively presumes that the insured is acquainted with the policy provisions regarding waivers as from the time when he receives the policy; but, in the interest of fair dealing, refuses to apply his knowledge or his stipulations to forfeitures known to the countersigning agent at the inception of the contract.[3] No matter how many standard policies the insured may have received previously; no matter how familiar he or his broker may in fact be with all its contents; no matter though the alleged fact of the agent's knowledge, shown by parol, be in dispute and contradicted by the agent as well as by the written contract; no matter though the home office have no knowledge of the ground of forfeiture; such forfeitures, if found by the jury to have been known to the agent, the company is held to have waived by the issuance of its policy or receipt of the premium.[4]

In one of the five New York cases last cited the insured was a corporation. In all the others the insured were business men, the policies in every case being upon their business properties. There was no claim in any of the cases that the insured had had no previous acquaintance with the New York standard policy. For aught that appeared, every one of them had taken out many such policies for a series of years. No point was made by the court in any of these cases that the insured in fact lacked familiarity with the terms of the contract. Nor was there any claim that the insurer had any knowledge of the ground of forfeiture other than the imputed knowledge of a local agent. Nevertheless, in all the cases, important

[1] *Chesmore* v. *Anchor F. Ins. Co.* (Ia., 1906), 108 N. W. 230.

[2] *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 419.

[3] *Lewis* v. *Guardian F. & L. Ins. Co.*, 181 N. Y. 392, 74 N. E. 224.

[4] *Forward* v. *Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *Wood* v. *Am. Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. R. 733; *Robbins* v. *Springfield F. & M. Ins. Co.*, 149 N. Y. 477, 44 N. E. 159; *Wisotzkey* v. *Niagara F. Ins. Co.*, 112 App. Div. 599, 98 N. Y. Supp. 760.

warranties of the statutory policy, upon which the insurers had relied, were annulled by oral testimony. The real explanation of the attitude of the courts in these and similar cases can only be found in the narrow and illiberal methods of certain insurers in the past, which have aroused antagonism on the part of judges, juries, and public, and which, unfortunately for this branch of the law, have invited reprisals.

The Virginia court takes a middle ground and forcefully defends it, holding that the policy stipulations regarding the limit of the agent's authority to waive will apply even to forfeitures known to the agent at the inception of the contract, provided the insurer can affirmatively show that the policy restriction had actually, and not merely constructively, been brought to the attention of the insured at that time.[1]

The Missouri court concludes that a local, countersigning agent with the usual authority, including the power to give written permits, is the *alter ego* of the principal, and that, as the principal has inherent, inalienable power to waive either orally or in writing, so has its agent.[2] Doubtless such an agent is the *alter ego* of the principal in accepting or rejecting the risk, and in fixing a rate of premium and in performing other authorized acts, but where his actual instructions, as well as the statutory form of policy delivered to the insured, expressly limit the scope of the agent's activities to the use of written permits, it is difficult to understand how a court can find an extension of his power as matter of law, or simply by virtue of his position.

The New Hampshire court falls back on the doctrine of essential justice with these remarks: "If the rule thus followed conflicts with the rule which prevents a written instrument from being controlled by parol testimony, it has been so generally adopted and become so firmly fixed in the law of insurance that it must be regarded as an exception to the latter rule. It has the great merit of working justice in cases of this kind, and undoubtedly arose from the necessity of the situation in order to accomplish that result."[3] But however it may have been in dealing with the unfair and varied forms of policies formerly in use, is it demonstrated to be of advantage to the public to give to all claimants, many of whom are either forgetful or dishonest, the power of evading the provisions of a standard policy by

[1] *Virginia F. & M. Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429, 46 S. E. 463, 102 Am. St. R. 846.

[2] *Thompson* v. *Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. 889.

[3] *Spalding* v. *New Hampshire F. Ins. Co.*, 71 N. H. 441, 52 Atl. 858.

oral testimony, in actions at law on the contract? The United States Supreme Court thinks that such a practice is detrimental to the general welfare, and many lower federal courts have since, with cordial approval, applied the rule laid down by the highest court, the rule always stoutly advocated by the courts of New Jersey and Massachusetts, and formerly in several cases by the highest court of New York.

There seems unfavorable prospect of securing any measure of uniformity in this branch of the law, the country over, for many years to come.[1] Nor is it easy to harmonize the recent decisions in the Empire State alone. Where the solicitor of a life company, knowing the facts, writes answers incorrectly into the application, it has repeatedly been held in that state that the restriction upon his authority stated in the application will control. In those cases apparently the knowledge of the agent was not imputed to the company although he was conducting an employment authorized by it and relating to the inception of the contract.[2]

But, on the other hand, New York as well as other state courts, notwithstanding a contract stipulation limiting waivers to written permits, seems to stand for the proposition that knowledge of forfeiture possessed even by a partner,[3] or by a clerk, of the countersigning agent, or by any subagent of the company, if obtained in the performance of some authorized act for the company, may be the basis of an estoppel, provided such knowledge is acquired before the policy issues, although the knowledge be not communicated to the agent signing the policy.[4]

[1] In a recent case, *Maupin* v. *Scottish U. & N. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003, Brannon, J., says: "Upon this subject of the power of agents to waive conditions imposing on the party insured duties proper for the protection of the insuring company, there is a world of decisions, and they are a wilderness of conflicting cases."

[2] *McCollum* v. *Mut. Life Ins. Co.*, 55 Hun (N. Y.), 103, 8 N. Y. Supp. 249, aff'd 124 N. Y. 642, 27 N. E. 412; *Kenyon* v. *K. T. & M. M. A. Assoc.*, 122 N. Y. 247, 25 N. E. 299; *Bernard* v. *United Life Assn.*, 14 App. Div. 142, 43 N. Y. Supp. 527; *Hamilton* v. *F. Mut. Life*, 27 App. Div. 480, 50 N. Y. Supp. 526; *Hewitt* v. *Am. Union Life Ins. Co.*, 85 App. Div. 279, 83 N. Y. Supp. 232.

[3] *Lewis* v. *Guardian F. Ins. Co.*, 181 N. Y. 392, 74 N. E. 224.

[4] For example, *Forward* v. *Continental Ins. Co.*, 142 N. Y. 382, 388, 37 N. E. 615, 25 L. R. A. 637; *Carpenter* v. *German-Am. Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015; *Arff* v. *Star Fire Ins. Co.*, 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. R. 721, 10 L. R. A. 609; *Ins. Co.* v. *Randle*, 81 Miss. 720, 33 So. 500; *Pollock* v. *German F. Ins. Co.*, 127 Mich. 460; *Steele* v. *Ins. Co.*, 93 Mich. 84, 53 N. W. 514. But see the more recent decision as to a life insurance solicitor in *Butler* v. *Mich. Mut. L. Ins. Co.*, 184 N. Y. 337, reversing 93 App. Div. 619. The difficulty of reconciling the New York cases in this regard is alluded to by the New York Supreme Court in *Blass* v. *Agricultural Ins. Co.*, 18 App. Div. 486, and by the Federal Supreme Court in *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308 at p. 329

§ 174. **Conclusion.**—Upon a careful review of the many conflicting decisions and opinions adverted to in the last section, we may well conclude with a Wisconsin jurist, that as an original proposition it would be difficult to justify the special and exceptional favor shown by the courts to policyholders.[1] We may also perhaps go further and conclude that the weight of reason is with the federal courts and those of Massachusetts, New Jersey, and England, convinced that the meaning and effect of a policy of insurance should not depend upon the uncertainties of oral testimony, and that their determination should not be left to the bias or caprice of a jury. In the law of insurance as in other branches of the law, it may seem to us to be more just and more expedient to adhere to the fundamental and long-established rule of evidence that except in cases of fraud or mutual mistake, for which relief may be obtained only in an equity forum, and within equity rules of procedure, the rights of the parties are to be governed by the plain terms of the contract as written. Although in a suit to reform the contract the burden of proof rests heavily upon the plaintiff,[2] nevertheless a chancellor or judge sitting in equity has abundant power to grant adequate relief, and in most jurisdictions speedy relief, to an honest claimant who has been defrauded, deceived, or misled by the representatives of an insurance company;[3] and none other should seek to evade his written engagements.

[1] *Welch* v. *Fire Asso. of Phila.*, 120 Wis. 456, 468, 98 N. W. 227, 231 (but Wisconsin stands with the majority of the state courts on the subject of waiver).

[2] See § 85.

[3] *Fitchner* v. *Fidelity Mut. F. Assoc.*, 103 Iowa, 276, 72 N. W. 530 (cited in 183 U. S. 25, 39); *Kelly* v. *Citizens' Mut. F. Assn.*, 96 Minn. 477, 105 N. W. 675; *Gwaltney* v. *Prov. Sav. Life Assur. Soc.*, 132 N. C. 925, 44 S. E. 659; *Medley* v. *German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101. The sequel to the famous *Northern Assur. Co.* case (183 U. S. 308) is instructive. After being defeated by the United States Supreme Court in an action on the contract the plaintiff went home to Nebraska, instituted a fresh action, this time for reformation of the policy, was allowed to recover in the state court notwithstanding the expiration of the one-year limitation of the policy, *Grand View Bldg. Assoc.* v. *Northern Assur. Co.* (Neb.), 102 N. W. 246, in which the state court criticises with evident feeling the decision of the federal court; and this recovery based on reformation was subsequently left undisturbed by the United States Supreme Court, 203 U. S. 106, 27 S. Ct. 27. The plaintiff might well have sought that form of remedy in the first instance. That the sanction of the contract as written may be of value to the insured is well illustrated by the *Van Tassel* case in which a written binder, and a letter of the company, claimed to be a cancellation of the binder, were before the court for construction. First trial was short and simple and on appeal the highest court decided in favor of the plaintiff that the binder was equivalent to a policy and that the notice was not so worded as to be effective. On a subsequent appeal the Court of Appeals by a vote of four out of seven judges concluded to let in parol evidence of custom and conversations. There were six trials of this case at circuit and ten hearings on the merits on appeal. The last printed record covered more than 400

It would seem, at least, as though a form of contract prescribed by statute ought, in the absence of fraud or mutual mistake, to be enforced according to its written terms.[1] The statutes providing for a standard fire policy give notice binding upon everybody that a prime purpose of the legislature is to secure "a uniform policy," not a form of contract depending upon the individual discretion or caprice of local agents.[2] The provisions of the policy also amount to explicit agreement that, for the benefit of both parties, oral testimony shall not avail to disturb the contract, and that no representative of the company below the board of directors shall be deemed to have authority to give oral permits or make oral changes. By its terms any proper modifications of the contract may be made, if in writing,[3] and such a business-like provision would seem to constitute no illegal restriction upon corporate action[4] as many courts infer; nor is it quite correct to say that the local agent in dealing with such a policy is "clothed with the power to make contracts" as the Mississippi and other courts declare.[5] His authority rather would seem to be limited to countersigning a statutory form of policy already printed and executed by higher officers in blank, and to granting permits, but only written permits.

Moreover, many provisions of the standard policy are precautionary in their character, and calculated to prevent arson and to encourage care in the management of an element always dangerous in a thickly settled community.[6] The insured public, in the last analysis, must pay for losses insured, and the entire community are interested, though they may not appreciate it, in compelling a reasonable enforcement of such warranties, approved as they are by many of our state legislatures.[7]

pages Meanwhile plaintiff had died and the defendant had gone out of business. See among other citations of this case, 72 Hun, 141, 151 N. Y. 130, 45 N. E. 365, 28 App. Div. 163, 161 N. Y. 413, 55 N. E. 936, 54 App. Div. 386, 66 App. Div. 531, 103 App. Div. 610, 184 N. Y. 607.

[1] *Nelson* v. *Traders' Ins. Co.*, 181 N. Y. 472, 74 N. E. 421 (unreasonable features of older form of policy have largely disappeared); *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 77 N. W. 752 (every man knows he is contracting for standard policy and nothing else).

[2] Under the doctrine of waiver the insured with several policies in identical terms upon one risk finds often that they have a diversified meaning and effect and may be far from concurrent.

[3] *Nelson* v. *Traders' Ins. Co.*, 181 N. Y. 472, 74 N. E. 421; *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 419.

[4] See cases § 161. Though a more general provision that no representative had power to alter the contract by any method might easily be so construed, *Home Ins. Co.* v. *Gibson*, 71 Miss. 58, 17 So. 13.

[5] *Western Assur. Co.* v. *Phelps*, 77 Miss. 625, 640, 27 So. 745.

[6] The fire loss in this country for 1906 exclusive of the San Francisco conflagration was above normal.

[7] See Appendix, ch. I.

§ 175. Present Knowledge of Existing Facts which will Shortly Constitute Breach.—The rule that issuing the policy with knowledge of a ground of forfeiture constitutes a waiver has been extended to the case where the general or countersigning agent knew at the inception of the contract that the property was unoccupied, and understood that the unoccupancy was likely to continue for more than the stipulated period of ten days.[1]

Thus, where on account of the great coal strike of 1905 the tenant of the insured, just before issuance of policy, had left his furniture and personal effects in the insured house in the country and had moved to a New York City hotel with his family for a few weeks, the company's local countersigning agent, his near neighbor, being at all times fully cognizant of the facts, the company was held estopped.[2] But knowledge by the agent of present vacancy will not avail to aid the insured if the agent has no reason to suppose that it will continue beyond the permitted period.[3]

§ 176. The Same—Subsequent Parol Waivers.—By the overwhelming weight of authority the policy restriction upon the authority of the countersigning agent is conclusive as regards the effect of his knowledge, declarations, and acts after the policy is issued,

[1] *Mil. Mechanics' Ins. Co.* v. *Brown*, 3 Kan. App. 225, 44 Pac. 35; *Queen Ins. Co.* v. *Kline*, 17 Ky. L. Rep. 619, 32 S. W. 214; *Chamberlain* v. *Brit.-Am. Assur. Co.*, 80 Mo. App. 589; *Blass* v. *Agricultural F. Ins. Co.*, 18 App. Div. 481, 46 N. Y. Supp. 392, aff'd 162 N. Y. 639; *Cross* v. *Nat. F. Ins. Co.*, 132 N. Y. 133, 30 N. E. 390; *Short* v. *Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138; *Cone* v. *Niagara F. Ins. Co.*, 60 N. Y. 619; *Bear* v. *Ins. Co.*, 34 Misc. 613, 70 N. Y. Supp. 581.

[2] *N. Y. Mut. Savings & Loan Assn.* v. *Westchester Fire Ins. Co.*, 110 App. Div. 760, 97 N. Y. Supp. 436. Similarly where agent knew that the mill was likely to cease operations for more than ten days, *Waukan Milling Co.* v. *Citizens' Mut. F. Ins. Co.* (Wis.), 109 N. W. 937 (citing many cases); *Ladd* v. *Ætna Ins. Co.*, 147 N. Y. 478, 42 N. E. 197. So also if, under similar circumstances, the agent promises to indorse permit but does not, *Queen Ins. Co.* v. *Straughan*, 70 Kan. 186, 78 Pac. 447; and see *Dupuy* v. *Ins. Co.*, 63 Fed. 680. So also if agent knows that gasoline has been used and is likely to be used again, *Hartley* v. *Penn. F. Ins. Co.*, 91 Minn. 382, 98 N. W. 198. And so as to any prohibited use, *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339; *Mfrs. & Merchants' Ins. Co.* v. *Armstrong*, 145 Ill. 469, 34 N. E. 553 (company knew that sprinkler equipment could not be installed within the sixty days named). So also if agent knows of other insurance though he may not know it to be outstanding at the precise moment when defendants' policy issues, *Wenzel* v. *Property Mut. Ins. Assn.* (Iowa, Jan., 1906), 35 Ins. L. J. 115. But the rule in the federal and other courts is different, *Kentucky, etc., Co.* v. *Norwich Union F. Ins. Co.*, 146 Fed. 695.

[3] *Ranspach* v. *Teutonia F. Ins. Co.*, 109 Mich. 699, 67 N. W. 967; *Moore* v. *Niagara F. Ins. Co.*, 199 Pa. St. 49, 48 Atl. 869, 85 Am. St. R. 771; *Queen Ins. Co.* v. *Chadwick*, 13 Tex. Civ. App. 318, 35 S. W. 26; *Conn. F. Ins. Co.* v. *Tilley*, 88 Va. 1024, 14 S. E. 851, 29 Am. St. R. 770; *England* v. *Westchester F. Ins. Co.*, 81 Wis. 683, 51 N. W. 954, 29 Am. St. R. 917.

unless the assured can show an actual authority of broader extent, which in most instances it is difficult to do.[1]

Thus, where during the term of a standard policy the assured informed the general agent of a change of ownership and got the reply, "I will see that the insurance is all right," *held*, no waiver, because no written consent was indorsed.[2]

But the distinctions drawn are sometimes fine. Thus, it was held that the company was estopped where the general agent, knowing that the policy was not in possession of the assured, had promised the vendee to go to the mortgagee, a bank in possession, and make indorsement consenting to change of title.[3] This case was clearly sound. The action was brought, not on the original contract, but by the transferee and based upon the subsequent oral contract made with him. But in a similar case where action was brought upon

[1] *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, 348, 23 S. Ct. 126; *Northern Assur. Co.* v. *Grand View Bldg. Asso.*, 183 U. S. 308, 22 S. Ct. 133; *Lippman* v. *Ætna Ins. Co.*, 120 Ga. 247, 47 S. E. 593; *Kirkman* v. *Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. 952, 48 Am. St. R. 454; *Sutherland* v. *Ins. Co.*, 110 Mich. 668, 68 N. W. 985; *Gould* v. *Dwelling House Ins. Co.*, 90 Mich. 302, 51 N. W. 455; *Ermentrout* v. *Girard F. & M.*, 63 Minn. 305, 65 N. W. 635; *Travelers' Ins. Co.* v. *Myers*, 62 Ohio St. 529, 57 N. E. 458, 460; *Hartford Ins. Co.* v. *Post*, 25 Tex. Civ. App. 428; *Oshkosh Match Works* v. *Manchester F. Assur. Co.*, 92 Wis. 510, 66 N. W. 525. The court should instruct the jury that a written agreement of waiver is essential, *Sullivan* v. *Met. Life Ins. Co.* (Mont., Jan., 1907), 36 Ins. L. J. 314. *Contra*, for example, *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339 (anticipated increase of hazard); *Springfield, etc., Co.* v. *Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. 238, 74 Am. St. R. 521; *Wilson* v. *Assur. Co.*, 51 S. C. 540, 29 S. E. 245, Chief Justice dissenting (vacancy).

[2] *Northam* v. *Dutchess Co. Ins. Co.*, 166 N. Y. 319, 322, 59 N. E. 912, 82 Am. St. R. 655. Similarly as to other insurance coupled with the agent's reply "all right I will attend to it," *Baumgartel* v. *Prov. Wash. Ins. Co.*, 136 N. Y. 547, 32 N. E. 990; *Frankfurter* v. *Home Ins. Co.*, 10 Misc. 157, 31 N. Y. Supp. 3; *German Ins. Co.* v. *Hetduk*, 30 Neb. 288, 46 N. W. 481, 27 Am. St. R. 402. Similarly as to vacancy, *O'Brien* v. *Prescott Ins. Co.*, 134 N. Y. 28, 31 N. E. 265. Change of posesssion, *Carey* v. *German-Am. Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 36 Am. St. R. 907, 20 L. R. A. 267. Increase of hazard from new adjacent building, *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 77 N. W. 752. Commencement of foreclosure proceedings coupled with assurance of the agent that no harm would ensue therefrom, *Quinlan* v. *Prov. Wash. Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. R. 645; *Moore* v. *Hartford F. Ins. Co.*, 141 N. Y. 219 ("standard policy was compelled to remedy existing evils of parol waivers"). Likewise, an oral promise of the agent to indorse permit for removal of property to another location does not bind the company under the standard policy unless the written consent is actually indorsed, *Parker* v. *Rochester German Ins. Co.*, 162 Mass. 479, 39 N. E. 179; *Connecticut Fire Ins. Co.* v. *Smith*, 10 Colo. App. 121, 51 Pac. 170. But where the countersigning agent actually received the policy for indorsement, collected pay for it and represented to the assured, who did not have the policy, that permit had been indorsed, the company was held estopped, *Morgan* v. *Ill. Ins. Co.*, 130 Mich. 427, 90 N. W. 40. If the insured gets a written permit he may attach it at any time to the policy, *Bennett* v. *Western Underwriters*, 130 Mich. 216, 89 N. W. 702.

[3] *Manchester* v. *Guardian Assur. Co.*, 151 N. Y. 88, 45 N. E. 381, 56 Am. St. R. 600.

the policy, *held*, that the transferee could not recover.[1] And if, as matter of fact, the plaintiff can show that the agent has express authority to disregard the provisions of the policy and give oral permits, such oral permit will be effective.[2] Or if knowledge of the situation is transmitted to superior officers or agents with more general powers and they by affirmative acts within the scope of their authority recognize the continued validity of the policy, it has been held that waiver is established under the standard policy.[3]

§ 177. **Overt Act with Authority to Perform the Act.**—Many courts draw a distinction between a mere declaration or promise made by the countersigning or other agent and an overt act done by him with authority, if such act is consistent only with the continued validity of the policy. Under these circumstances it has been held that where the assured relies upon the act to his prejudice an estoppel is established as a paramount, inexorable inference of law, no matter what the policy provides in respect to the agent's authority to waive or to the method of waiver. Thus where an agent, whose duty it is to collect premiums, and make written indorsements, actually collects a premium or makes an indorsement with knowledge of previous forfeitures for which no written consent is given, the company is held to be estopped.[4]

[1] *Northam* v. *Dutchess Co. Mut. Ins. Co.*, 177 N. Y. 73, 69 N. E. 222. Compare, however, *Northam* v. *International Ins. Co.*, 45 App. Div. 177, 61 N. Y. Supp. 45, aff'd 165 N. Y. 666, 59 N. E. 1127, in which recovery was allowed because agent collected premium with knowledge. Applying the same distinction to a recent Texas case, *Home Mut. Ins. Co.* v. *Nichols* (Tex. Civ. App., 1903), 72 S. W. 440, we reach the conclusion that the judgment was right but that the plaintiff should have set up as his cause of action the subsequent new parol contract.

[2] *Continental F. Ins. Co.* v. *Brooks*, 131 Ala. 614, 30 So. 876 (the agent, no longer in company's employ, testified on this point for plaintiff); *West. Assur. Co.* v. *Williams*, 94 Ga. 128, 21 S. E. 370; *German Ins. Co.* v. *Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. R. 150; *Niagara Ins. Co.* v. *Lee*, 73 Tex. 641, 11 S. W. 1024.

[3] *Hunt* v. *State Ins. Co.*, 66 Neb. 121, 92 N. W. 921.

[4] For example, *Northam* v. *International Ins. Co.*, 45 App. Div. 177, 61 N. Y. Supp. 45, aff'd 165 N. Y. 666, 59 N. E. 1127; *Ætna Life Ins. Co.* v. *Fallow*, 110 Tenn. 720, 77 S. W. 937 (citing numerous cases); *Northwestern Mut. L. Ins. Co.* v. *Freeman*, 19 Tex. Civ. App. 632; and see *Bigelow* v. *Granite State Ins. Co.*, 94 Me. 39, 46 Atl. 808. The same rule applies though the premium is not collected until after loss, *Mechanics' & T. Ins. Co.* v. *Smith*, 79 Miss. 142, 30 So. 362 (tender back after trial begun is too late); *Phœnix Ins. Co.* v. *Covey*, 41 Neb. 724, 60 N. W. 12. And see *Hartford F. Ins. Co.* v. *Orr*, 56 Ill. App. 629; *Frasier* v. *New Zealand Ins. Co.*, 39 Ore. 342, 64 Pac. 814 (as to vacancy, citing many cases); *Milkman* v. *United Mut. Ins. Co.*, 20 R. I. 10, 36 Atl. 1121. But if the whole premium is due despite the breach the rule is otherwise, *German Ins. Co.* v. *Emporia, etc., Assoc.*, 9 Kan. App. 803, 59 Pac. 1092; *Cohen* v. *Continental F. Ins. Co.*, 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; *Joliffe* v. *Madison Mut. Ins. Co.*, 39 Wis. 111, 20 Am. Rep. 35. And see *Burner* v. *German-Am. Ins. Co.*, 103 Ky. 370, 45 S. W. 109. The United

The Connecticut court defines, in no uncertain terms, the binding effect of a warranty in the law of insurance.[1] Nevertheless, it also recognizes that, despite the policy stipulation of the necessity of a written agreement to effect waiver, the collection of premiums will estop the company from insisting upon a prior known forfeiture.[2]

§ 178. As to Provisions Relating to Proceedings After Loss.—The provisions of the policy relating to proofs of loss and adjustment are held to be more readily waived.[3] But by the better reason and authority the countersigning agent has no authority under the standard policy to waive by parol the service of proofs altogether,[4] unless it affirmatively appear that express authority has been granted him to do so.[5] But other courts hold to the contrary.[6]

The countersigning agent has apparent authority to receive proofs and therefore to waive matters of merely technical character, for

States Supreme Court says: "It is true that where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affecting its liability, and if subsequently the premiums are received by the company without objection any forfeiture incurred will be presumed to be waived," *Globe Mut. Ins. Co.* v. *Wolff*, 95 U. S. 326, 332, 24 L. Ed. 387; *McGurk* v. *Met. L. Ins. Co.*, 56 Conn. 528, 540, 16 Atl. 263, 1 L. R. A. 563; *Germania Fire Ins. Co.* v. *Hick*, 125 Ill. 361, 7 N. E. 792, 8 Am. St. R. 384, in which the court says: "An insurance company that takes a premium for a policy under conditions in respect to matters known to exist, that would render the policy invalid, will not be permitted to say that it is not a binding contract for that reason, and the company will be held as having the same knowledge of the condition and situation of the property as that possessed by the agent transacting the business for it." This language is adopted and approved in *Vesey* v. *Commercial Union Assur. Co.*, 18 So. Dak. 632, 101 N. W. 1074, citing many other authorities, *Wing* v. *Harvey*, 5 De G., M. & G. 265; *Armstrong* v. *Turquand*, 9 Ir. C. L. R. 32.

[1] *Fell* v. *John Hancock Life Ins. Co.*, 76 Conn. 494, 57 Atl. 175 (occupation of lockmaker and no prior application for life insurance incorrectly warranted; policy avoided).

[2] *Hennessy* v. *Met. Life Ins. Co.*, 74 Conn. 699, 52 Atl. 490. See also *dictum* of English court to same effect, *Biggar* v. *Rock Life Assur. Co.* (1902), 1 K. B. 516.

[3] See § 144, *supra*.

[4] For example, *Burlington Ins. Co.* v. *Kennerly*, 60 Ark. 532, 31 S. W. 155; *Ruthven* v. *Am. Ins. Co.*, 92 Iowa, 316, 60 N. W. 663; *Kirkman* v. *Farmers' Mut. F. Ins. Co.*, 90 Iowa, 457, 57 N. W. 952, 48 Am. St. R. 454; *Lohnes* v. *Ins. Co. of No. Am.*, 121 Mass. 439; *Wadhams* v. *West. Assur. Co.*, 117 Mich. 514, 76 N. W. 6; *Lumber Co.* v. *Citizens' Ins. Co.*, 136 Mich. 42, 98 N. W. 761; *Ermentrout* v. *Girard F. & M. Ins. Co.*, 63 Minn. 305, 65 N. W. 635, 56 Am. St. R. 485, 30 L. R. A. 346; *Gould* v. *Dwelling House Ins. Co.* 90 Mich. 302, 51 N. W. 455; *Hicks* v. *Brit.-Am. Ins. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; *Travelers' Ins. Co.* v. *Myers*, 62 Ohio St. 529, 57 N. E. 458, 460, 49 L. R. A. 760; *Smith* v. *Ins. Co.*, 60 Vt. 682, 15 Atl. 353; *Oshkosh Match Works* v. *Manchester F. Assur. Co.*, 92 Wis. 510, 66 N. W. 525.

[5] *O'Leary Bros.* v. *Ins. Co.*, 100 Iowa, 390, 69 N. W. 686.

[6] *Indian River State Bank* v. *Hartford Ins. Co.*, 46 Fla. 283, 35 So. 228; *Citizens' Ins. Co.* v. *Stoddard*, 197 Ill. 330, 64 N. E. 355; *Phenix Ins. Co.* v. *Munger*, 49 Kan. 178, 30 Pac. 120; *Nickell* v. *Phœnix Ins. Co.*, 144 Mo. 420, 46 S. W. 435; *Snyder* v. *Dwelling House Ins. Co.*, 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. R. 625.

example, to extend the time of service and to excuse informality in their contents,[1] and, according to some courts, to extend time for bringing suit.[2]

§ 179. **Special Soliciting Agents—Fire.**—Solicitors for fire insurance have no authority to waive conditions or forfeitures, but only to receive proposals, forward them and do various other acts.[3] The same rules apply in general as are applicable to solicitors for life insurance and the same contrariety of views among the courts is found.[4] If they are intrusted with the closing of a contract of insurance, and allowed to make a delivery of the policy, it has been held that they have implied authority to determine how the premium shall be paid, and if they give credit the policy will still be binding, though in contradiction to its terms;[5] but not so, in the opinion of some courts, if the policy expressly provides that the agent has no such *power*.[6]

§ 180. **Adjusters—Other Special Agents.**—A special agent appointed to investigate the amount and character of a loss and report thereon has no implied authority to waive by parol an essential condition of the contract or a forfeiture, especially where, as is usual, the policy denies this power.[7] And if the policy expressly denies his power he cannot waive service of proof of loss.[8] By virtue of his

[1] *Schloss* v. *Westchester F. Ins. Co.* 141 Ala. 566, 37 So. 701; *Indian River State Bk.* v. *Hartford Ins. Co.*, 46 Fla. 283, 35 So. 228 (1903); *Phenix Ins. Co.* v. *Munger*, 49 Kan. 178, 30 Pac. 120, 33 Am. St. R. 360; *Walker* v. *Lancashire Ins. Co.*, 188 Mass. 560, 75 N. E. 66; *Harnden* v. *Mill. & Mech. Ins. Co.*, 164 Mass. 382, 41 N. E. 658, 49 Am. St. R. 467; *Farmers' F. Ins. Co.* v. *Baker*, 94 Md. 545, 51 Atl. 184; *Thompson* v. *Traders' Ins. Co.*, 169 Mo. 12 (informal proofs); *Vesey* v. *Commercial Union*, 18 So. Dak. 632, 101 N. W. 1074.

[2] *Firemen's Fund Ins. Co.* v. *Western Refrig. Co.*, 162 Ill. 322, 44 N. E. 746.

[3] *Cassimus* v. *Scottish Union & Nat. I. Co.*, 135 Ala. 256, 33 So. 163; *Lohnes* v. *Ins. Co. of N. A.*, 121 Mass. 439; *Tate* v. *Citizens' Mut. Ins. Co.*, 13 Gray (Mass.), 79; *Elliott* v. *Farmers' Ins. Co.*, 114 Iowa, 153, 86 N. W. 224; *Hausen* v. *Citizens' Ins. Co.*, 66 Mo. App. 29; *Tabor* v. *Rockingham Farmers' M. F. I. Co.*, 69 N. H. 666, 45 Atl. 479. But see *State Mut. Ins. Co.* v. *La Tourette*, 71 Ark. 242, 74 S. W. 300, Bunn, C. J., dissenting; *Citizens' Ins. Co.* v. *Crist*, 22 Ky. L. R. 47, 56 S. W. 658.

[4] See §§ 165–171.

[5] *Bodine* v. *Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Boehen* v. *Williamsburgh City Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787.

[6] *Russell* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656.

[7] *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 22 S. Ct. 133; *Weed* v. *London & L. Fire Ins. Co.*, 116 N. Y. 106, 22 N. E. 229; *Marvin* v. *Universal Life Ins. Co.*, 85 N. Y. 278, 39 Am. Rep. 657. But see *Georgia Home Ins. Co.* v. *Allen*, 128 Ala. 451, 30 So. 537.

[8] *Kirkman* v. *Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. 952, 48 Am. St. R. 454; *Contra*, *Reed* v. *Continental Ins. Co.* (Del.), 65 Atl. 569.

position, however, he may have apparent authority to waive the time of service.[1]

If an adjuster, as is not infrequently the case, is given power not only to adjust the amount of loss and report complications, but to dispose of the whole matter by giving a draft upon the company in settlement, at his sole discretion, it has been held that he has actual power after loss to waive forfeitures under the standard or any policy.[2] This subject has occupied the attention of the highest court in Connecticut in connection with an elaborate citation of authorities.[3]

The authority of clerks of agents or of insurers is, as a rule, limited to the performance of ministerial and clerical acts, and they are not to be allowed to disturb or alter the terms of the policy, unless such a result is naturally involved in the proper performance of the particular act which they are employed to do.[4]

[1] *Sergent* v. *L. & L. & G. Ins. Co.*, 155 N. Y. 349, 355, 49 N. E. 935.

[2] *Georgia Home Ins. Co.* v. *Allen*, 119 Ala. 436, 24 So. 399; *Germania Fire Ins. Co.* v. *Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; *Dobson* v. *Hartford Fire Ins. Co.*, 86 App. Div. 115, 121, 83 N. Y. Supp. 456, aff'd 179 N. Y. 557, 71 N. E. 1130; *Smaldose* v. *Ins. Co. of North Am.*, 162 N. Y. 580, 57 N. E. 168. Where the adjuster continued to make demands for duplicate vouchers a compliance with which to his knowledge would postpone suit until after the lapse of the year's limitation for beginning action, *held*, that the company was estopped from setting up the forfeiture, *Dibbrell* v. *Georgia Home Ins. Co.*, 110 N. C. 193, 14 S. E. 783, 28 Am. St. R. 678, Merriman, C. J., dissenting.

[3] *Bernhard* v. *Rochester German Ins. Co.* (Conn. Dec., 1906), 65 Atl. 134.

[4] *Waldman* v. *North British & M. Ins. Co.*, 91 Ala. 170, 24 Am. St. R. 883.

CHAPTER IX

General Principles—Continued

Marine Insurance

§ 181. What is Marine Insurance.—The law of marine insurance is in so many particulars peculiar to that branch of insurance that it will be convenient to present by themselves some of the principles relating to it.[1]

Marine insurance is an insurance against risks, connected with navigation, to which a ship, cargo, freight, profits, or other insurable interest may be exposed during a certain voyage or a fixed period of time.[2]

§ 182. Implied Warranties.—There are three warranties which are understood in every contract of marine insurance, and are as efficacious as though they were written upon the face of the policy. These relate to seaworthiness, deviation, and the legality of the adventure. The last is sometimes classed as a condition rather than a warranty.[3]

§ 183. Warranty of Seaworthiness.—In every voyage policy upon ship, freight, cargo, or other interest, a warranty is implied that, at the commencement of the voyage, the ship shall be seaworthy for the purpose of the particular adventure insured;[4] otherwise the

[1] Insurable interest, concealment, representations, express warranties, and other matters, affecting the rights of the parties to the marine policy, have already received consideration. See ch. II–V.

[2] *Sælberg* v. *Western Assur. Co.*, 119 Fed. 23, 28, 55 C. C. A. 601. Policy sometimes covers the goods on shore, *Pelly* v. *Royal Exch. Assur. Co.* (1757), 1 Burr. 341. Or on quay, *Ide* v. *Chalmers* (1900), 5 Com. Cas. 212. Or on voyage partly by water and partly by land, see § 22. Liability confers insurable interest, see § 33. Thus, liability of shipowner under contract to carry, *Cunard Co.* v. *Marten* (1902), 2 K. B. 624 (1903), 2 K. B. 511; or liability for colliding with another ship, *Tatham* v. *Burr* (1898), App. Cas. 385.

[3] There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk, *Dent* v. *Smith*, L. R. 4 Q. B. 414 (British ship transferred to Russian owners. Policy on gold.).

[4] *Richelieu & O. Nav. Co.* v. *Boston M. Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398; *Long Dock Mills & El. Co.* v. *Mannheim Ins. Co.*, 116 Fed.

policy does not attach.[1] At best the dangers of ocean travel are manifold and serious. The underwriter who is asked to assume liability for them is entitled, when he fixes the amount of his premium, to reckon on a suitable ship, properly manned, equipped, and supplied, with due regard to the character of the adventure proposed.[2] An element of public policy also is manifestly involved in the requirement that the warranty of seaworthiness must be observed, and that the safety of all on board must be thereby to that extent secured.

Where a vessel is lost by an undisclosed cause, the burden of proof on the issue of unseaworthiness may become an important factor in the litigation between insurers and insured. If soon after sailing, the ship founders or becomes so leaky or disabled as to be unable to proceed, and this cannot be explained by any stress of weather, or other known cause, the proper inference is that she was unseaworthy.[3] The question whether a vessel insured was seaworthy is, however, ordinarily one of fact for the jury; and although the cause

886, aff'd 123 Fed. 861; *Walsh* v. *Washington Ins. Co.*, 32 N. Y. 427; *Greenock S. S. Co.* v. *Marit. Ins. Co.* (1903), 2 K. B. 657; *Dixon* v. *Sadler*, 5 M. & W. 405.

[1] But see § 114. Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port, *Haughton* v. *Empire Mar. Ins. Co.*, L. R. 1 Exch. 206; *Quebec Mar. Ins. Co.* v. *Commercial Bank*, L. R. 3 P. C. 241; *Paddock* v. *Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

[2] In a case between carrier and shipper, the United States Supreme Court says, by Justice Clifford: "A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and stanch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily at least, in case of his sickness or physical disqualification," *Propeller Niagara* v. *Cordes*, 21 How. (U. S.) 7, 23, 16 L. Ed. 41. Lord Cairnes says: "By 'seaworthy,' my lords, I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic," *Steel* v. *State Line S.S. Co.*, 3 App. Cas. 72. And see § 185. The issue of seaworthiness often arises in cases between shipper and shipowner. A ship may be seaworthy, as between shipowner and insurer on ship, though unseaworthy as between shipowner and shipper of a particular cargo, Chalmers & Owen, Ins. (1907), 58.

[3] *Bullard* v. *Insurance Co.*, 1 Curt. 148, Fed. Cas. No. 2,122; De Hart & Simey, Ins. (1907), 51, citing Arnould, § 725; *Pickup* v. *Thames Ins. Co.* (1878), 3 Q. B. D. 594, 47 L. J. Q. B. 749; *Ajum Goolam Hassen* v. *Union Mar. Ins. Co.* (1901), App. Cas. 362, 70 L. J. P. C. 34. Mr. Justice Washington stated broadly that every warranty in the policy whether express or implied is a condition precedent to a right of recovery and that the insured cannot recover without first averring and proving performance, *Craig* v. *U. S. Ins. Co.*, 1 Pet. C. C. 410, Fed. Cas. No. 3,340. See § 117, *supra*.

of loss be not proved, yet if there is evidence showing seaworthiness in the vessel at the inception of the voyage, and if it appear that she subsequently encountered marine perils such as might disable a stanch and well manned vessel, the jury may attribute the loss to the perils insured against.[1]

In a voyage policy on goods or other movables there is an implied warranty, that, at the commencement of the voyage, the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy.[2] The fitness of the ship to carry the goods, however, should be decided with reference to the perils insured against by the policy. For example, where cattle are insured against mortality, the warranty is not satisfied when the appliances for ventilation are insuffi-

[1] *Walsh* v. *Washington Mar. Ins. Co.*, 32 N. Y. 427. See many cases on burden of proof in this section *infra*. The underwriter may waive the breach of the implied warranty of seaworthiness or estop himself from insisting upon it, *Thebaud* v. *Insurance Co.*, 155 N. Y. 516, 50 N. E. 284. An acceptance of a notice of abandonment is a waiver of a known forfeiture, *Provincial Ins. Co.* v. *Leduc* (1874), L. R. 6 P. C. 224, 43 L. J. P. C. 49; Arnould, § 690; De Hart & Simey, Ins. (1907), 43, note (e).

[2] *The Maori King* (1895), 2 Q. B. 550, 558 (frozen meat). English and other courts hold that the burden is on the underwriter to establish unseaworthiness, *Ajum, Goolam & Co.* v. *Union Mar. Ins. Co.* (1901), App. Cas. 362; *Pickup* v. *Thames, etc., Ins. Co.*, 3 Q. B. D. 594; *Earnmoor* v. *Cal. Ins. Co.*, 40 Fed. 847; *Guy* v. *Citizens' Mut. Ins. Co.*, 30 Fed. 695; *Perry* v. *Cobb*, 88 Me. 435, 34 Atl. 378, 49 L. R. A. 389. Other cases, more logically perhaps (see *Hennessey* v. *Met. L. Ins. Co.*, 74 Conn. 699), but less conveniently, hold that the insured must furnish, in the first instance, at least, some general proof of seaworthiness, *Tidmarsh* v. *Washington F. & M. Ins. Co.*, 4 Mason (U. S.), 439, Fed. Cas. No. 14,024; *Lunt* v. *Boston Mar. Ins. Co.*, 6 Fed. 562, 567; *Nome Beach Co.* v. *Munich Assur. Co.*, 123 Fed. 820; *Berwind* v. *Greenwich Ins. Co.*, 114 N. Y. 231, 234, 21 N. E. 151; *Van Wickle* v. *Mech. & T. Ins. Co.*, 97 N. Y. 350; *Moser* v. *Sun Mut. Ins. Co.*, 1 Denio (N. Y.), 176, Duer, J.; and see *The Southwark*, 191 U. S. 1, 24 S. Ct. 1; *The Edwin L. Morrison*, 153 U. S. 199, 210, 14 S. Ct. 823. It has been held, however, that upon the whole case the insurer must establish unseaworthiness by preponderance of evidence, *Lunt* v. *Boston Mar. Ins. Co.*, 6 Fed. 562; *Nome Beach Co.* v. *Munich Assur. Co.*, 123 Fed. 820; *Bullard* v. *Roger Williams Ins. Co.*, Fed. Cas. No. 2,122; *Adderly* v. *Am. Mut. Ins. Co.*, Fed. Cas. No. 75; and see *Richelieu, etc., Co.* v. *Boston Mar. Ins. Co.*, 136 U. S. 408, 428, 10 S. Ct. 934; but it has also been held that where rottenness, inherent defects, and other unseaworthiness, are expressly excepted, the burden is upon the insured to show that his loss is not within the exception, *Reilly* v. *Ins. Co.*, 81 App. Div. 314, 81 N. Y. Supp. 59. Last editors of Arnould (7th ed.) give rule as to burden of proof one way. Arnould gave it the other, § 1277. As to what subsequently discovered defects do or do not create presumption of unseaworthiness at time of sailing, and when issue is for jury, see *Voisin* v. *Prov. Wash. Ins. Co.*, 51 App. Div. 553, 557, 65 N. Y. Supp. 333; *Starbuck* v. *Phœnix Ins. Co.*, 47 App. Div. 621, 62 N. Y. Supp. 264, 34 App. Div. 293, 54 N. Y. Supp. 293; *Singleton* v. *Phœnix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839; *Thebaud* v. *Great West. Ins. Co.*, 155 N. Y. 516, 50 N. E. 284; *Morse* v. *St. Paul F. & M. Ins. Co.*, 124 Fed. 451, 122 Fed. 748; *Long Dock Mills & El. Co.* v. *Mannheim Ins. Co.*, 123 Fed. 861. As to how warranty of seaworthiness is affected by Harter Act see *The Irrawaddy*, 171 U. S. 187, 18 S. Ct. 831; *Nord-Deutscher Lloyd* v. *President, etc., of Ins. Co.*, 110 Fed. 420, 424–428, 49 C. C. A. 1.

cient;[1] but if cattle were insured against war risks only, it has been suggested that the ventilation of the hold would be immaterial.[2]

§ 184. **Warranty of Seaworthiness—Time Policies.**—After much discussion it has been settled by the English courts that no warranty of seaworthiness is to be implied in a time policy. But where with the privity of the assured the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.[3] This distinction is placed by those courts upon the ground that the warranty of seaworthiness attaches, if at all, at the time of the commencement of the risk, and that to imply such a warranty in a time policy, which might begin to run when the vessel is in mid-ocean, would be inconvenient and unreasonable.

In the United States, upon the question whether or not a warranty of seaworthiness is implied in time policies, the decisions are not in harmony. The Connecticut court has decided that no distinction in this respect exists between voyage and time policies,[4] but the opinion of the court in that case can hardly be said to have considered or disposed of all the difficulties attaching to such a rule. By another court, it has been held, that the warranty is at any rate to be implied in those cases where the vessel insured by the time policy is, at the time of the commencement of the risk, at a port where repairs could be made.[5] In a more recent case, however, the Illinois court has decided to abide by the English rule.[6] In a still later case, the Federal Supreme Court uses the following language with regard to this subject: "In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk; and the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission. A defect of seaworthiness arising after the commencement of the risk, and permitted to continue from bad

[1] *Sleigh* v. *Tyser* (1900), 2 Q. B. 333, 69 L. J. Q. B. 626. So also seaworthiness of a vessel engaged in the dressed meat trade extends to the refrigerating apparatus needful for the preservation of the meat during transportation, *The Southwark*, 191 U. S. 1, 24 S. Ct. 1.

[2] De Hart & Simey, Ins. (1907), 52.

[3] *Dudgeon* v. *Pembroke*, L. R. 2 App. Cas. 284, 46 L. J. Q. B. 409, 36 L. T. 382, 2 Asp. M. C. 323; *Thompson* v. *Hopper*, 34 Eng. Law and Eq. 266, 27 L. J. Q. B. 441, 6 E. & B. 173, 88 Eng. C. L. Rep. 171; *Gibson* v. *Small*, 24 Eng. Law and Eq. 17, 4 H. L. Cas. 353, 17 Jur. 1131.

[4] *Hoxie* v. *Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240. So, also, *Merchants' Mut. Ins. Co.* v. *Sweet*, 6 Wis. 670.

[5] *Hoxie* v. *Pacific Mutual Ins. Co.*, 7 Allen (Mass.), 211, Bigelow, C. J.; *Capen* v. *Washington Ins. Co.*, 12 Cush. (Mass.) 517.

[6] *Merchants' Ins. Co.* v. *Morrison*, 62 Ill. 242, 14 Am. Rep. 93.

faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith or want of prudence or diligence, but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect." [1] The learned revisers of Arnould's work on marine insurance, in a treatise of their own, with reference to a time policy, have this to say: "The authorities support the view that in order to prevent the assured from recovering, his conduct in sending the ship to sea in an unseaworthy state must amount to willful misconduct." [2] This states the rule more liberally to the insured than do most of the American authorities.[3]

§ 185. Seaworthiness is what.—A ship is seaworthy when reasonably fit, in all respects, to encounter the ordinary perils of the seas, incident to the adventure insured.[4]

[1] *Union Ins. Co.* v. *Smith*, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497, Blatchford, J. The New York court, without however citing any of the late cases, has stated the rule in the following words: "In every case of marine insurance by a general policy covering all perils of the sea, where the vessel insured is in port, there is an implied warranty that the vessel is seaworthy at the inception of the policy. It is a condition precedent to the risk, and if the vessel is not seaworthy the policy does not attach. In an action to recover for a loss upon such a policy, where the fact of seaworthiness at the time of issuing the policy is shown, it is immaterial what the vessel's condition is thereafter during the voyage, as loss from unseaworthiness is among the perils insured against. The plaintiffs, under such a policy, make out a *prima facie* case by showing seaworthiness at the inception of the risk. But in time policies there is implied a warranty that the vessel will be kept in repair and made seaworthy at all times during the continuance of the risk, so far as that is reasonably possible, and this implied covenant imposes upon the insured the duty of active diligence to keep the vessel in good order and in a seaworthy condition," *Berwind* v. *Greenwich Ins. Co.*, 114 N. Y. 231, 234, 23 N. Y. St. R. 93, 21 N. E. 151, Brown, J. This language, probably, must be understood in a sense somewhat similar to that employed by Mr. Justice Blatchford in the case of the *Union Ins. Co.* v. *Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497, since it is not to be supposed that the court could spell out of a policy, insuring even against barratry, an absolute and continuous warranty, obligatory upon the assured and his agents during the voyage and in foreign ports, to keep the ship as seaworthy as possible. Where at the time of the commencement of the risk a ship was not in port, but off on a distant voyage, it was held that the implied warranty of seaworthiness was not applicable, *Jones* v. *Ins. Co.*, 2 Wall., Jr. (U. S.), 278, Fed. Cas. No. 7,470, distinguished in *Rouse* v. *Insurance Co.*, 3 Wall., Jr. (U. S.), 367, Fed. Cas. No. 12,089.

[2] De Hart & Simey, Ins. (1907), 48, citing *Thompson* v. *Hopper* (1858), E. B. & E. 1038; *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284; *Trinder* v. *Thames & M. Mar. Ins. Co.* (1898), 2 Q. B. 114.

[3] *Capen* v. *Washington Ins. Co.*, 12 Cush. (Mass.) 517.

[4] *The Southwark*, 191 U. S. 1, 8, 24 S. Ct. 1; *Thebaud* v. *Great West. Ins. Co.*, 155 N. Y. 516, 519, 50 N. E. 284; *Bouillon* v. *Lupton* (1864), 33 L. J. C. P. 43. Illustrations from Chalmers & Owen, Ins. (1907): (1) Policy on ship from Montreal to Halifax. At the time the ship sailed there was a defect in her boiler. The defect did not appear in the river, but disabled her when she got out to sea. She put back to port,

This requires that the ship on sailing should be tight and stanch in hull, properly rigged and laden. She must also be equipped and furnished with the requisite appurtenances, such as ballast, cables, anchors, cordage and sails, food, water, fuel and lights, and other necessary or proper stores and implements for the voyage;[1] and also provided with a competent master, a sufficient number of competent officers and seamen,[2] as well as with a pilot, when required by law or custom.[3] In a recent English treatise the statement is made, "as regards the pilot, the result of the authorities seems to be that, generally speaking, a ship is not seaworthy at the outset of the voyage, or on leaving an intermediate port (treating this as a new stage), without a pilot, where one is required by law or usage for safe navigation; but that it is not a breach of the warranty to enter a port without a pilot."[4] Custom, or statute, however, may control. And it is manifest that even for inland marine transit a ship must be provided with a good and reliable compass.[5] A concrete example will make clearer the application of the doctrine relating to seaworthiness.

The schooner *Caroline Mills* was insured in California for one year, subject to the provisions of the California Civil Code, "to be engaged as an inter-island trader among the Sandwich Islands." The Code provides that, when the insurance is for a specified length

and the defect was repaired. Afterwards she proceeded on her voyage and was lost in bad weather. *Held*, that she was unseaworthy at the commencement of the voyage, and that the insurer was not liable, *Quebec Mar. Ins. Co.* v. *Commercial Bk.*, L. R. 3 P. C. 234. (2) Steamer built for inland navigation in Trinidad is insured from Clyde to Trinidad. In a rather heavy sea in the Atlantic she breaks asunder and is lost. With the exercise of reasonable care she might have been made more fit for the ocean transit. The insurer is not liable, *Turnbull* v. *Janson* (1877), 3 Asp. Mar. Cas. 433. Otherwise if all reasonable means had been used, *Clapham* v. *Langton*, 5 B. & S. 729.

[1] *Merchants' Ins. Co.* v. *Morrison*, 62 Ill. 242, 246, 14 Am. Rep. 93; see also *Hutchins* v. *Ford*, 82 Me. 363, 370, 19 Atl. 833. The ship must have sufficient ground tackle and anchors, *Wilkie* v. *Geddes*, 3 Dow. 57. Also firewood, oil, and candles, *Fontaine* v. *Phœnix Ins. Co. of N. Y.*, 10 Johns. (N. Y.) 58; also cables and anchors, *Lawton* v. *Royal Canadian Ins. Co.*, 50 Wis. 163, 6 N. W. 505. As to quantity of water required see *Warren* v. *Manufacturers' Ins. Co.*, 13 Pick. (Mass.) 518, 522, 25 Am. Dec. 341; *Deshon* v. *Merchants' Ins. Co.*, 11 Metc. (Mass.) 199. And as to equipment generally see *Tidmarsh* v. *Washington F. & M. Ins. Co.*, 4 Mason (U. S. C. C.), 439, Fed. Cas. No. 14,024.

[2] *M'Lanahan* v. *Universal Ins. Co.*, 1 Pet. (U. S.) 170.

[3] *Whitney* v. *Ocean Ins. Co.*, 14 La. 485, 33 Am. Dec. 595, and note 599–601. Want of a licensed pilot (under par. 4463, Rev. Stat. U. S., 1869) is no defense unless averred and proved, *Old Dominion Ins. Co.* v. *Frank*, 2 Ohio Dec. 93, 7 Ohio Dec. (reprint), 302. As to pilot in coasting trade see *Cox* v. *Charleston F. & M. Ins. Co.*, 3 Rich. L. (S. C.) 331, 45 Am. Dec. 771.

[4] De Hart & Simey, Ins. (1907), 49, citing Arnould, §§ 702, 704, 724; *Phillips* v. *Headlam* (1831), 2 B. & Ad. 380.

[5] *Richelieu & Ont. Nav. Co.* v. *Boston Mar. Ins. Co.*, 136 U. S. 408, 429, 10 S. Ct. 934, 34 L. Ed. 398 (ship unseaworthy, though defect in compass was not known).

of time, there is an implied warranty that the ship shall be seaworthy at the commencement of every voyage she may undertake during that time. Before the vessel started on her voyage, the owners, knowing that the chain cables attached to her anchor were old and weak, had them reënforced with six-inch hawsers. This, however, the experts on the trial showed to be an improper and unskillful method of strengthening iron cables for use among the coral reefs of the Hawaiian islands, because rope hawsers are liable to become chafed and cut by the rocks on the bottom. During a heavy swell, but without the existence of any storm or extraordinary violence of the elements, when anchoring a couple of miles off Honokoa, the chains and hawsers on both anchors of the vessel parted, as she surged upon them, impelled by the swell, and thereupon she was driven ashore by the wind and totally lost. Judge Hoffman decided that the warranty of seaworthiness was not fulfilled and dismissed the libel on the policy of insurance.[1]

The requirement as to competent officers and crew has reference to the particular voyage, whether, for example, a short coasting voyage, or a long sea voyage.[2] The ship's cargo also must be properly stowed, and the weight of it not in excess of the vessel's safe carrying capacity.[3]

The underwriters, however, are liable for injudicious acts of the master and crew in rendering a vessel unseaworthy during the voyage, for instance, by throwing overboard a part of the ballast, since the assured gives no warranty that the vessel shall continue seaworthy, or that the master or crew shall do their duty.[4] Accordingly, it may be said in general, that the implied warranty of seaworthiness is not broken merely because the vessel becomes unseaworthy during her

[1] *Pope* v. *Swiss Lloyd Ins. Co.*, 4 Fed. 153.

[2] *Hutchins* v. *Ford*, 82 Me. 363, 370, 19 Atl. 832; *Louisville Ins. Co.* v. *Monarch*, 99 Ky. 578, 18 Ky. L. Rep. 444, 36 S. W. 563. Thus, cattle ship must have proper ventilation and enough attendants, *Sleigh* v. *Tyser* (1900), 2 Q. B. 333, 82 Law T. N. S. 804. Compass must be safe and suitable, *Richelieu & O. Nav. Co.* v. *Boston M. Ins. Co.*, 136 U. S. 408, 34 L. Ed. 398, 10 S. Ct. 934. And machinery of steam vessels must be properly constructed, *Myers* v. *The Girard Insurance Co.*, 26 Pa. St. 192, 193. Boilers must not be defective, *Quebec Mar. Ins. Co.* v. *Commercial Bk. of Canada*, 7 Moore P. C. N. S. 1, 3 L. R. P. C. 234, 39 L. J. P. C. 53.

[3] *Foley* v. *Tabor*, 2 Fost. & Fin. 663, 672; *Cincinnati Mut. Ins. Co.* v. *May*, 20 Ohio St. 211, 225–227. That condition is implied that cargo will be stowed in safe and proper manner and that policy is vitiated by breach of implied warranty that ship is seaworthy, see *Leitch* v. *Atlantic Mut. Ins. Co.*, 66 N. Y. 100, 108. Breach of a clause "warranted no iron . . . exceeding net registered tonnage," *Hart* v. *Standard Mar. Ins. Co.*, L. R. 22 Q. B. Div. 499, 6 Asp. M. C. 368. See *Reck* v. *Phœnix Ins. Co.*, 130 N. Y. 160, 29 N. E. 137.

[4] *Dixon* v. *Sadler*, 5 Mees. & Wels. 405, aff'd 8 Mees. & Wels. 895.

voyage;[1] or because a competent master becomes incompetent at a foreign port.[2]

In the case of an insurance being effected on cargo which is of such a nature or so stowed as to render the vessel unseaworthy, it will be no extenuation to show that in case of need the cargo can be readily jettisoned, for instance cargo stowed on deck, for the warranty of seaworthiness is to be considered in relation to the subject-matter insured, and cannot be taken to contemplate the destruction of that very cargo which it is designed to protect.[3]

Neither the ignorance nor the innocence of the insured will avail to relieve him from the consequence of a breach of the warranty, though all reasonable precautions were taken to secure the seaworthiness of the vessel on sailing, and her unseaworthy condition arose from a latent defect, since an actual fulfillment of the implied condition is indispensable.[4] Upon the same principle, an insurance on cargo is invalidated if the vessel sail unseaworthy, though the assured be ignorant of her state, or powerless to alter it.[5] For example, in an action for salvage, it appeared that a steamship laden with cargo had become disabled at sea in consequence of the breaking of her crank shaft. Although the breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover, nevertheless the court held that the implied warranty of seaworthiness had been violated.[6] A temporary defect, however, due to the neglect of some precaution at the time of sailing is not unseaworthiness, if the state of the ship be such that, if the master and crew do their duty, no extra danger will be incurred. Thus the ship is not unseaworthy because a port-hole has been improperly left open, unless (as where the cargo has been piled up against it) it could not, if bad weather came on, be readily closed at sea.[7]

The implied condition of seaworthiness is to be confined to the ship by which the insurance is effected, and cannot be extended to lighters employed to land the cargo.[8]

[1] *Capen* v. *Washington Ins. Co.*, 12 Cush. (Mass.) 517; *Deblois* v. *Ocean Ins. Co.*, 16 Pick. (Mass.) 303. But it is said to be the duty of the insured to keep the vessel seaworthy during the risk if practicable to do so, *Paddock* v. *Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

[2] *Copeland* v. *New England Mar. Ins. Co.*, 2 Mete. (Mass.) 432.

[3] *Daniels* v. *Harris*, L. R. 10 C. P. 1, 2 Asp. M. C. 413 (wine stored on deck).

[4] *The Southwark*, 191 U. S. 1, 6, 24 S. Ct. 1. But note the effect of the Harter Act on latent defect where due diligence has been employed, *The Irrawaddy*, 171 U. S. 187, 18 S. Ct. 831.

[5] *Oliver* v. *Cowley*, Park. Ins. 470.

[6] *The Glenfruin* (1885), 10 Prob. Div. 103, 54 L. J. Adm. 49.

[7] De Hart & Simey, Ins. (1907), 50, citing *Steel* v. *State Line SS. Co.* (1877), 3 App. Cas. 72; *Hedley* v. *Pinkney* (1892), 1 Q. B. 58, 61 L. J. Q. B. 179; *Gilroy* v. *Price* (1893), App. Cas. 56.

[8] *Lane* v. *Nixon*, L. R. 1 C. P. 412, 35 L. J. C. P. 243; see *Van Valkenburgh* v. *The Astor Mut. Ins. Co.*, 1 Bosw. (N. Y.) 61.

In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy.[1] This question was disposed of by an English case in which cocoanut oil, value to include ten per cent advance on invoice and charges, was insured at and from any port or ports in Cochin, to Marseilles. The insurer defended the action brought on the policy for a total loss with a plea that the goods insured were not seaworthy for the voyage at the time the ship set sail. To this plea the plaintiff demurred on the grounds, "that there is no implied warranty of the seaworthiness of the goods insured by a policy; and that the plea does not allege that the loss was attributable to the condition of the goods." The demurrer was sustained and judgment rendered for the plaintiff.[2]

The standard of seaworthiness required to satisfy the warranty is not uniform in every case, but variable according to circumstances. Thus, where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty, that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.[3] For instance, in a policy "at and from," the risk is divisible into two distinct parts, the risk in port and the risk at sea, and a different degree of seaworthiness is required at the commencement of each of these sections.[4] For purposes of coaling steamships, or renewal of any consumable stores, of which a sufficient supply for the whole voyage cannot be taken on board at the start, it may be appropriate to consider the voyage as divided into stages; and it may be a matter of proof as to where the necessity of the case requires each stage to be.[5]

So where the voyage consists partly of river and partly of sea navigation, and requires a different state of equipment for each stage,[6] if the vessel be unseaworthy for any distinct stage of the adventure on entering upon it, the policy, it has been held, will be avoided, and no subsequent loss will be recoverable, though the de-

[1] *Koebel* v. *Saunders*, 17 C. B. N. S. 71, 33 L. J. C. P. 310 (cocoanut oil).

[2] *Koebel* v. *Saunders*, 17 C. B. N. S. 71. If, however, the loss had been alleged and shown to have been due to inherent vice in the goods, the insurer would not have been liable.

[3] *The Vortigern* (1899), P. 140 (coals).

[4] *Greenock Steamship Co.* v. *Maritime Ins. Co.*, L. R. (1903) 2 K. B. 657 (insufficient coal); *McLanahan* v. *Universal Ins. Co.*, 1 Pet. (U. S.) 170, 184.

[5] *The Vortigern* (1899), p. 140, 68 L. J. P. 49; *Greenock SS. Co.* v. *Marit. Ins. Co.* (1903), 2 K. B. 657, 72 L. J. K. B. 868. "If the ship be not seaworthy at the commencement of an early stage, it seems to follow . . . that the policy is avoided from that time, so that the insured cannot recover for a loss on a later stage, on which the ship sailed in a seaworthy condition," De Hart & Simey, Ins. (1907), 51.

[6] *Bouillon* v. *Lupton*, 33 L. J. C. P 37, 15 C. B. N. S. 113.

fect may have been remedied before loss, and the loss have occurred irrespective of it.[1]

The warranty of seaworthiness in general only attaches at the inception of the risk; so that in the case of an insurance out and home, if the risk be one and indivisible, the starting of the vessel outward in a seaworthy state will satisfy the warranty, and there will be no breach, though the vessel should be unseaworthy upon sailing on her homeward passage or from any intermediate port.

The standard of seaworthiness may, also, have a relation to the character of the ship insured, and if an insurer agrees with full knowledge of the facts to insure a vessel incapable, from size or construction, of being brought up to the ordinary standard of seaworthiness, the implied warranty will be satisfied if the vessel is made as seaworthy as her capacity will admit of.[2]

For example, where both parties know that the vessel is not seagoing but constructed for river service.[3] The steamer *Dos Hermanos*, when the policy issued, was in process of construction at Philadelphia, for use as a river steamer near Frontera, Mexico. The voyage from Philadelphia to Frontera was insured, and the use for which the vessel was designed was made known to the underwriters. Though provided with suitable crew and proper equipment for the voyage, the steamer was not, in the character of her construction, seaworthy for ocean transit. After leaving the port of Philadelphia, she took the inside course through canals and bays as far as possible, but below Fort Macon it became necessary to go outside upon the open sea, and shortly afterwards the vessel was lost. The verdict of the jury in favor of the insured was sustained on appeal.[4]

But as a general rule, the character of the voyage, rather than the purpose for which the ship was originally constructed, must determine the question whether this warranty has been kept.[5]

It may not always be easy to draw the line with precision between certain doctrines, relating to the warranty of seaworthiness, which in their nature are somewhat inharmonious; thus on the one side, the general rules that the warranty applies only to the condition of the vessel at the time of the inception of the risk, or time of starting, and

[1] *Quebec Marine Ins. Co.* v. *Com. Bank of Canada*, L. R. 3 P. C. 234.

[2] *Burges* v. *Wickham*, 33 L. J. Q. B. 17.

[3] *Thebaud* v. *Great West. Ins. Co.*, 155 N. Y. 516, 50 N. E. 281.

[4] *Thebaud* v. *Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 834. Compare *Thebaud* v. *Phœnix Ins. Co.*, 52 Hun, 495, 5 N. Y. Supp. 619.

[5] *Thebaud* v. *Phœnix Ins. Co.*, 52 Hun (N. Y.), 495, 23 N. Y. St. R. 814, 5 N. Y. Supp. 619. Seaworthiness applies to the intended purposes to which the vessel is to be applied, *Paddock* v. *Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

that the underwriter may be held liable for results of negligence or even of barratry by master or mariner during the voyage; on the other side, the doctrines by virtue of which the voyage is divided into stages for various purposes, and the warranty of seaworthiness on the part of the insured is extended so far as to make it applicable to acts of master and mariners or other representatives of the owners, during the pendency of the voyage.

Where the nationality or neutrality of a ship or cargo is an express warranty, it is implied by the warranty of seaworthiness that the ship will carry the requisite documents to show such nationality or neutrality.[1]

§ 186. **Implied Warranty—Deviation.**—There is a second implied warranty in marine insurance, namely, that there shall be no deviation.[2] A deviation is a voluntary departure, without necessity or reasonable cause, from the usual and regular course of the voyage contemplated by the policy.[3] Whether an increase of the risk is occasioned,[4] or whether the ship may have regained her route before loss, or whether the deviation may have contributed to the loss, is immaterial,[5] the insurer is discharged from liability as from the time of deviation.[6]

Thus, in a leading case in which reformation of the policy was prayed for, a policy in favor of Hearne for $5,000 insured the bark *Maria Henry*, under his charter-party, valued at $16,000, "at and from Liverpool to port in Cuba, and at and thence to port of discharge in Europe." The insured vessel, loaded with coal, proceeded to St. Iago de Cuba and discharged her outward cargo there. Thence she went to Manzanillo, another port in Cuba, where she took on

[1] *Elting* v. *Scott*, 2 Johns. 157; *Christie* v. *Secretan*, 8 T. R. 192.

[2] See English codification of law of deviation and excuses therefor, Mar. Ins. Act (1906), c. 41, §§ 46–49.

[3] *Hostetter* v. *Park*, 137 U. S. 30, 40, 11 S. Ct. 1; *Martin* v. *Ins. Co.*, 2 Wash. (C. C.) 254; *Coffin* v. *Newburyport, etc., Ins. Co.*, 9 Mass. 436, 447; *Kettell* v. *Wiggin*, 13 Mass. 68; *Thebaud* v. *Great Western Ins. Co.*, 155 N. Y. 516, 522, 50 N. E. 284 (in which it is said: "whether the departure amounts to a deviation must be determined by the motive, consequences, and circumstances of the act").

[4] *Maryland Ins. Co.* v. *Leroy*, 7 Cranch, 26, 3 L. Ed. 257; *Natchez Ins. Co.* v. *Stanton*, 10 Miss. 340, 41 Am. Dec. 592; *Snyder* v. *Atlantic Mutual Ins. Co.*, 95 N. Y. 196, 47 Am. Rep. 29; *Coffin* v. *Insurance Co.*, 9 Mass. 436.

[5] *Burgess* v. *Equitable Marine Ins. Co.*, 126 Mass. 70, 30 Am. Rep. 654; *Davis* v. *Garrett* (1830), 6 Bing. 716; *Thompson* v. *Hopper* (1856), 6 E. & B. 948, 26 L. J. Q. B. 22.

[6] Illustration from Chalmers & Owen, Ins. (1907): Insurance on salvage pumps from A. to the SS. *Alexandra* ashore in the neighborhood of D. "and while *there* engaged at the wreck and until again returned to A." The pumps are lost on the wreck while it is being towed to N., a port of safety. This is a deviation, *Wingate* v. *Foster* (1878), 3 Q. B. D. 582.

board a cargo of native woods. On the homeward voyage she was lost by perils of the sea. The company refused to pay the charterer upon the ground that the voyage from St. Iago de Cuba to Manzanillo was a deviation from the voyage described, inasmuch as the policy specified "port" and not "ports." The court sustained the defense and also held that the testimony produced by the plaintiff tending to show a trade usage incident to such voyages to go to two ports in Cuba, one for discharge of outward cargo, and another for shipping a return cargo, was not sufficient to establish a mutual mistake of the parties in the contract as written, and would not avail for reformation of the policy.[1]

The Massachusetts court furnishes an instructive illustration. A vessel, named *Christie Johnstone*, was insured "at and from Plymouth to the Banks, cod-fishing, and at and thence back to Plymouth." She took the usual quantity of bait, insufficient, however, for the trip, the practice being to rely principally on catching squid on the Banks to use for bait. This year the squid, though formerly plenty, were very scarce, and, in order to procure bait, the master was obliged to go one hundred miles from the Banks to the port of St. Peters, the trip thither with return to the Banks occupying about a week. Subsequently while fishing on the Banks, the vessel sprung a leak in a severe gale and was totally lost. The insurance company claimed that the number of fish taken on the trip was of no concern to it, and that if the insured proposed either to fish or catch bait in other waters than those specified, he should have insured the fresh adventure. The court held that while the plaintiff's vessel might have delayed for any reasonable time upon the Banks for the purpose of the voyage, including, for example, the occupations of fishing or getting bait, without being guilty of deviation, yet to depart from the specified route, though necessary to the success of the fishing adventure, was an unwarranted deviation which avoided the policy in suit.[2]

Trade usage plays an important part in fixing the proper course;[3] but a deviation from the direct course of the voyage insured, though in conformity with usage, will not be covered unless made in further-

[1] *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395. The plaintiff, however, succeeded in getting a judgment reforming a policy issued by another company upon the same charter-party, *Equitable Safety Ins. Co.* v. *Hearne*, 20 Wall. (U. S.) 494, 22 L. Ed. 398.

[2] *Burgess* v. *Equitable Mar. Ins. Co.*, 126 Mass. 70, 30 Am. Rep. 654.

[3] *Hostetter* v. *Park*, 137 U. S. 30, 11 S. Ct. 1; *Parsons* v. *Manufacturers' Ins. Co.*, 16 Gray (Mass.), 463, 465; and see § 89. But custom is not admissible to disturb an unambiguous description of prohibited waters, *Odiorne* v. *New England Mut. Mar. Ins. Co.*, 101 Mass. 551, 3 Am. Rep. 401.

ance of the adventure to which the policy relates;[1] and if the course of sailing between the places named is not fixed by mercantile usage, such a course must be pursued as would appear reasonably direct and advantageous to a master of ordinary skill and discretion.[2] But no voyage for any lawful purpose is a deviation under a time policy "to all places on the globe."[3]

If a vessel is insured to or from a district containing several ports not mentioned by name in the policy, she must visit them in their natural or geographical order;[4] but, if the ports are designated by name, they must be visited in the order in which they are mentioned in the policy.[5] It is not essential, however, that a vessel thus insured should proceed to all the ports named. She may go to one or more and omit the rest. But such ports as she does call at must be visited in the order above described, and it is not lawful for her to revisit any.[6] This rule is binding unless the departure is warranted by recognized usage.[7]

A mere plan or intention to deviate without the overt act does not avoid;[8] until the deviation begins the policy is still in force.[9] But a mere deviation, with intention to return to the course and complete it, must be distinguished from a change of voyage, since the rules of law applicable are not precisely the same in both cases. There is a change of voyage, where, after the commencement of the risk, the

[1] *Pearson* v. *Commercial Union Assur. Co.*, L. R. 1 App. Cas. 498. Where the course is defined by names of places in a general printed bill of lading, it may be a deviation to adhere to such definition if the character of the adventure demands a more direct route, *Margetson* v. *Glynn*, 1 Q. B. 337 (1892). Even a liberty to deviate may not authorize an independent voyage for a different object, *Seccomb* v. *Provincial Ins. Co.*, 10 Allen (Mass.), 305.

[2] *Hearne* v. *Marine Ins. Co.*, 20 Wall. (U. S.) 488, 22 L. Ed. 395; *Commonwealth Ins. Co.* v. *Cropper*, 21 Md. 311; *Turner* v. *Protection Ins. Co.*, 25 Me. 515, 43 Am. Dec. 294; *Reade* v. *Commercial Ins. Co.*, 3 Johns. 352, 3 Am. Dec. 495. If repairs become necessary the master need not always select the nearest available port, *Phelps, James & Co.* v. *Hill*, 1 Q. B. 605, 617 (1891).

[3] *Ellery* v. *New England Ins. Co.*, 8 Pick. (Mass.) 14.

[4] *Metcalfe* v. *Parry*, 4 Camp. 123; *Clason* v. *Simmonds* (1741), 6 T. R. 533, n.

[5] *Beatson* v. *Haworth*, 6 T. R. 533, 3 Rev. R. 258; *Marsden* v. *Reid*, 4 East, 576.

[6] *Marsden* v. *Reid*, 3 East, 576.

[7] *McCall* v. *Sun Mutual Ins. Co.*, 66 N. Y. 505. A departure to learn whether a port not of destination is blockaded is a deviation, *Maryland Ins. Co.* v. *Woods*, 6 Cranch (U. S.), 29. Or to stop at intermediate ports between two specified ports in the absence of necessity or custom, *Mannheim Ins. Co.* v. *Atlantic & L. S. R. Co.*, Rap. Jud. Queb. 11 B. R. 200 (1902), 11 K. B. 200. Compare *McCall* v. *Sun Mut. Ins. Co.*, 66 N. Y. 505.

[8] *Arnold* v. *Pac. Mut. Ins. Co.*, 78 N. Y. 7; *Thellusson* v. *Ferguson* (1780), 1 Dougl. 361; *Kewley* v. *Ryan* (1794), 2 H. Bl. 343; *Heselton* v. *Allnut* (1813), 1 M. & S. 46; *Hare* v. *Travis* (1827), 7 B. & Cr. 14.

[9] *Marine Ins. Co.* v. *Tucker*, 3 Cranch, 357, 2 L. Ed. 466; *Bearns* v. *Columbian Ins. Co.*, 48 Barb. (N. Y.) 445.

destination of the ship is voluntarily changed from the destination contemplated by the policy; and, in the latter case, according to the law of Great Britain,[1] the insurer is discharged from liability as from the time when the determination to change is manifested, although the ship may not in fact have left the regular course when the loss occurs.[2] The same distinction seems to be recognized in this country.[3] If the ship originally set sail from a place of departure, or to a destination, other than that specified in the policy, the risk does not attach at all, since the insurance is then avoided from the inception of the contract.[4]

§ 187. Deviation by Delay.—Unjustifiable delay in the prosecution of the adventure under a voyage policy amounts to a deviation, and the insurer is discharged from liability as from the time when the delay becomes unreasonable.[5]

This rule is exemplified by a case in a lower Federal court, in which

[1] Mar. Ins. Act (1906), § 45.

[2] Arnould, §§ 380, 381, 386; *Tasker* v. *Cunningham* (1819), 1 Bligh, 87.

[3] *Merrill* v. *Boylston F. & M. Ins. Co.*, 3 Allen (Mass.), 247. Compare *Bearns* v. *Columbian Ins. Co.*, 48 Barb. (N. Y.) 445 (intent to deviate is not deviation); *Simpson S. Co.* v. *Premier, etc., Assn.* (1905), 10 Com. Cas. 198, 201 ("an intention to commit a breach of course does not itself constitute a breach," by Bingham, J.).

[4] *Way* v. *Modigliani* (1787), 2 T. R. 30; *Simon* v. *Sedgwick* (1893), 1 Q. B. 303. Where a policy on goods covered both sea transit and subsequent land transit, the court held that to determine whether the risk attached, the terminus of the sea voyage only had to be considered, *Simon* v. *Sedgwick* (1893), 1 Q. B. 303, 62 L. J. Q. B. 163.

[5] *Arnold* v. *Pac. Mut. Ins. Co.*, 78 N. Y. 7; *Audenreid* v. *Mercantile Mut. Ins. Co.*, 60 N. Y. 482. Illustration from Chalmers & Owen, Ins. (1907): A ship is insured from England to the coast of West Africa and "during her stay and trade there" and back to England. After completing her cargo for homeward voyage, she delays sailing for a month to salve the cargo of another ship which has been wrecked. On the way home she is lost. The assured cannot recover, *Company of African Merchants* v. *Brit. Ins. Co.* (1873), L. R. 8 Exch. 154. In applying this rule there must be kept in view the object of the voyage, the cause for the delay, the usage of trade, and whether the act was done in the exercise of good faith and sound discretion or otherwise. No certain or fixed time can be said to be reasonable or unreasonable, *Foster* v. *Jackson Ins. Co.*, 1 Edm. Sel. Cas. (N. Y.) 290, 305; *New Jersey Lighterage Co.* v. *New York Mut. Ins. Co.*, 17 Jones & S. (N. Y.) 165, 168; *Phillips* v. *Irving*, 7 Man. & Gr. 325, 327. See *Grant* v. *King*, 4 Esp. 175, 176, the question here, however, was whether the delay voided the policy or whether there was an abandonment of the original voyage. See § 186, *supra*. Unreasonable delay in starting from initial port may prevent policy from attaching, *Maritime Ins. Co.* v. *Stearns* (1901), 2 K. B. 912. Where a policy of insurance was effected on a ship, at and from Montreal to Montevideo, and a delay occurred in the arrival of the vessel at Montreal, which, by converting the voyage from a summer into a winter one, materially affected the risk and rate of premium, it was held that the policy would not attach, *De Wolf* v. *Archangel Mar. Bank & Ins. Co.*, 2 Asp. Mar. L. C. 273. Delay occasioned by seizure for debts for repairs is not excusable, *Augusta Ins., etc., Co.* v. *Abbott*, 12 Md. 348. Nor delay by the master for his own purposes, *Mount* v. *Larkins*, 8 Bing. 108, 21 E. C. L. 241 (and cases cited). Nor unnecessary delay waiting for documents, *Himely* v. *Ins. Co.*, 1 Mill. Const. (S. C.) 154, 12 Am. Dec. 623.

the defendant had insured the plaintiff $500, by valued policy, "on his commissions as supercargo of the *Leonidas* from Alexandria to Pernambuco, until landed." The vessel arrived off Pernambuco at 9 A. M., but instead of going directly into port she came to anchor in the outer roadstead, while the master went to town for several hours to inquire about the market. A storm came on; the anchor dragged, and the vessel drifted ashore. The court instructed the jury that if the vessel could have proceeded to port without coming to anchor in the outer road, the stopping there was a deviation which discharged the underwriters. The insurance company got a verdict from the jury.[1] In the following instances, on the other hand, the delay was held to be justifiable: where a ship was detained for six weeks by a belligerent cruiser;[2] where an American ship was delayed because of the impossibility of getting an American crew in a French port;[3] where a ship was detained more than four months for repairs, and by insufficient depth of water to cross the bar;[4] where a ship was delayed at an intermediate port to make it seaworthy for the next stage of the voyage;[5] where, in pursuance of a known usage of the trade, the ship stopped a reasonable time for selling out her cargo.[6]

§ 188. Deviation, when Proper.—A deviation is justifiable, and does not exonerate the insurers, if it is necessitated either by physical or by moral force.[7] The compulsion, however, must be real and not unsubstantial or imaginary.

Thus, in an early case, the insurance was on goods on board the *Margaret and Anne* from Iceland to England. A total loss happened by fire; but prior to the loss, while the vessel still lay at Iceland, the captain of an English warship lying near by ordered the master of the *Margaret and Anne* to go out to sea to examine a strange sail. No violence or threats accompanied the order, but the master without remonstrance or protest, perhaps with a hope of sharing prize

[1] *West* v. *Columbian Ins. Co.*, 5 Cranch (C. C.), 309, Fed. Cas. No. 17,421.

[2] *Scott* v. *Thompson* (1805), 1 B. & P. N. R. 181.

[3] *Grant* v. *King* (1802), 4 Esp. 175.

[4] *Smith* v. *Surridge* (1801), 4 Esp. 25.

[5] *Bouillon* v. *Lupton* (1863), 15 C. B. N. S. 113, 33 L. J. C. P. 37.

[6] *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 383, 6 L. Ed. 664. So also where ship stopped to take on water, *Wood* v. *Pleasants*, Fed. Cas. No. 17,961, 3 Wash. C. C. 201.

[7] The necessity is not to be tested by the event but by all the circumstances attending the case, *Byrne* v. *Louisiana State Ins. Co.*, 7 Mart.N. S. (La.) 126. See also *Stocker* v. *Harris*, 3 Mass. 409, 418, where it is declared that the necessity must be real and imperious, *Burgess* v. *Equitable Marine Ins. Co.*, 126 Mass. 70, 79, 80, 30 Am. Rep. 654; *Riggin* v. *Patapsco Ins. Co.*, 7 Hur. & J. (Md.) 279, 289, 16 Am. Dec. 302; *Kettell* v. *Wiggin*, 13 Mass 68, 72.

money, put out to sea, fired two guns at the strange sail, and, upon discovery that she was a neutral, returned to his moorings. Lord Ellenborough decided that there was no duress, either physical or moral, exercised by the naval commander or his crew; and that, however laudable might have been the purpose of the master in obeying the direction of the captain of the warship, the deviation being without legal excuse, the voyage insured was at an end, and the policy forfeited.[1]

But in another case the motive for the departure was quite different, and the insured was held entitled to recover the loss of his ship by capture. The policy was upon the *Samuel Cumming*, at and from Jamaica, and Trinidad in the island of Cuba, to any port or ports of her discharge in the United Kingdom. In an unsuccessful quest for convoy the captain deviated slightly from the regular course, went around near Havana, and made a call of an hour at Moro Castle. Chief Justice Gibbs said that whatever is necessary for the safety of the ship, the captain may do as agent to the underwriters; and that it may be as justifiable to seek convoy as to avoid an enemy.[2]

If a vessel is forcibly diverted from her course by stress of weather,[3] the compulsion of an enemy in time of war,[4] or the violence of a mutinous crew,[5] or refusal of the crew to proceed on the voyage,[6] such a deviation is excusable.

If a vessel put into a port outside the ordinary course for repairs [7] or necessary supplies,[8] or to set her cargo in order, or to procure proper officers, or to recruit the crew for the navigation,[9] or if she remain in her port of lading to avoid a capture,[10] or depart from the usual course from the same motive, the divergence is excusable.[11]

[1] *Phelps* v. *Auldjo* (1809), 2 Camp. 350.

[2] *D'Aguilar* v. *Tobin* (1816), Holt N. P. 185. So also where there was a deviation to avoid capture, *O'Reilly* v. *Gonne* (1815), 4 Camp. 249.

[3] *Graham* v. *Commercial Ins. Co.*, 11 Johns. (N. Y.) 352; *Delaney* v. *Stoddart*, 1 Term Rep. 22, 1 Rev. Rep. 139.

[4] See *Scott* v. *Thompson*, 1 Bos. & P. N. R. 181 (ship detained six weeks by a hostile cruiser).

[5] See *Elton* v. *Brogden*, 2 Strange, 1264.

[6] *Driscoll* v. *Bovil*, 1 Bos. & P. 313.

[7] *Turner* v. *Protection Ins. Co.*, 25 Me. 515, 43 Am. Dec. 294; *Hall* v. *Ins. Co.*, 9 Pick. (Mass.) 466; *Silloway* v. *Neptune Ins. Co.*, 12 Gray (Mass.), 73.

[8] *Thomas* v. *Royal Exchange Assurance*, 1 Price, 195. In this case the ship was delayed by adverse winds and danger and put into a place of safety on its course and sent ashore for provisions and the policy gave liberty to touch and stay. See *Coles* v. *Marine Ins. Co.*, 3 Wash. (U. S. C. C.) 159, 163, per Washington, J.; *Wood* v. *Pleasants*, 3 Wash. (U. S. C. C.) 201, Fed. Cas. No. 17,961.

[9] *Winthrop* v. *Union Ins. Co.*, 2 Wash. (U. S. C. C.) 7, 17, Fed. Cas. No. 17,901; *Fernandez* v. *Great Western Ins. Co.*, 3 Robb. (26 N. Y. Super. Ct. 457, 475, per Morrell, J., case is reversed 48 N. Y. 571, 8 Am. Rep. 571.

[10] *Whitney* v. *Haven*, 13 Mass. 172.

[11] *Post* v. *Phœnix Ins. Co.*, 10 Johns. (N. Y.) 78; *Goyon* v. *Pleasants*, 3 Wash. (U. S. C. C.) 241, Fed. Cas. No. 5,647. Illustration from Chalmers & Owen, Ins. (1907): Ship insured from Lyons

A deviation is also proper when caused by circumstances over which neither the master nor the owner of the ship has any control,[1] or when necessary to comply with a warranty,[2] or to avoid a peril whether insured against or not,[3] or when caused by barratrous conduct of master or crew if barratry be insured against,[4] or when made in good faith for the purpose of saving human life, as, for example, for necessary treatment of a sick or wounded seaman,[5] or relieving another vessel in distress.[6]

A departure from an ordinary course of the voyage with the object of saving persons whose lives are in jeopardy is allowed on the ground of humanity, but the same immunity will not be extended in favor of a deviation made solely for the purpose of saving property.[7]

Thus, in an English case, the plaintiffs chartered the defendants' steamship *Olympias* to carry a cargo of wheat from Cronstadt to the Mediterranean. Whilst on her voyage thither the defendants' captain sighted the *Arion* in distress, and for £1,000 agreed to tow her into the Texel, which was out of his direct course. Whilst so doing, the *Olympias* stranded, and ultimately with her cargo was totally lost. To save the *Arion* and her cargo, it was necessary to take her to the Texel; but the deviation was not necessary to the safety of those on board her. Consequently it was held that there was a fatal deviation and that the plaintiffs were entitled to recover the value of their cargo against the defendants as owners of the ship in fault.[8]

When the cause excusing the deviation or delay ceases to operate,

to Galatz. She starts from Lyons on July 24, properly equipped for the river voyage. She is detained for three weeks at Marseilles to equip herself for the open sea voyage. This delay is justifiable, *Bouillon* v. *Lupton* (1863), 15 C. B. N. S. 113.

[1] "If a degree of force was exercised towards" the master "which either physically he could not resist, or morally as a good subject he ought not to have resisted, the deviation is justified," otherwise not. *Phelps* v. *Auldjo*, 2 Camp. 350, 351, per Lord Ellenborough. Cal. Civ. Code, § 2695, subd. 1.

[2] Going out of course to procure a pilot is not a deviation, *Pouverin* v. *Louisiana State Mar. & F. Ins. Co.*, 4 Rob. (La.) 234.

[3] See *Lee* v. *Gray*, 7 Mass. 349; *Robinson* v. *Marine Ins. Co.*, 2 Johns. (N. Y.) 89; *Scott* v. *Thompson*, 1 Bos. & P. N. R. 181; Cal. Civ. Code, § 2695, subd. 2.

[4] *Ross* v. *Hunter*, 4 T. R. 33.

[5] *The Iroquois*, 194 U. S. 240, 24 S. Ct. 640. See also *Perkins* v. *Augusta Ins. & Bkg. Co.*, 10 Gray (Mass.), 312, 71 Am. Dec. 654.

[6] *Schooner Boston*, 1 Sumn. 328.

[7] *Co. of African Merchants* v. *British & Foreign Marine Ins. Co.*, L. R. 8 Exch. 154. See also *Settle* v. *Perpetual Ins. Co.*, 7 Mo. 379. But compare *Woolf* v. *Claggett*, 3 Esp. 257, 258, 6 Rev. R. 830. If the paramount motive is to save life, and the saving of property is incidental, the underwriter is liable, *Williams* v. *Box of Bullion*, 1 Spr. (U. S.) 57, Fed. Cas. No. 17,717; *Crocker* v. *Jackson*, 1 Spr. (U. S.) 141, Fed. Cas. No. 3,398; *Scaramanga* v. *Stamp*, 5 C. P. Div. 295.

[8] *Scaramanga* v. *Stamp* (1880), 5 C. P. D. 295, 49 L. J. C. P. 674 (no question of insurance was directly involved).

the ship must resume her course and prosecute her voyage, with reasonable dispatch.[1]

In time policies, especially on voyages in inland waters, a deviation from the permitted course has been held to suspend and not to avoid the policy;[2] but these decisions are of very questionable soundness, and are not in accord with the current of authority.[3] No such doctrine is recognized by the English common law,[4] or by the English codification of marine insurance law.[5]

§ 189. Illegality.—There is a third implied warranty, that the adventure insured is a lawful one and that so far as the insured can control the matter the adventure shall be carried out in a lawful manner.[6] Illegality in any part of an integral voyage has been held to make the whole voyage illegal;[7] but mere knowledge that there is some illegality in the performance of the voyage does not make the insured a party to the illegality when he has no control over the navigation of the ship.[8]

The lawfulness of an American adventure or an American insurance, as the question comes before an American court, is determined by American law.[9] In relation to an American policy, an adventure is

[1] Eng. Mar. Ins. Act (1906), § 49. Preliminary trial trips up and down a river by a new craft to test the vessel's capacity to make an ocean voyage may not be deviations, *Thebaud* v. *Great Western Ins. Co.*, 155 N. Y. 516, 50 N. E. 284. Compare *Fernandez* v. *Great Western Ins. Co.*, 48 N. Y. 571, 8 Am. Rep. 571.

[2] *Greenleaf* v. *St. Louis Ins. Co.*, 37 Mo. 25; *Hennessey* v. *Manhattan Fire Ins. Co.*, 28 Hun (N. Y.), 98; *Wilkins* v. *Ins. Co.*, 30 Ohio St. 317. Question of deviation often turns upon the phraseology or stipulation of the policy.

[3] *Cogswell* v. *Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076, aff'd 157 N. Y. 709; *Odiorne* v. *New England Mut. Mar. Ins. Co.*, 101 Mass. 551, 3 Am. Rep. 401; *Stetson* v. *Mass. Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217. See § 114.

[4] Arnould, §§ 376, 377.

[5] Mar. Ins. Act (1906), § 46 (1).

[6] *Redmond* v. *Smith*, 7 M. & G. 457. As to illicit voyages: (1) Where the sovereign of a country to which the ship belongs prohibits his subjects from trading with a foreign country or port, whether the prohibition be a consequence of his declaring war against the foreign country, or be made by express ordinance for any cause at the will of the sovereign. (2) Voyages prohibited by the trade laws of a foreign state. (3) Transportation by a neutral of goods contraband of war and the law of nations and (4) a trade illicit *lege loci* and a trade illicit *jure belli*, see *Richardson* v. *Marine Ins. Co.*, 6 Mass. 102, 111–115, 4 Am. Dec. 92, per Parsons, C. J. But noncompliance with law of Congress requiring a certain quantity of water, well secured under deck, does not render the voyage illegal, so as to avoid insurance, *Warren* v. *Mfrs. Ins. Co.*, 13 Pick. (Mass.) 518, 25 Am. Dec. 341.

[7] *Clark* v. *Protection Ins. Co.*, 1 Story, 109, Fed. Cas. No. 2,832; De Hart & Simey, Ins. (1907), 53; Arnould, §§ 735–739.

[8] De Hart & Simey, Ins. (1907), 53; *Cunard* v. *Hyde* (1858), 27 L. J. Q. B. 408; Arnould, § 745.

[9] So also an insurance in England either on enemies' goods or against British capture was held illegal by British court, *Kellner* v. *Le Mesurier* (1803), 4 East, 402, 403; *Gamba* v. *Le Mesurier*, 4 East, 407. Illustrations of illegality from Chalmers & Owen, Ins. (1907): (1) Time policy on ship. The

illegal which contravenes the laws or the war policy of this country. Thus, an insurance on an adventure prohibited by a United States revenue law, or on an enemy's property, or on an American subject's unlicensed trade with an enemy, is void.[1] So also the carriage of contraband goods to an enemy of this country, or a voyage in breach of an American blockade would be an illegal adventure.[2]

Smuggling voyages, trading adventures to an enemy's port, and all other enterprises prohibited by the law of the land or by the law of nations, being illegal, no policy of insurance will be upheld if effected with the intent to cover them; but this prohibition has been held not to apply to trading adventures undertaken in violation of the revenue laws of other nations.[3] It has been urged, however, that a sound regard for international ethics must ultimately eliminate the exception, although now recognized both in England and America.[4] But the reasons favoring the deliberate conclusions of the courts on this question are weighty, and are not likely to be ignored in the future. To learn all the laws of his home country furnishes a sufficient task for the average person insured. Any rule fastening upon the insured a sweeping obligation to make himself familiar in addition with the local laws and regulations of all foreign nations would be

master with the connivance of the owner, engages in smuggling. The ship is arrested in England. The insurer is not liable, *Pipon* v. *Cope*, 1 Camp. 434. But smuggling or other illegal conduct without owner's connivance is barratry and covered, *Cory* v. *Burr* (1883), 8 App. Cas. 399. (2) Policy on a French ship effected in England, capture being insured against. After policy is effected war breaks out between France and England and the ship is captured by a British cruiser. The assured cannot recover on the policy, *Kellner* v. *Le Mesurier* (1803), 4 East, 396.

[1] Likewise Mr. Justice Washington held that sailing under a British license during war between this country and England was illegal, *Craig* v. *United States Ins. Co.*, 1 Pet. C. C. 410, Fed. Cas. No. 3,340. But see *Hayward* v. *Blake*, 12 Mass. 176.

[2] De Hart & Simey, Ins. (1907), 53, where it is also said: "The English courts pay no attention to the revenue laws of foreign states, and in case of a war between foreign states they do not regard blockade running or the carriage of contraband of war as illegal," citing *Ex parte Abavasse* (1865), 34 L. J. Bk. 17; *The Helen* (1865), L. R. 1 A. & E. 1. And see *Parker* v. *Jones*, 13 Mass. 173; *Skidmore* v. *Destoity*, 2 Johns. Cas. 77 (insurance sustained upon goods contraband of war, though captured by a British cruiser and condemned). The United States Circuit Court held with the courts of England and Massachusetts "that a denial of entry or an interdiction of commerce at the port of destination is not a risk within the common policy," though a risk that could be expressly undertaken, *Andrews* v. *Ins. Co.*, 3 Mason, 6, citing to the different doctrine, to wit, that the risk would fall within the common policy, the following New York cases, *Suydam* v. *Mar. Ins. Co.*, 1 John. 181; *Schmidt* v. *Ins. Co.*, 1 John. 249; *Craig* v. *Ins. Co.*, 6 John. 226.

[3] *Fracis* v. *Sea Ins. Co.*, 8 Asp. Mar. Cas. 418 (edict Persian government); *Lever* v. *Fletcher*, Park, Ins. (8th ed.), 506. But policy would be void if assured concealed any material fact which he was bound to disclose, *Parker* v. *Jones*, 13 Mass. 173. Insurance against loss by a breach of foreign trade laws is legal, *Parker* v. *Jones*, 13 Mass. 173; *Richardson* v. *Maine F. & M. Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92.

[4] Hughes, Admiralty, 66.

onerous and would work injustice in many instances. To thus multiply, in favor of the underwriters, the grounds for forfeiting the insurance moneys which they have agreed to pay in case of loss, would result in serious misfortune, and not infrequently would bring ruin to innocent parties.

Policies upon risks which contravene either the statutes enacted to regulate trade and navigation, or the commercial treaties entered into with other countries, are void equally with those which run counter to the revenue laws, subject, however, to the exception, that, if the adventure can be carried on without violating the law, an illegal act performed in the prosecution of it will not invalidate the policy unless committed by or with the concurrence of the assured.[1]

Thus, where the defendant insured Means & Clark, for whom it might concern, in the sum of $20,000, on the ship *Avon*, valued at $28,000, for one year. She sailed from Maine to New Orleans, thence to Natchez and on her passage thence for Liverpool was totally lost by perils of the seas. The master, Arthur Child, was employed for the owners to obtain certain rigging and equipment for the ship. It was his intention to change a hempen cable for one of iron. While at New Orleans, Child, without privity of the owners, substituted for the hempen cable an iron cable, worth more than $400, which had been smuggled in and secretly put aboard the *Avon* at night, Child's object being to avoid payment of duties to the United States. Justice Story decided that, inasmuch as the policy was founded in no illegality at its inception, the plaintiffs were entitled to recover $20,000 for a total loss.[2]

§ 190. Actual Total Loss.—A loss may be total or partial. A

[1] *Waugh* v. *Morris*, L. R. 8 Q. B. 202. Thus in a case where the master of a vessel in the timber trade stowed a portion of the cargo on deck during the winter season, and, contrary to statute, sailed without a clearance certificate that the cargo was below deck, it was held that the illegality did not vitiate the policy, it having been committed without the knowledge or privity of the owner, *Wilson* v. *Rankin*, L. R. 1 Q. B. 162. Otherwise if owner was privy to the illegality, *Cunard* v. *Hyde* (1860), 29 L. J. Q. B. 6. Again, where a ship not licensed by the board of trade to carry passengers did carry them, it was held, that, inasmuch as such carriage was the unauthorized act of the master alone, without the knowledge of the owners, and contrary to their intentions, the policy was not vitiated by it, *Dudgeon* v. *Pembroke*, 2 Asp. Mar. L. C. 323, L. R. 9 Q. B. 581, 1 Q. B. D. 96. It has been held that a policy "for whom it may concern" covers belligerent property unless there is something in the case to exempt it from the ordinary import of these words, *Buck* v. *Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151, 160, 7 L. Ed. 90. As to illegality of part of the risk see *Richardson* v. *Maine Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92; *Bird* v. *Appleton*, 8 T. R. 562, 565; and compare *Wilson* v. *Maryatt*, 8 T. R. 41, 45, 46.

[2] *Clark* v. *Protection Ins. Co.*, 1 Story, 109, Fed. Cas. No. 2,832.

total loss may be actual or constructive. An actual total loss occurs where the subject-matter insured is destroyed or irreparably damaged, or where the assured is irretrievably deprived of it.[1]

Thus, for instance, where a vessel founders in mid-ocean in a gale,[2] or is captured by an enemy and condemned as a prize,[3] or where goods taken ashore from a wreck are plundered by the inhabitants of the coast.[4]

Indeed, wherever the thing insured is by the operation of a peril insured against reduced to such a state as to be incapable of use under its original name or kind, there is an actual total loss. For example, if a ship is so injured by the perils of the sea as to be incapable of repair, the loss is actual,[5] though her materials survive [6] either in fragments or bound together in the original form. And again, if goods are so badly damaged as to become incapable of use for the purpose intended, there is an actual total loss. As, for example, where dates were so impregnated with sewage and so fermented as not to be mer-

[1] *Sælberg* v. *Western Assur. Co.*, 119 Fed. 23, 55 C. C. A. 601 (ship was not lost *in specie*). See also *The Blairmore* (1898), A. C. 593, 67 L. J. P. C. N. S. 96 (ship foundered in bay and was raised, a constructive loss). But a wreck incapable of being brought to port is an actual total loss, *Walker* v. *Protection Ins. Co.*, 29 Me. 317. Illustrations from Chalmers & Owen, Ins. (1907): (1) Hides are insured from Valparaiso to Bordeaux. In consequence of sea damage they arrived at Rio in a state of incipient putridity and are sold there. Their state is such that they would be wholly putrid if carried on to Bordeaux. This is an actual total loss, *Roux* v. *Salvador*, 3 Bing. N. C. 266. (2) A ship is deserted in a sinking condition. She is afterwards towed into port by salvors and sold by order of the court for less than the salvage costs. This is an actual total loss, *Crossman* v. *West* (1887), 13 App. Cas. 160. If a ship can be taken to a port and repaired, though at an expense exceeding its value, it has not ceased to be a ship, *Nova Scotia Mar. Ins. Co.* v. *Churchill*, 26 Can. S. C. 65, 73, citing *Barker* v. *Jansen*, L. R. 3 C. P. 303; and see *Burt* v. *Brewers, etc., Ins. Co.*, 78 N. Y. 400.

[2] *Ogden* v. *N. Y. Mut. Ins. Co.*, 35 N. Y. 418 (total loss of passage money). Submersion of a vessel is or is not a total loss according to circumstances, *Sewall* v. *U. S. Ins. Co.*, 11 Pick. (Mass.) 90.

[3] *Rhinelander* v. *Ins. Co.*, 4 Cranch (U. S.), 29; *Monroe* v. *British F. & M. Ins. Co.*, 52 Fed. 777, 5 U. S. App. 179, 3 C. C. A. 280; *Sawyer* v. *Maine F. & M. Ins. Co.*, 12 Mass. 291; *Watson* v. *Marine Ins. Co.*, 7 Johns. (N. Y.) 57. But not before sentence of condemnation while there is a *spes recuperandi*, *Barney* v. *Maryland Ins. Co.*, 5 Har. & J. (Md.) 139. If ship is afloat, or can be put afloat, or at any expense can be repaired, she is not "an actual total loss," but underwriters by taking possession under a rescue clause may convert the loss into "an actual total loss," *Carr* v. *Security Ins. Co.*, 109 N. Y. 504, 17 N. E. 369, 16 N. Y. St. R. 442. But it has been held that total loss of value in a ship though repairable constitutes "an actual total loss," *Bullard* v. *Roger Williams Ins. Co.*, 1 Curt. (U. S.) 148.

[4] *Boudrett* v. *Heutigg*, 1 Holt (N. P.), 149.

[5] *Irving* v. *Manning*, 1 H. L. Cas. 287; *Murray* v. *Great Western Ins. Co.*, 72 Hun, 282, aff'd on opinion below 147 N. Y. 711, 42 N. E. 724; *Graves* v. *Washington M. Ins. Co.*, 12 Allen (Mass.), 391.

[6] A mere congeries of materials useable as a coal barge is not a ship, *Merchants' S. Co.* v. *Commercial Mut. Ins. Co.*, 51 N. Y. Sup. Ct. 444; and see *Cambridge* v. *Anderton*, 2 Barn & C. 691.

chantable as dates.[1] So also where perishable goods are so much damaged that it is impossible for them to arrive at destination, and therefore they are justifiably sold at a port of distress, there is an absolute total loss.[2]

In the case of an actual total loss, no notice of abandonment need be given.[3] And where, after the lapse of a reasonable time, no news of the ship has been received, an actual total loss may be presumed.[4]

§ 191. Constructive Total Loss—What Constitutes.—It may be

[1] *Asfar & Co.* v. *Blundell* (1896), 1 Q. B. 123, 65 L. J. Q. B. N. S. 138, 73 L. T. Rep. 648; but see *Williams* v. *Canton Ins. Co.* (1901), App. Cas. 462. So where the remnants of a machine though about one-half in weight of the whole were of no value as a machine, *Great Western Ins. Co.* v. *Fogarty*, 19 Wall. 640, 22 L. Ed. 216. So where hides and skins became putrid in mass, *De Peyster* v. *Ins. Co.*, 19 N. Y. 272, 75 Am. Dec. 331. So of rotten fruit, thrown overboard, *Dyson* v. *Rowcroft*, 3 B. & P. 474. It is held that there can be no actual total loss of a cargo of goods if any part arrive in specie at the port of destination and capable of use for the purpose intended, but only when they are physically destroyed, or their value extinguished by a loss of identity. *Washburn Moen Mfg. Co.* v. *Reliance Mar. Ins. Co.*, 179 U. S. 1, 11, 21 S. Ct. 1, 45 L. Ed. 49 (cargo of wire); *Morean* v. *Ins. Co.*, 1 Wheat. (U. S.) 219, 4 L. Ed. 75 (cargo of corn); *Biays* v. *Ins. Co.*, 7 Cranch (U. S.), 415, 3 L. Ed. 389. *Wallerstein* v. *Columbian Ins. Co.*, 44 N. Y. 204, 4 Am. Rep. 664 (coffee, total loss of value is "a total loss" if not an "actual total loss"); and compare *Devitt* v. *Prov. Wash. Ins. Co.*, 173 N. Y. 17, and *Corbett* v. *Spring Garden Ins. Co.*, 155 N. Y. 389, 50 N. E. 282. If any goods are left capable of preservation *in specie*, an entire loss of value is not "an actual total loss," *Hugg* v. *Ins. Co.*, 7 How. (U. S.) 595, 12 L. Ed. 834; *Robinson* v. *Commonwealth Ins. Co.*, 20 Fed. Cas. No. 1002; *Williams* v. *Kennebec Mut. Ins. Co.*, 31 Me. 455; *Francis* v. *Boulton* (1895), 65 L. J. Q. B. 153. Where goods reach destination *in specie*, but, by reason of obliteration of marks, are incapable of identification, loss, if any, is partial, not total, *Spence* v. *Union Mar. Ins. Co.* (1868), L. R. 3 C. P. 427. Jettison of a cargo of cattle does not create an absolute total loss, whether they were jettisoned for the purpose of being saved or to lighten the vessel, if in fact a part are ultimately saved and sold as salvage, *Monroe* v. *British & F. M. Ins. Co.*, 52 Fed. 777, 3 C. C. A. 280, 5 U. S. App. 179. As to total loss of freight see *Silloway* v. *Neptune Ins. Co.*, 12 Gray (Mass.), 73; *Hubbell* v. *Great West. Ins. Co.*, 74 N. Y. 246; *Abbott* v. *Broome*, 1 Caines (N. Y.), 292, 2 Am. Dec. 187; *De Longuemere* v. *Phœnix Ins. Co.*, 10 Johns. (N. Y.) 127. As to total loss of profits see *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222, 7 L. Ed. 659. As to sale by master see *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. (U. S.) 604; *Gardner* v. *Salvador*, 1 Mood. & Rob. 116; *Cambridge* v. *Anderton*, 4 Dowl. & Ry. 203, 2 B. & Cr. 691; *Martin* v. *Crokatt*, 14 East, 465; *Nova Scotia Mar. Ins. Co.* v. *Churchill*, 26 Can. S. C. 65.

[2] *Roux* v. *Salvador* (1836), 3 Bing. N. C. 266, 7 L. J. Exch. 328. Likewise where the ship was justifiably sold because not capable of being repaired with profit, *Idle* v. *Royal Exchange Ass. Co.* (1819), 8 Taunt. 755; *Gordon* v. *Mass. F. & M. Ins. Co.*, 2 Pick. (Mass.) 249. But where the master having no funds for repairing the vessel, sold her, it was held that there was not a total loss, *Murray* v. *Hatch*, 6 Mass. 465. Compare *Am. Ins. Co.* v. *Ogden*, 15 Wend. (N. Y.) 532, 20 Wend. (N. Y.) 287; *Neilson* v. *Columbian Ins. Co.*, 1 Johns (N. Y.) 301. Sale because of lack of funds to repair at port of destination does not constitute a total loss, *Allen* v. *Commercial Ins. Co.*, 1 Gray (Mass.), 154.

[3] *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 471. Assured though suing for total may recover for partial loss if policy permit, *King* v. *Walker*, 2 H. & C. 384.

[4] *Ogden* v. *N. Y. Mut. Ins. Co.*, 35 N. Y. 418; *Green* v. *Brown*, 2 Strange, 1199.

stated generally that there is a constructive total loss where the loss, though not actually total, is of such a character that the assured is entitled, if he thinks fit, to treat it as total by abandonment.[1]

§ 192. **Constructive Total Loss—England.**—In the codification of marine insurance law, recently enacted in England, constructive total loss is thus described: (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. (2) In particular, there is a constructive total loss (i) where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or (ii) in the case of damage to a ship, when she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or (iii) in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.[2]

[1] *Western Assur. Co.* v. *Poole* (1903), 1 K. B. 376, 383; *Sælberg* v. *Western Assur. Co.*, 119 Fed. 23, 29, 55 C. C. A. 601. One case held a constructive total loss though there was no right of abandonment, but this was based upon the special phraseology of the policy, *Devitt* v. *Prov. Wash. Ins. Co.*, 173 N. Y. 17, 65 N. E. 777. Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss, *Adams* v. *Mackenzie* (1863), 13 C. B. (N. S.) 446; *Sailing Ship Blairmore* v. *Macredie* (1898), App. Cas. 598. The term "abandonment" is used in three different senses, (1) voluntary cession of remains of subject insured to insurer in case of constructive total loss; (2), incorrectly, as equivalent to notice of abandonment; (3) the cession, in favor of insurer, by operation of law, of whatever remains of subject insured, when insurer settles for a total loss, Chalmers & Owen, Ins. (1907), 90.

[2] Mar. Ins. Act (1906), § 60. Insurance on ship. The ship gets on a rock and the master *bona fide* comes to the opinion that she cannot be saved. He therefore sells her for £18. The buyer gets her off the rock and repairs her at a cost of £750, when she is worth £1200. This, it is held in England, is not a total loss, *Gardner* v. *Salvador*, 1 Moo. & R. 116; *Rodocanachi* v. *Elliott* (1874), L. R. 9 C. P. 518 (goods in besieged town); *Woodside* v. *Globe Mar. Ins. Co.* (1896), 1 Q. B. 105 (valued policy); *Rankin* v. *Potter*, L. R. 6 H. L. 83; *Corbett* v. *Spring Garden Bank*, 155 N. Y. 389

§ 193. **Constructive Total Loss—United States.**—In the United States, for convenience and certainty, an arbitrary rule has been adopted to determine whether the insured is entitled to claim a constructive total loss.[1] Where the cost of repairs or expenditures will exceed fifty per cent of the value of the ship or cargo when repaired or restored, by the rule prevailing in this country, a constructive total loss is established entitling the assured to abandon.[2] "The value of the ship when repaired," as referred to in this and the last section is, in a valued as well as in an open policy, the real repaired value. For this purpose, in the absence of agreement otherwise, a policy valuation does not govern.[3]

Whatever the actual damage to the thing insured, there may be a constructive total loss, where circumstances render it impracticable to continue the adventure to its conclusion;[4] as, for example, in case

394, 50 N. E. 282. Expense of future salvage is to be included, *Sewall* v. *U. S. Ins. Co.*, 11 Pick. (Mass.) 90; *Kemp* v. *Halliday* (1866), L. R. 1 Q. B. 520. Constructive total loss as computed in England, *Angel* v. *Merchants' Mar. Ins. Co.* (1903), 1 K. B. 811 (ship valued at £23,000, total repairs amounted to £22,559. *Held*, owner could not add value of wreck to cost of repairs in order to make constructive total loss); *The Blairmore*, 67 L. J. P. C. N. S. 96, 100 (1898), App. Cas. 593. In referring to the method specified in the text of estimating cost of repairs to a damaged ship it is said: "These words give further effect to the principle that the test of repairability is purely a physical or material one. The test is whether the vessel is worth repairing or not, without any regard being paid to the final incidence of the expenses of doing so. No deductions from such expenses should therefore be made merely because some other interest is liable to contribute thereto, by way of general average or otherwise. But inasmuch as there may be in the future certain expenses incurred not merely on the ship's account, but by way of salvage on account of and for the benefit of other parties as well, it is only the ship's proportion of such expenses which must be taken as forming the cost of her repairs, the rest being deemed to be incurred on behalf of the other interests thereby benefited. The words 'future general average contribution' must mean contribution to which the vessel would become liable owing to future operations," De Hart & Simey, Ins. (1907), 71.

[1] *Ins. Co. of North Am.* v. *Canada Sugar Ref. Co.*, 87 Fed. 491, 493, 5 U. S. App. 22, 31 C. C. A. 65, reversed 175 U. S. 609, 20 S. Ct. 239.

[2] *Bradlie* v. *Maryland Ins. Co.*, 12 Pet. (U. S.) 378, per Story, J., 9 L. Ed. 1123; *Sælberg* v. *West. Assur. Co.*, 119 Fed. 23, 31; *Devitt* v. *Providence Wash. Ins. Co.*, 173 N. Y. 17, 21, 65 N. E. 777, per Cullen, J.; *McConochie* v. *Sun Mut. Ins. Co.*, 26 N. Y. 477; *Louisville Underwriters* v. *Monarch*, 99 Ky. 578, 36 S. W. 563; *Fulton Ins. Co.* v. *Goodman*, 32 Ala. 108; *Jones* v. *West. Assur. Co.*, 198 Pa. St. 206, 47 Atl. 948. Successive losses may be added to make up the amount, *Taber* v. *China Mut. Ins. Co.*, 131 Mass. 239.

[3] *Irving* v. *Manning* (1847), 1 H. L. Cas. 287. But policies often contain a clause stipulating that the agreed valuation shall be taken to be the repaired value; see *North Atlantic S.S. Co.* v. *Burr* (1904), 9 Com. Cas. 164.

[4] Judge Story says: "The right of abandonment has been admitted to exist, where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests by sovereign authority; where there is a present total loss of the physical possession and use of the ship, as in case of submersion; where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be re-

of an embargo or capture,[1] or impossibility of forwarding cargo by a substituted ship,[2] or breaking up of the voyage for the cargo by the total destruction of the ship without opportunity of reshipment,[3] but the master has no right to sell a wrecked vessel and so make the insurers liable for a total loss upon it, unless in a case of such extreme necessity as to leave no alternative.[4]

With respect to freight, in case it is impossible to earn it, owing to a total loss of ship or cargo, the loss, as already shown, is actual and can be recovered without notice of abandonment. Where, however, the loss though probable is not ascertained, but depends upon chances of recovery or estimated expenditure, the claim falls within the category of constructive total loss, and requires the same kind of proof as in the case of similar claims upon ship or cargo.[5]

If the ship is destroyed, or the voyage interrupted by a peril in-

paired for the voyage in the port where the disaster happens; and, lastly, where the injury is so extensive, that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value. None of these cases will, I imagine, be disputed. If there be any general principle, that pervades and governs them, it seems to be this, that the right to abandon exists, whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost," *Peele* v. *Merchants' Ins. Co.*, 3 Mason, 27, 65, 19 Fed. 98.

[1] *Ruys* v. *Royal Exch. Assur. Corp.* (1897), 2 Q. B. 135 (though ship was ultimately released and returned).

[2] *Canada Sugar Ref. Co.* v. *Insurance Co.*, 87 Fed. 491, 493, reversed on another point, 175 U. S. 609, 20 S. Ct. 239. Where on destruction of ship, whaling outfits are in safety at a port and can be sold, there is no constructive total loss of outfits, though no vessel is obtainable within a reasonable time for forwarding them, *Taber* v. *China Mut. Ins. Co.*, 131 Mass. 239.

[3] *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. (U. S.) 383, 6 L. Ed. 664. A sale of ship or cargo from necessity, as viewed at the time, is a total loss in this country, *Hurtin* v. *Phœnix Ins. Co.*, 12 Fed. Cas. 1047; *Fuller* v. *Kennebec Mut. Ins. Co.*, 31 Me. 325; *Stephenson* v. *Piscataqua F. & M. Ins. Co.*, 54 Me. 55. Master presumed to have done his duty in ordering sale, *Robinson* v. *Commonwealth Ins. Co.*, 20 Fed. Cas. 1002. But master must consult owners or insurers if practicable, *Peirce* v. *Ocean Ins. Co.*, 18 Pick. (Mass.) 83, 29 Am. Dec. 567.

[4] *Gordon* v. *Mass. F. & M. Ins. Co.*, 2 Pick. (Mass.) 249; *Hall* v. *Franklin Ins. Co.*, 9 Pick. (Mass.) 466, *Peirce* v. *Ocean Ins. Co.*, 18 Pick. (Mass.) 83, 29 Am. Dec. 567; *Taber* v. *China Mut. Ins. Co.*, 131 Mass. 239.

[5] *Hart* v. *Delaware Ins. Co.*, 11 Fed. Cas. 683; *Lord* v. *Neptune Ins. Co.*, 10 Gray (Mass.), 109; *Thwing* v. *Wash. Ins. Co.*, 10 Gray (Mass.), 443; *Hubbell* v. *Great West. Ins. Co.*, 74 N. Y. 246. As to constructive total loss of freight in England see *Rankin* v. *Potter* (1873), L. R. 6 H. L. 83, 102; *Popham* v. *Ins. Co.* (1904), 10 Com. Cas. 31; *Hughes* v. *Sun Mut. Ins. Co.*, 100 N. Y. 58, 63, 2 N. E. 901, 3 N. E. 71 (total loss of freight defined). A loss of more than half a cargo of coal *in specie* by the perils insured against authorizes abandonment and claim for total loss of freight under a valued policy, *Boardman* v. *Boston Mar. Ins. Co.*, 146 Mass. 442, 453, 16 N. E. 26. As to constructive total loss of profits, see *Canada Sugar R. Co.* v. *Ins. Co.*, 175 U. S. 609, 20 S. Ct. 239, 44 L. Ed. 292.

sured against, it is, in general, the duty of the master to transship the cargo[1] or other movables, if he can, and send them on to their destination. In case of justifiable transshipment, the liability of the insurer continues notwithstanding the landing or transshipment.[2]

§ 194. **Notice of Abandonment.**—Where there is a constructive total loss, the assured may either treat it as a partial loss, or abandon the subject-matter insured to the insurer, and treat the loss as if it were an actual total loss.[3] There is no compulsion upon the assured to abandon,[4] but upon exercising an election to avail himself of this privilege, he must, speaking generally, with reasonable diligence after receipt of reliable tidings of the loss,[5] give to the insurer a notice of abandonment so that the latter may have opportunity to take any proper steps to recover the property or realize any salvage that may be obtainable.[6] An actual abandonment, however, if accepted by the underwriter, dispenses with the necessity of formal notice of abandonment.[7]

The object of the notice is to bind the assured by his election, and to give the underwriters opportunity of making the most of the abandoned property.[8] Abandonment takes place in all cases of total loss, actual or constructive, but notice is only necessary in the latter case.[9]

[1] *Bryant* v. *Commonwealth Ins. Co.*, 13 Pick. (Mass.) 543; *Center* v. *American Ins. Co.*, 7 Cow. 564, aff'd 4 Wend. (N. Y.) 45; *Schieffelin* v. *N. Y. Ins. Co.*, 9 Johns. 21.

[2] Chalmers & Owen, Ins. (1907), 81, and authorities cited. See *Hansen* v. *Dunn* (1906), 11 Com. Cas. 100. "It is probable that the insurer is liable for loss occurring in the course of transshipment, landing, or reshipment, as well as for losses that take place on the substituted vessel," De Hart & Simey, Ins. (1907), 70, citing Arnould, § 468. The insurer is still liable for the cargo which is of necessity carried overland, because of the damage to the ship, *Bryant* v. *Commonwealth Ins. Co.*, 13 Pick. (Mass.) 543.

[3] *Western Assur. Co.* v. *Poole* (1903), 1 K. B. 376, 384; *Delaware Ins. Co.* v. *Winter*, 38 Pa. St. 176.

[4] *Mason* v. *Marine Ins. Co.*, 110 Fed. 452, 460, 49 C. C. A. 106.

[5] *Roux* v. *Salvador*, 3 Bing. N. C. 286; *Gernon* v. *Royal Exch. Assur. Co.*, 2 Marsh. 88; *Taber* v. *China Mut. Ins. Co.*, 131 Mass. 239; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727; *Harvey* v. *Detroit F. & M. Ins. Co.*, 120 Mich. 601, 79 N. W. 898. What is reasonable time for abandonment is a mixed question of law and fact, *Smith* v. *Ins. Co.*, 4 Mass. 668. Two months, too late, *Taber* v. *China Mut. Ins. Co.* 131 Mass. 239. A little short of one month, too late, *Orrok* v. *Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271.

[6] *Rankin* v. *Potter*, L. R. 6 H. L. 83, 119, 42 L. J. C. P. 169, 29 L. T. 142, 22 W. R. 1, 2 Asp. M. C. 65; *Roux* v. *Salvador*, 3 Bing. N. C. 286. This notice not only according to insurance law but according to the universal practice of merchants and underwriters is a necessary preliminary to a claim for a constructive total loss. It is in effect an offer by the assured to the underwriter to vest the property in the underwriter so that he may thereafter deal with it as his own, *West. Assur. Co.* v. *Poole* (1903), 1 K. B. 376, 383.

[7] *Canada Sugar Ref. Co.* v. *Ins. Co.*, 175 U. S. 609, 618, 20 S. Ct. 239.

[8] De Hart & Simey, Ins. (1907), 73, citing *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 480.

[9] De Hart & Simey, Ins. (1907), 73,

An acceptance of an abandonment is not to be presumed from the mere silence of the insurers upon receiving the notice, but may be inferred from their acts as well as their words; that is, it may be constructive as well as express,[1] as, for example, where the insurers take possession of the property insured and do not return it within a reasonable time.[2]

When notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss, and the sufficiency of the notice,[3] and where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.[4]

Where, however, at the time the assured elects to treat the claim as one of constructive total loss, there is no possibility that the underwriter could derive any advantage from notice, either because there is nothing to abandon,[5] or because the disposal of the property was justifiably determined before the opportunity to give notice occurred, no notice is essential. For instance, where the news of the loss of the ship and of her sale reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment;[6] and the same conclusion was ar-

citing Arnould, § 1045. But as to the situation where there are several insurers, or where the subject-matter is not fully covered, see Arnould, §§ 1187, 1188, 1215, 1216. For purposes of adjustment of a marine loss, the subject-matter is considered always fully covered, either by the underwriters alone, or, in case of short insurance, by the underwriters and by the insured himself, who is a coinsurer for the deficiency, see §§ 50, 201.

[1] *Singleton* v. *Phœnix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839; *Provincial Ins. Co.* v. *Leduc*, L. R. 6 P. C. 224, 43 L. J. P. C. 49, 31 L. T. 142, 2 Asp. M. C. 338, 22 W. R. 929. See *Canada Sugar Ref. Co.* v. *Insurance Co.*, 175 U. S. 609, 618, 20 S. Ct. 239.

[2] *Copelin* v. *Ins. Co.*, 9 Wall. (U. S.) 461. But this rule, relating to possession, does not apply under a policy providing that the acts of insurers in recovering, saving, or disposing of the property insured shall not be considered a waiver or an acceptance of an abandonment, *Schuyler* v. *Phœnix Ins. Co.*, 134 N. Y. 345, 32 N. E. 25; *Northwestern Transp. Co.* v. *Thames & M. Ins. Co.*, 59 Mich. 214, 26 N. W. 336.

[3] *Richelieu & O. Nav. Co.* v. *Boston M. Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398. Thus policy on ship with warranty not to be in Gulf of St. Lawrence after Nov. 15. After that date ship is wrecked in Gulf, but insurer with knowledge of fact accepts notice of abandonment. The insurer is liable, *Provincial Ins. Co.* v. *Leduc* (1874), L. R. 6 P. C. 224. And see De Hart & Simey, Ins. (1907), 43, note (e); also Eng. Mar. Ins. Act (1906), § 62 (6).

[4] See *Gould* v. *Citizens' Ins. Co.*, 13 Mo. 524; *McBride* v. *Marine Ins. Co.*, 7 Johns. (N. Y.) 431; *Jumel* v. *Marine Ins. Co.*, 7 Johns. (N. Y.) 412, 5 Am. Dec. 283.

[5] *Standard Mar. Ins. Co.* v. *Nome Beach L. & T. Co.*, 133 Fed. 636, 643; *Canada Sugar Ref. Co.* v. *Ins. Co.*, 175 U. S. 609, 617, 20 S. Ct. 239, in which it is said "a policy upon expected profits does not seem to offer anything upon which an abandonment can operate."

[6] *Farnworth* v. *Hyde*, 2 Mar. L. R. 187, 429.

rived at under similar circumstances in an action upon a policy of insurance on cargo.[1]

The notice of abandonment to be effective must also be followed by actual abandonment, and there must be no retention of control by the assured.[2]

If the loss is the result of a peril not insured against there exists no right to abandon.[3] The right to abandon, it has been said by the United States Supreme Court, is to be determined by the situation at the time of the abandonment, and the rights of the assured turn upon the probabilities as reasonably to be gathered from the existing circumstances and not of necessity upon the actual result.[4] In England, it is said, a notice of abandonment, in order to be effective, must have been justified by the state of affairs existing not only at the time when it was given, but also at the time of action brought.[5] But many American courts lay controlling emphasis upon the situation as fairly viewed at the time when the notice is given.[6] Mr.

[1] *Roux* v. *Salvador*, 3 Bing. N. C. 266.

[2] *Louisville Underwriters* v. *Pence*, 93 Ky. 96, 19 S. W. 10.

[3] *Richelieu & O. Nav. Co.* v. *Boston M. Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398.

[4] Sufficient if expense of recovery and repairs would probably exceed one-half value, *Orient Mut. Ins. Co.* v. *Adams*, 123 U. S. 67, 75, 31 L. Ed. 63, 8 S. Ct. 68 (subsequent result though evidence is not decisive); *Peele* v. *Merchants' Ins. Co.*, 19 Fed. Cas. 98; *Fulton Ins. Co.* v. *Goodman*, 32 Ala. 108, 127, 128 (repairs ultimately cost less than one-half value of vessel when repaired); *Fontaine* v. *Phœnix Ins. Co.*, 11 Johns. (N. Y.) 293; *Louisville Underwriters* v. *Monarch*, 99 Ky. 578, 36 S. W. 563; *Louisville Underwriters* v. *Pence*, 93 Ky. 96, 104, 19 S. W. 10, 40 Am. St. Rep. 176. But in some cases it is held that where the underwriters have refused to accept abandonment, its validity must be determined by the actual and ultimate cost of repairs, *Wood* v. *Lincoln & K. Ins. Co.*, 6 Mass. 479; *Hall* v. *Franklin Ins. Co.*, 9 Pick. (Mass.) 466; *Marmand* v. *Melledge*, 123 Mass. 173. Or by the ultimate result, *McIves* v. *Henderson*, 4 M. & S. 576. As where ship was captured but restored before action brought, *Bainbridge* v. *Neilson* (1808), 10 East, 329. The underwriters cannot defeat the effect of a valid notice of abandonment by intervening before action brought and raising and repairing the vessel at less than the estimated cost, *Sailing Ship Blairmore Co.* v. *Macredie* (1898), App. Cas. 607; *Peele* v. *Merchants' Ins. Co.*, 3 Mason (U. S.), 27; but compare Massachusetts cases last cited. In Massachusetts it is held that the actual state of facts at the time of an abandonment, rather than the intelligence received by the insured, is the proper test of the right to abandon, *Dorr* v. *Union Ins. Co.*, 8 Mass. 502; *Hall* v. *Franklin Ins. Co.*, 9 Pick. (Mass.) 466. The right to abandon and recover for a constructive total loss depends on the state of facts when abandonment is made, *Snow* v. *Union Mut. Mar. Ins. Co.*, 119 Mass. 592, 21 Am. Rep. 349; *Greene* v. *Pac. Mut. Ins. Co.*, 9 Allen (Mass.), 217 (whaler jammed fast in ice; constructive total loss). The redelivery of a captured vessel on bail does not defeat the right to abandon, *Lovering* v. *Mercantile Ins. Co.*, 12 Pick. (Mass.) 348.

[5] De Hart & Simey, Ins. (1907), 73, citing Arnould, §§ 1095–1102; *Ruys* v. *Royal Exch. Ass. Corp.* (1897), 2 Q. B. 135, 66 L. J. Q. B. 534; *Sailing Ship Blairmore* v. *Macredie* (1898), App. Cas. 593, 67 L. J. P. C. 96. For example, in case of capture, *Bainbridge* v. *Neilson* (1808), 10 East, 329.

[6] *Orient Mut. Ins. Co.* v. *Adams*, 123 U. S. 67, 75, 8 S. Ct. 68, 31 L. Ed 63.

Justice Story in an elaborate opinion, after reviewing the two doctrines and the reasons and authorities bearing upon them, gave to the American rule the weight of his judgment.[1]

§ 195. **Form of Notice of Abandonment.**—No specific form is necessary for the notice of abandonment, nor, unless required by the policy, is it essential that it should be made in writing, though it is customary and advisable so to give it. But the notice must be given in terms which indicate the intention of the assured to abandon to the insurer unconditionally his insured interest in the subject-matter.[2]

§ 196. **Effect of Abandonment.**—Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.[3]

If there are several underwriters, they share in the transfer of the interest in proportion to the amount of their several subscriptions.[4]

[1] *Peele* v. *Merchants' Ins. Co.*, 3 Mason, 27, 19 Fed. Cas. 98.

[2] *Canada Sugar Ref. Co.* v. *Insurance Co.*, 175 U. S. 609, 20 S. Ct. 239; *Ins. Co. of N. A.* v. *Johnson*, 70 Fed. 794, 37 U. S. App. 413, 17 C. C. A. 416; *Bosley* v. *Chesapeake Ins. Co.*, 8 Gill & J. (Md.) 450, 22 Am. Dec. 337; *Northwestern Transp. Co.* v. *Thames & M. Ins. Co.*, 59 Mich. 214, 26 N. W. 336. The word "abandon" need not be used in notice; any equivalent expression conveying notice of intention to abandon is sufficient, *Currie* v. *Bombay Native Ins. Co.*, 6 Moore P. C. N. S. 302, 39 L. J. P. C. 1, 22 L. T. 317. If a writing is required by the policy such stipulation must be complied with, *Northwestern Transp. Co.* v. *Thames & M. Ins. Co.*, 59 Mich. 214, 26 N. W. 336. Clause requiring written transfer on abandonment construed in *Harvey* v. *Detroit F. & M. Ins. Co.*, 120 Mich. 601, 79 N. W. 898. Compare *The Manitoba*, 30 Fed. 129; *The Mary E. Perew*, 15 Blatchf. (U. S. C. C.) 58.

[3] *Mason* v. *Mar. Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700; *Patapsco Ins. Co.* v. *Southgate*, 5 Pet. (U. S.) 604, 8 L. Ed. 243; *Northwest Trans. Co.* v. *Thames & M. Ins. Co.*, 59 Mich. 244, 26 N. W. 336; *Cincinnati Ins. Co.* v. *Duffield*, 6 Ohio St. 200, 67 Am. Dec. 339; *Stewart* v. *Greenock Ins. Co.* (1848), 2 H. L. Cas. 182 Accordingly expenses properly incurred by the master from date of casualty will be chargeable to the underwriters, *Gilchrist* v. *Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43; *Rankin* v. *Potter*, L. R. 6 H. L. 119; and, on the other hand, all the incidents of ownership pass as fully as though a deed of cession had been executed. The underwriters, on paying total loss or amount of valuation in a valued policy, may seek to recover the property, or sell it, or do with it what they deem best, and they may keep the proceeds though in excess of the amount of insurance paid, *Mobile, etc., R. Co.* v. *Jurey*, 111 U. S. 584, 594; *Mason* v. *Marine Ins. Co.*, 110 Fed. 452, 460; *North Eng. Ins. Assoc.* v. *Armstrong*, L. R. 5 Q. B. 244, 248; *Stewart* v. *Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159, 183. But where salvage consists of damages from another vessel for collision the underwriters can only be indemnified out of the proceeds, giving to the assured any balance, *The Livingston*, 130 Fed. 746, since such a claim passes by virtue of the right of subrogation and not as an incident to the property in the ship, *Simpson* v. *Thompson* (1877), 3 App. Cas. 292. An abandonment rightfully made relates back to the time of the loss, *Snow* v. *Ins. Co.*, 119 Mass. 592, 20 Am. Rep. 349.

[4] *Gilchrist* v. *Chi. Ins. Co.*, 104 Fed.

And where the assured is insured for an amount less than the insurable value, or in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance, and therefore is entitled to his share of salvage.[1]

After abandonment, any acts subsequent to the casualty, performed by the assured or his agents in respect to the subject of insurance, are at the risk of the insurer and inure to his benefit, if done reasonably and in good faith.[2]

By the English rule, upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned and which is earned by her subsequent to the casualty causing the loss,[3] less the expenses of earning it, incurred after the casualty; and, where the ship is carrying the owners' goods, the insurer is entitled to a reasonable remuneration for the carriage of them, subsequent to the casualty causing the loss.[4] In America many decisions award the pending freight, where it has been finally matured by the underwriter, to him and to the owner of the vessel *pro rata itineris* which each has accomplished.[5]

The doctrine of abandonment in marine insurance law must not be confused with that of subrogation. The doctrine of abandonment applies only to a total loss, whether actual or constructive, and involves a change of property in the thing insured. Abandonment is the cession of all interest in the thing insured which the assured by necessary inference of law makes to the insurer by acceptance of payment for total loss. By abandonment, an actual change of ownership, from the insured to the insurer, is effected, and therefore if the thing abandoned, peradventure, prove to be of greater value than the amount so paid by the underwriters, they may possibly succeed in more than recouping their loss.[6] But subrogation, on the other

566; *Stewart* v. *Greenock Mar. Ins. Co.*, 2 H. L. Cas. 183. A disbursement policy is entitled to its share of salvage, *Brown* v. *Merchants' Mar. Ins. Co.*, 152 Fed. 411. Abandonment relates only to property at risk at the time of loss; not to property previously delivered or disposed of.

[1] *Natchez, etc., Co.* v. *Louisville Underwriters*, 44 La. Ann. 714; *The Welsh Girl* (1906), 22 T. L. R. 475.

[2] *Rankin* v. *Potter* (1873), L. R. 6 H. L. 119; *Jumel* v. *Marine Ins. Co.*, 7 Johns. (N. Y.) 412, 413, 5 Am. Dec. 283; *Mordecai & Co.* v. *Ins. Co.*, 12 Rich. L. (S. C.) 512; *The Sarah Ann*, 2 Sumn. (U. S. C. C.) 206, Fed. Cas. No. 12,342, case aff'd 13 Pet. (U. S.) 387, 10 L. Ed. 213. See *Peirce* v. *Ocean Ins. Co.*, 18 Pick. (Mass.) 83, 89, 29 Am. Dec. 567; *Chesapeake Ins. Co.* v. *Stark*, 6 Cranch (U. S.), 272, explained in *Columbian Ins. Co.* v. *Ashby*, 4 Pet. (U. S.) 137.

[3] See *Ins. Co.* v. *Hadden* (1884), 13 Q. B. D. 706.

[4] *The Red Sea*, 73 Law T. Rep. 462 (1896), P. 20; *Miller* v. *Woodfall* (1857), 27 L. J. Q. B. 120.

[5] *Mason* v. *Marine Ins. Co.*, 110 Fed. 452, 457-459, 49 C. C. A. 106.

[6] *Mobile, etc., R. Co.* v. *Jurey*, 111 U. S. 584, 594.

hand, involves no such change of property, and occurs whether the loss be total or partial. It is by subrogation that the insurer has the right to stand in the shoes of the assured, so as to enable the insurer, after indemnifying the assured for a loss, to enforce in his own interest all remedies which the assured may have against third persons, with the object of preventing the assured from recovering from his underwriters for a loss which has been made good to him from other sources.[1] But the insurer's right by subrogation is limited in amount to a reimbursement for their payment, and for any balance recovered they must account to the insured, who, in the absence of an express assignment of his title, remains owner of the subject-matter of insurance.[2]

§ 197. **Particular Average.**—The term "particular average" in marine insurance sometimes is used in contradistinction to general average. It then means a partial loss insured against, of such a character that it is not the subject of general average contribution, but remains with the particular interest, or with the insurers of that interest.[3]

The same term is used also in contradistinction, sometimes to salvage charges;[4] and sometimes to particular charges, which, though they may be recoverable from the underwriters, are incurred, not to repair the damage, nor for the common safety, but to preserve or rescue the particular interest, as, for example, ship or cargo.[5] The words "particular average," when occurring in the memorandum clause of the policy, mean partial loss.[6]

[1] De Hart & Simey, Ins. (1907), 90.

[2] *The Livingston*, 130 Fed. 746.

[3] *Wilson* v. *Smith*, 3 Burr. 1550, 1555; *Price* v. *A1 Ships, etc., Assoc.*, 22 Q. B. D. 580, 590.

[4] "The charges recoverable under maritime law by a salvor independently of contract," Eng. Mar. Ins. Act (1906), ch. 41, § 65; *Anderson* v. *Ocean Mar. Ins. Co.* (1884), 10 App. Cas. 107; *Aitchison* v. *Lohre* (1879), 4 App. Cas. 765. Referring to the case last cited it is said: "The result of the decision is that if the particular average claim together with the salvage charges exceed the full sum insured, the excess is not recoverable from the insurers. It is to be noticed that this rule does not apply where the salvage services have been rendered under a contract with the salvors; in such a case the assured may recover the excess either under the suing and laboring clause as particular average, or as general average, according to circumstances," De Hart & Simey, Ins. (1907), 76. A shipowner's liability to pay life salvage is not covered by a policy in the usual form; but is sometimes specially insured against, *Nourse* v. *Liverpool, etc., Assn.* (1896), 2 Q. B. 16, 65 L. J. Q. B. 507. A clause "no claim to attach for salvage charges" in a reinsurance against "total loss" was held to exclude liability under the sue and labor clause, *Western Assur. Co.* v. *Poole* (1903), 1 K. B. 376, 72 L. J. K. B. 195.

[5] *Kidston* v. *Empire Mar. Ins. Co.*, L. R. 1 C. P. 535; MacArthur, Ins. (2d ed.), 261.

[6] See ch. XX. "Particular charges are not included in particular average," Eng. Mar. Ins. Act (1906), c. 41, § 64.

The technical rules relating to adjustments of losses with marine underwriters are of more interest and utility to the expert average adjuster, and to the specialist in marine insurance law than to the general practitioner; and, therefore, need not long detain us. The concise phraseology of the rules following in this chapter has been largely borrowed from the English codification passed by Parliament in 1906.

§ 198. **Salvage Charges Recoverable.**—Subject to any express provision in the policy, salvage charges, incurred in preventing a loss by perils insured against, may be recovered as a loss by those perils.[1]

§ 199. **Insurer Liable for General Average Loss.**—Subject to any express provision in the policy, where the assured has incurred a general average expenditure,[2] he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss, without having enforced his right of contribution from the other parties liable to contribute,[3]

[1] *Aitchison* v. *Lohre* (1879), 4 App. Cas. 765; *Steamship Balmoral* v. *Marten* (1901), 2 K. B. 904. They do not fall under sue and labor clauses but recovery is limited by amount insured. Illustrations taken from Chalmers & Owen (1907), 95, 96: (1) A ship valued at £2,600 is insured with D. for £1,200. After encountering very bad weather the ship is rescued by a steamer with which no contract is made, and which afterward obtains an award of £800, as salvage money. The owner does not abandon the ship, but elects to repair her. D.'s proportion of the expenses of repair comes to £1,200; that is to say, the full sum insured. He is not liable for any portion of the salvage or general average expenses in excess of the £1,200, *Aitchison* v. *Lohre* (1879), 4 App. Cas. 755, *cf. Montgomery* v. *Indemnity Mut. Mar. Ins. Co.* (1900), 6 Com. Cas. 23. (2) Time policy on ship, which begins a voyage short of coal and engages the services of a tug to tow her to port of discharge. The owner of tug gets judgment for salvage services which the assured has to pay. The steamer met with no extraordinary weather and might in time have sailed to her port. The loss is not due to perils of the seas, but to improper deficiency of coal, *Ballantyne* v. *McKinnon* (1896), 2 Q. B. 455.

[2] General average defined § 212.

[3] Eng. Mar. Ins. Act (1906), c. 41, § 66(4); *Dickenson* v. *Jardine*, L. R. 3 C. P. 639; *The Mary Thomas* (1894), Prob. 125. The distinction specified in the text between recovery for expenditure and recovery for sacrifice is thus explained: "General average expenditures do not involve the loss or destruction of anything insured. The underwriter is only liable for his assured's proportion of the amount expended, and consequently he cannot be sued until there has been some kind of adjustment. It is different with a general average sacrifice. The insured may, in the first instance, recover the whole loss from the insurer, but when the ship, freight, and cargo belong to the same person, it is said that the assured is deemed to have the contribution of the other interests in his pocket, and can only recover a proportionate amount from the underwriter on each," De Hart & Simey, Ins. (1907), 77, citing *Montgomery* v. *Indemnity, etc., Ins. Co.* (1902), 1 K. B. 734, 741, 61 L. J. K. B. 467.

provided, in either case, the peril, sought to be avoided by the general average expenditure or sacrifice, was one insured against.[1]

§ 200. **Insurer also Liable for General Average Contribution.**—Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution [2] in respect of the subject insured he may recover therefor from the insurer,[3] provided the general average loss was incurred for the purpose of avoiding a peril insured against.[4]

§ 201. **Measure of Indemnity.**—The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy, to the full extent of the insurable value, or, in the case of a valued policy, to the full extent of the value fixed by the policy, is called the measure of indemnity.[5]

Where there is a loss recoverable under a marine policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy, in the case of a valued policy, or to the insurable value, in the case of an unvalued policy.[6]

That is to say, if not fully insured, the assured as to the deficiency is himself a coinsurer.[7]

§ 202. **Total Loss.**—Where there is a total loss of the subject-mat-

[1] *Ralli* v. *Troop*, 157 U. S. 386, 393, 15 S. Ct. 657; *Harris* v. *Scaramanga*, L. R. 76 C. P. 496.

[2] Defined § 212.

[3] Eng. Mar. Ins. Act (1906), c. 41, § 66(5); *The Brigella* (1893), p. 198, 7 Asp. Mar. Cas. 405.

[4] *Harris* v. *Scaramanga*, L. R. 7 C. P. 496. Thus the underwriters, though not directly parties to a general average adjustment, must make good the loss of the assured, so far as the amount of the insurance permits, *Ralli* v. *Troop*, 157 U. S. 386, 15 S. Ct. 657; *Potter* v. *Ocean Ins. Co.*, 3 Sumn. (U. S. C. C.) 27; *Padelford* v. *Boardman*, 4 Mass. 548, 550. Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those interests were owned by different persons, *Montgomery* v. *Indemnity Mut. M. Ins. Co.* (1901), 1 K. B. 147, aff'd (1902) 1 K. B. 734.

[5] Eng. Mar. Ins. Act (1906), § 67 (1).

[6] *Lohre* v. *Aitchison* (1878), 3 Q. B. D. 564, 565. Rule of adjustment differs in fire insurance, see § 50.

[7] Thus a cargo valued at $10,000 is insured for $2,000, leaving the owner coinsurer for $8,000. The damage by sea perils is $1,500. Two-tenths or one-fifth of the loss, $300, falls upon the underwriters, the balance, $1,200, or four-fifths of the whole loss, remains with the insured, *Western Assur. Co.* v. *Southwestern Trans. Co.*, 68 Fed. 923, 16 C. C. A. 65. Illustration from Chalmers & Owen, Ins. (1907), 102. A ship valued at £5,000 is insured for £1,000. The ship is stranded, and the owner spends £1,000 in trying to get her off, but eventually she is totally lost. The insurer must pay £1,000 on the policy, and £200 (*i. e.*, one-fifth) under the suing and laboring clause. It is immaterial whether the real value of the ship be £4,500 or £5,500.

ter insured, if the policy be valued, the measure of indemnity is the sum fixed by the policy.[1] If the policy be not valued, the measure of indemnity is the insurable value of the subject-matter insured.[2]

§ 203. Partial Loss of Ship.—In case of partial loss of the ship, subject to any express provision in the policy, the following rules apply: (1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty.[3]

[1] *Sailing Ship Blairmore* v. *Macredie* (1898), App. Cas. 610. In case of total loss the policy valuation makes settlement a simple matter. In case of a valued policy on freight or cargo, if a part only of the subject is exposed to risk the valuation applies only in proportion to such part, *Davy* v. *Hallett*, 3 Caines (N. Y.), 16, 2 Am. Dec. 241. Where profits are valued and insured, loss of profits is presumed from loss of the property out of which they were expected to arise, and the valuation of policy fixes their amount, *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. (U. S.) 222. Where hull and machinery are separately valued, the parts thus separated are to be treated as distinct insurances, *Am. S. S. Co.* v. *Indemnity Mut. Mar. Ins. Co.*, 108 Fed. 421, aff'd 118 Fed. 1014, 56 C. C. A. 56. Unless the policy can be construed to intend a separate insurance on several articles, a total loss of part is only a partial loss, De Hart & Simey, Ins. (1907), 67.

[2] *Irving* v. *Manning* (1847), 1 H. L. Cas. 305, 307. In the absence of a policy valuation insurable value is ascertained as follows: In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole, *Carson* v. *Mar. Ins. Co.*, 5 Fed. Cas. 178; *Leavenworth* v. *Delafield*, 1 Caines (N. Y.), 573, 2 Am. Dec. 201; *Moran Galloway* v. *Uzielli* (1905), 2 K. B. 558 (disbursements); *Brough* v. *Whitmore* (1791), 4 T. R. 206 (stores and provisions for crew); *Stevens* v. *Columbian Ins. Co.*, 3 Caines (N. Y.), 43, 2 Am. Dec. 247 (cost of insurance). The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores, if owned by the assured, and in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade, *Hogarth* v. *Walker* (1900), 2 Q. B. 283 (fittings), but a policy on "hull and machinery," instead of "ship," may not cover coals and stores, *Roddick* v *Ins. Co.* (1895), 2 Q. B. 386. In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance, *U. S. Shipping Co.* v. *Empress, etc., Corp.* (1907), 1 K. B. 259 (commission not to be added). In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole, *Usher* v. *Noble* (1810), 12 East, 639, 646. In America instead of "prime cost" the actual or market value at time and place of lading is sometimes said to be the test, but in practice this is measured by the invoice or cost price, *Pleasants* v. *Maryland Ins. Co.*, 8 Cranch, 55, 3 L. Ed. 486; *Snell* v. *Delaware Ins. Co.*, 22 Fed. Cas. 713, 4 Dall. 430; *Warren* v. *Franklin Ins. Co.*, 104 Mass. 518. Loss in raising money for the purchase is not to be added, *Minturn* v. *Columbian Ins. Co.*, 10 Johns. (N. Y.) 75. In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance, McArthur, Ins. (2d ed.), p. 69.

[3] *Henderson* v. *Shankland* (1896), 1 Q. B. 525; *Pitman* v. *Universal Mar. Ins. Co.* (1882), 9 Q. B. D. 192, 215; *Aitchison* v. *Lohre* (1879), 4 App. Cas. 762. The measure of indemnity is thus

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.[1]

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.[2]

§ 204. **Partial Loss of Freight.**—Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value, in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.[3]

§ 205. **Partial Loss of Goods.**—Where there is a partial loss of goods, merchandise, or other movables, the measure of indemnity, subject to any express provision in the policy, is as follows:

(1) Where part of the goods, merchandise, or other movables insured by a valued marine policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.[4]

(2) Where part of the goods, merchandise, or other movables insured by an unvalued marine policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss.[5]

theoretically, the cost of repairs, less the improvement resulting therefrom. As to what are customary deductions see § 209 and Appendix, ch. III; also Chalmers & Owens, Ins. (1907), 154. As to "reasonable cost of repairs," see *Ruabon S.S. Co.* v. *London Ass. Co.* (1900), App. Cas. 6, 69 L. J. Q. B. 86; *Agenoria S.S. Co.* v. *Merchants', etc., Ins. Co.* (1903), 8 Com. Cas. 212.

[1] *Stewart* v. *Steele* (1852), 5 Scott N. R. 948.

[2] *Stewart* v. *Steele* (1852), 5 Scott N. R. 927. Where the ship was sold in her damaged state, it was held that the amount recoverable was her value before the casualty less the amount for which she sold, *Pitman* v. *Universal Mar. Ins. Co.* (1882), 9 Q. B. D. 192, 51 L. J. Q. B. 561.

[3] *U. S. Shipping Co.* v. *Empress, etc., Corp.* (1907), 1 K. B. 259; *The Main* (1894), P. 320. See Arnould, §§ 878, 1041.

[4] *Ursula-Bright S.S. Co.* v. *Amsinck*, 115 Fed. 242, 245, and cases cited; *Lamar Ins. Co.* v. *McGlashen*, 54 Ill. 513, 5 Am. Rep. 162, and see more in detail § 236; *Irving* v. *Manning* (1847), 1 H. L. Cas. 305.

[5] *Irving* v. *Manning* (1847), 1 H. L. Cas. 305; *Tobin* v. *Hartford*, 32 L. J

(3) Where the whole or any part of the goods or merchandise insured has been delivered at its destination, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value.[1]

It is important to discriminate between a particular average loss and a salvage loss on goods, since the measure of liability laid upon the underwriter is not the same in both. A salvage loss is a total loss

C. P. 134, 136; *Lewis* v. *Rucker* (1761), 2 Burr. 1167. A particular average on goods consists either in damage to or total loss of part of the subject insured by operation of the perils insured against, *Kidston* v. *Empire Mar. Ins. Co.*, L. R. 1 C. P. 535.

[1] *Johnson* v. *Sheddon* (1802), 2 East, 580. "Gross value" means the wholesale price, or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers, Eng. Mar. Ins. Act. (1906), § 71(4). Thus it appears that, in case of damaged cargo at destination, a loss percentage is obtained which is applied to the agreed valuation, if the policy is valued, otherwise to the original market or insurable value, *Lawrence* v. *N. Y. Ins. Co.*, 3 Johns. Cas. 217. The practical mode of ascertaining such ratio or percentage of loss is usually based upon a comparison between the gross proceeds of sales of property sound and property damaged at place of discharge, *Lamar Ins. Co.* v. *McGlashen*, 54 Ill. 513, 5 Am. Rep. 162; *Lawrence* v. *N. Y. Ins. Co.*, 3 Johns. Cas. 216; *Evans* v. *Commercial Ins. Co.*, 6 R. I. 47. If property is reconditioned the underwriter is liable for the reasonable expense, *Francis* v. *Boulton* (1895), 65 L. J. Q. B. N. S. 153, 73 L. T. R. 578. Illustrations from Chalmers & Owen, Ins. (1907), 107, 108: (1) Unvalued policy on coffee from Jamaica to London. The insurable value, *i. e.*, the invoice cost, plus shipping expenses and charges of insurance, is £200. Half the coffee is damaged on the voyage. The value of the damaged coffee in London is half that of the undamaged coffee. The selling price in London fixes the measure or percentage of depreciation, but not the amount the insurer has to pay. That must be determined by applying the depreciation to the insurable value, so that in this case the insurer has to pay £50, *Usher* v. *Noble* (1810), 12 East, 639 (the test adopted excludes the rise or fall of the London market). (2) Policy on 40 bales of cotton, which are shipped as part of a cargo of 1,600 bales of cotton belonging to different owners. Owing to sea perils 200 bales have to be jettisoned, and the rest are damaged and the marks wholly obliterated. The 1,400 bales are sold for the benefit of whom it may concern. This is a partial loss, and the assured is entitled to recover as if five of the forty bales had been jettisoned, and the rest damaged to the extent shown by the sale of the whole, *Spence* v. *Union Mar. Ins. Co.* (1868), L. R. 3 C. P. 427. (3) Policy on 1,700 packages of tea, valued at £6,000. Part of the tea is sea-damaged, and the remainder, which arrives undamaged, sells in consequence for a smaller price. The insurer is not liable for the depreciation so caused, *Cator* v. *Great Western Ins. Co.* (1873), L. R. 8 C. P. 552, 561; and see *Brown Bros.* v. *Fleming* (1902), 7 Com. Cas. 245 (damage to labels, etc.). (4) Policy on cargo of sheet iron in separate packages, average payable "on each packet separately or on the whole." Damage is sustained before the termination of the risk. The whole of the iron is unpacked and examined. The damaged iron is sold, and the rest is repacked and sent on. The insurer is not liable for the expenses incurred in examining and repacking the packages which were not damaged, *Lysaght* v. *Coleman* (1895), 1 Q. B. 49.

diminished by salvage, and takes place in relation to goods when there is either an absolute or a constructive total loss of the subject insured, but some remains of the property have been recovered by the assured.[1] The underwriters are called upon to pay the difference between the insured value of the goods and the net proceeds of sale, ascertained by deducting from the gross proceeds the expenses of salvage. On the other hand, the method for computing a technical particular average loss is declared to be well established and is thus described: the damaged goods, upon reaching their destination, must be at once sold for the best price obtainable.[2] It is then to be determined what the goods would have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the sale of the damaged article gives the ratio of deterioration, and the underwriter is to pay this ratio or percentage of loss on the policy value.[3]

§ 206. **Apportionment of Valuation.**—Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole.[4]

§ 207. **General Average Contribution and Salvage Charges.**—Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution if the subject-matter liable to contribution is insured for its full contributory value; but if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by

[1] MacArthur, Ins. (2d ed.), 241. See *Devitt* v. *Prov. Washington Ins. Co.*, 61 App. Div. 390, 401, 70 N. Y. Supp. 654 (in which there was a constructive total loss of canal cargo of potatoes which the court holds to be "a salvage loss." Some of the potatoes arrived *in specie* but salvage expenses exceeded proceeds).

[2] Usually by auction.

[3] *London Assur.* v. *Companhia de, etc.*, 167 U. S. 149, 171, 17 S. Ct. 785, 42 L. Ed. 113 (where, by agreement, loss was converted into a constructive total loss and adjusted by the court as a salvage loss). Loss on goods arriving *in specie* sea-damaged and with marks obliterated, so that they cannot be delivered to their respective owners, must be adjusted according to the rules of particular average, *Spence* v. *Union Mar. Ins. Co.*, L. R. 3 C. P. 427.

[4] Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound value of the different species, qualities, or descriptions of goods.

the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute. Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.[1]

§ 208. Liability for Successive Losses may Exceed Amount of Policy.—The rule obtains in marine insurance that if a partial loss is repaired or adjusted and there is a subsequent partial or total loss under the same policy, the insurer is liable for both, though exceeding the total amount underwritten.[2] This rule, peculiar to marine insurance, secures only reasonable protection to the insured, who in case of partial loss to his property on a distant voyage is likely to receive no prompt report of the extent of loss and cost of restoration, and may, therefore, be in no position to take out further insurance to equal the cost of repairs until, by reason of a subsequent total loss, it is too late. The chance of added liability occasioned by

[1] McArthur, Ins. (2d ed.), 206, 210. In a recent case in England it was held that the assured was concluded for this purpose also by the agreed valuation in his policy, *Balmoral Co.* v. *Marten* (1902), App. Cas. 511. There the policy value of ship was £33,000, her actual value adopted in the salvage action was £40,000. *Held*, that the insurer was only liable to make good to the assured thirty-three fortieths of his general average losses. The law in the United States has been held to be otherwise. Here the recovery for general average loss to the ship and necessary salvage expenditures is not to be reduced in the proportion of the undervaluation in the policy but is to be based upon the actual value, *International Nav. Co.* v. *Sea Ins. Co.*, 63 C. C. A. 663, 129 Fed. 13, 15; *International Nav. Co.* v. *Brit. & For. Mar. Ins. Co.*, 100 Fed. 304. The contributory value, for the purpose of general average, is the value at the port of adjustment, whereas the insurable value is the value at the commencement of the voyage.

[2] *Wood* v. *Ins. Co.*, 6 Mass. 479, 4 Am. Dec. 163; *Brooks* v. *MacDonnell* (1835), 1 Y. & C. 500, 515; *Le Cheminant* v. *Pearson*, 4 Taunt. 367; compare *The Dora Foster* (1900), Prob. 241. Rule is otherwise in fire insurance, 60 Neb. 116, 82 N. W. 313. In *Christie* v. *Buckeye*, 5 Fed. Cas. 653, the underwriter was held liable for full amount of policy for total loss, and in addition for the payment of prior general average loss. So also in *Barker* v. *Phœnix Ins. Co.*, 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; *Saltus* v. *Commercial Ins. Co.*, 10 Johns. (N. Y.) 487. This doctrine is held to be independent of any special clause in the policy, *Matheson* v. *Equitable Mar. Ins. Co.*, 118 Mass. 209, 19 Am. Rep. 441. Where under the same policy a partial loss, which has not been repaired or otherwise made good is followed by a total loss, the assured can only recover for the total loss, *Livie* v. *Janson* (1810), 12 East, 648 (stranding followed by capture). In England it has been held that where a partial loss takes place under one policy and a total loss under a consecutive policy, the assured may recover for both, although the partial loss be unrepaired and however extensive it may be, De Hart & Simey, Ins. (1907), 87, citing *Lidgett* v. *Secretan* (1871), L. R. 6 C. P. 616, 40 L. J. C. P. 257; *Woodside* v. *Globe Mar. Ins. Co.* (1896), 1 Q. B. 105, 65 L. J. Q. B. 117.

this recognized doctrine of law is not forgotten by the underwriter when he estimates the rate of his premium.

§ 209. **One-third off New for Old.**—In the case of a partial loss of a ship or its equipments, the old materials are to be applied toward payment for the new, and, in general, a deduction of one-third from the cost of repairing or replacing the damage is made after deducting the value or proceeds of the old materials, and the marine insurer is liable for two-thirds of the balance of the cost.[1]

[1] *Eager* v. *Atlas Ins. Co.*, 14 Pick. (Mass.) 141; *Byrnes* v. *Nat. Ins. Co.*, 1 Cow. (N. Y.) 265, 276 (where the court says: "The true rule seems to be this, to apply the old materials towards payment for the new and to allow the deduction of the one-third new for old, upon the balance"). But certain exceptions to this rule are allowed, see Chalmers & Owen, Ins. (1907), 154, for example, in the case of iron ships. Anchors, *Brooks* v. *Oriental Ins. Co.*, 7 Pick. (Mass.) 259, 269; metal sheathing, see *Prince* v. *Equitable Safety Ins. Co.*, 12 Gray (Mass.), 527; chain cables, etc., *Orrok* v. *Commonwealth Ins. Co.*, 21 Pick. 456, 32 Am. Dec. 277; *Dunham* v. *Com. Ins. Co.*, 11 Johns. (N. Y.) 315, 6 Am. Dec. 374. For deductions, see Appendix, ch. III. As to new ship on first voyage see *Pirie* v. *Steele*, 2 Mood. & R. 49. The charter party may be so worded as to make the outward and homeward passage only one voyage, *Fenwick* v. *Robinson*, 3 C. & P. 323.

CHAPTER X

General Average—Marine

§ 210. General Average—Related to Insurance.—This subject belongs not only to admiralty law, but also to the law of insurance, since general average losses, incurred to avert a peril insured against, are held by legal construction or inference to be covered by the marine policy.[1] Thus, while in the first instance the owner of ship or of cargo, regardless of whether his interest is insured, is obligated to make contribution in proportion to the value of his property saved by a general average sacrifice or expenditure, yet by virtue of insurance law, if he is so fortunate as to be insured, he reclaims from his underwriters the amount of this contribution.[2] Therefore it will be observed, that an adjustment of a general average loss, if incurred to avert a peril insured against, concerns not only the owners of ship, freight, and cargo at risk, but also their respective sets of underwriters as well.

The English law and that of the Federal courts of the United States differ as to the extent to which the underwriter is thus answerable. By the law of England, the shipowner reclaims in full, provided the policy value amounts to the value assessed for contribution.[3] By the New York decisions [4] as well as by those of the Federal courts,[5] the policy valuation is conclusive, and the underwriter who covers this agreed policy value is answerable for the entire general average assessment, even though based upon a valuation exceeding that stated in the policy.

§ 211. General Average—Its Basis.—The rule of general average has its basis in the community of interest existing between the owners of ship and cargo, by reason of which losses intentionally incurred

[1] See §§ 199, 207. Included in Eng. Mar. Ins. Act (1906), § 66.

[2] McArthur, Mar. Ins. (2d ed.), 206, "The law of average and contribution had existed for ages before the practice of insurance was known," *Price* v. *Noble*, 4 Taunt. 123, 126, by Heath, J.

[3] *Steamship Balmoral Co.* v. *Marten* (1902), A. C. 511.

[4] *Providence & Stonington SS. Co.* v. *Phenix Co.*, 89 N. Y. 559.

[5] *Int. Nav. Co.* v. *Atlantic Mut. Co.*, 100 Fed. 304, 316.

for the common safety ought to be equitably apportioned among the interests thereby benefited.[1]

§ 212. **General Average Loss and Contribution Defined.**—A general average loss, is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice. Any extraordinary sacrifice or expenditure, voluntarily and reasonably made or incurred, in time of danger, for the purpose of preserving the property imperilled in the common adventure, is a general average act, provided it be done by the master or one in his stead authorized to act.[2] The party on whom the general average loss falls is entitled, subject to the conditions imposed by maritime law, to a ratable contribution from the other parties interested, and this is called a general average contribution.[3]

§ 213. **Distinction between General and Particular Average.**—The distinction between a general and a particular average lies in the fact that in the former case there is a general distribution of the loss among the parties to the adventure, while in the latter case there is a special application of the loss to one or more of the parties.[4] Every partial loss is particular average in relation to the party who first sustains it, whether that loss is ultimately to be made good by a general contribution or to remain where it falls.[5]

[1] "It is founded upon the plainest principles of common justice," *Louisville Underwriters* v. *Pence*, 93 Ky. 96, 103, 40 Am. St. R. 176, 19 S. W. 10, per Holt, C. J. "Average contribution is the creation of the maritime law and is founded in the great principles of equity," *Dike* v. *Propeller St. Joseph*, 6 McLean (U. S. C. C.), 573, 575, Fed. Cas. No. 3,908.

[2] *Ralli* v. *Troop*, 157 U. S. 386, 400, 403, 404, 15 S. Ct. 657; *Hobson* v. *Lord*, 92 U. S. 397; *Star of Hope*, 9 Wall. (U. S.) 203, 228; *The Strathdon*, 94 Fed. 206, 208; *Van Den Toorn* v. *Leeming*, 79 Fed. 107; *Iredale* v. *Traders' Ins. Co.* (1900), 2 Q. B. 515, 519; *Svensden* v. *Wallace*, 13 Q. B. D. 69, 84. Compare *Compania La Flecha* v. *Brauer*, 168 U. S. 104, where it is held that a jettison must be reasonably necessary.

[3] *Svensden* v. *Wallace* (1885), 10 App. Cas. 415.

[4] See *Orrok* v. *Commonwealth*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271. "Particular average is the damage or loss, short of total, falling directly upon a particular property. General average is the liability or claim falling upon that property from the loss of or damage to something else," *Bargett* v. *Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385; *Potter* v. *Ocean Ins. Co.*, 3 Sumn. (U. S. C. C.) 27, 39; *Firemen's Ins. Co.* v. *Fitzhugh*, 4 B. Mon. (Ky.) 160, 164 *et seq.*

[5] *Price & Co.* v. *A1 Ships Ins. Assoc.*, 22 Q. B. D. 580, 590; *Peters* v. *Warren Ins. Co.*, 1 Story (U. S. C. C.), 463, 469, Fed. Cas. No. 11,034. For instances of particular average on ship and how computed, see *Marine Ins. Co.* v. *China, etc., S. Co.*, 11 App. Cas. 573; *Ruabon S. Co.* v. *London Assur.* (1900), App. Cas. 6. Obviously it is likely to make a great difference in the result, whether the loss remains with the particular interest or whether it is distributed among all, *Dent* v. *Smith*, L. R. 4 Q. B. 414; but if all interests are insured, it is usually a question between the different sets of underwriters. The liability to contribute,

Thus, in an old case, the English ship *Brothers* was captured by a French privateer. The English captain and most of the crew were taken out and replaced by a French prize crew. On the way to Marseilles in a heavy storm, the Frenchmen, after consulting the English mate, necessarily threw overboard the ship's guns, anchors, chains, and a quantity of stores from the middle deck in order to lighten the laboring vessel. Before reaching Marseilles the ship was recaptured by the English mate, with the aid of others aboard, and brought to Gibraltar. The owner of the ship made a claim on the owner of the cargo, for contribution to the jettison. Lord Mansfield, holding that the act was justifiably done for the common safety, allowed the claim.[1]

But where the captain of a Spanish ship, on the point of being boarded by an enemy, threw overboard a bag containing $100,000, not to avert a common danger, but to prevent the enemy from getting the money, the insurers of the money paid the loss without claiming the benefit of general average.[2]

§ 214. Obligation Rests upon Law Rather than Contract.—The right to general average and its correlative obligation are not founded necessarily upon contract, but arise from the common law of the sea, which is applicable to all who are engaged in maritime commerce.[3] Therefore the right and the obligation exist as between the owners of ship, freight and cargo whether their interests are insured or not insured.[4]

§ 215. Origin of General Average.—The earliest trace of this ancient rule of maritime law is to be found in an extract from the Rhodian law which was incorporated in the Roman civil law.[5] Thence it found its way into the common law of England and of the United

however, exists independent of insurance, and therefore the liability of the insurer under the policy may not be commensurate with that of the assured under the contract of affreightment, *The Brigella* (1893), P. 195. For example, if goods are insured warranted free from capture, general average expenses incurred to avoid capture would not fall upon the underwriter.

[1] *Price* v. *Noble*, 4 Taunt. 123.

[2] *Butler* v. *Wildman*, 2 B. & Ald. 398.

[3] *Ralli* v. *Troop*, 157 U. S. 386, 400, 15 S. Ct. 657; *Ruabon S. Co.* v. *London Assur.* (1900), App. Cas. 6. Dock charges and expenses, *Burton* v. *English*, L. R. 12 Q. B. D. 218, 220, cited and relied on in *Marwick* v. *Rogers*, 163 Mass. 50, 52, 47 Am. St. R. 436, 39 N. E. 780.

[4] *The Brigella* (1893), P. 195, 7 Asp. Mar. Cas. 404.

[5] The Rhodian law provides "if goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all," *Columbian Ins. Co.* v. *Ashby*, 13 Pet. (U. S.) 331, 338, 10 L. Ed. 186; Lowndes, Gen. Av., 1; *Anderson* v. *Ocean SS. Co.*, 10 App. Cas. 107, 114.

States and became an implied condition both in the contract of affreightment and the policy of marine insurance.[1]

§ 216. **Requisites of General Average Act.**—To justify a general average contribution the following conditions must be fulfilled: (1) When the act is performed the danger must be imminent.[2] (2) It must be a common peril threatening both ship and cargo.[3] (3) The sacrifice or expense must be voluntarily made or incurred to avoid the peril and for the common safety or for the common benefit.[4] (4) The general average act must be followed by some measure of success, since, if the whole be lost, the sacrifice of part is proved to be of no avail, and there is nothing saved upon which contribution can be laid;[5] but either ship or cargo may become a total loss without defeating general average, provided the general average act was justifiable when performed and was presently successful.[6] (5) The act must be directed by the master of the ship, or by someone in his stead authorized to represent the owners of all interests included in the common adventure. Thus the scuttling of a ship by the municipal authorities of a port against the protest of the commanding officer, to extinguish a fire in her hold, is not a general average loss,[7] but if a sacrifice, as in the case of pouring

[1] *Ralli* v. *Troop*, 157 U. S. 386, 393, 15 S. Ct. 657. See *Nimick* v. *Holmes*, 25 Pa. St. 366, 371, 64 Am. Dec. 710.

[2] *Hobson* v. *Lord*, 92 U. S. 397, 400; *Ralli* v. *Troop*, 157 U. S. 386, 400, 15 S. Ct. 657.

[3] *Barnard* v. *Adams*, 10 How. (U. S.) 270, 303, 13 L. Ed. 417.

[4] *J. P. Donaldson*, 167 U. S. 599, 602; *Ralli* v. *Troop*, 157 U. S. 386, 403; *Hobson* v. *Lord*, 92 U. S. 397, 400; *Van Den Toorn* v. *Leeming*, 79 Fed. 107; *Iredale* v. *China Traders Ins. Co.* (1900), 2 Q. B. 515, 519. Thus where masts, spars, rigging, and sails, were first carried away by the elements and left hanging over the vessel's side, and afterwards were cut loose for the common safety, the owner of the cargo saved by being taken out of the ship and brought into port, was held not liable for contribution, *Nickerson* v. *Tyson*, 8 Mass. 467.

[5] *Ralli* v. *Troop*, 157 U. S. 386, 403, 15 S. Ct. 657; *Hobson* v. *Lord*, 92 U. S. 397, 403; *Star of Hope*, 9 Wall. (U. S.) 203, 229, 230, 19 L. Ed. 638 ("if nothing is saved there cannot be any such contribution"); *Barnard* v. *Adams*, 10 How. (U. S.) 303, 13 L. Ed. 417; *Columbian Ins. Co.* v. *Ashby*, 13 Pet. (U. S.) 331, 338, 10 L. Ed. 186; *Scudder* v. *Bradford*, 14 Pick. (Mass.) 13, 15, 25 Am. Dec. 355; *Nimick* v. *Holmes*, 25 Pa. St. 266, 64 Am. Dec. 710. As to how far success is an essential element by the English and continental practice see Arnould, Mar. Ins. (7th ed.), §§ 912, 979, 980. It has been stated that the operation of the rule turns more in England upon the immediate and not the ultimate success than it does in the United States and on the continent, 1 Ency. Laws, Eng. (ed. 1897), 428.

[6] *Columbian Ins. Co.* v. *Ashby*, 13 Pet. (U. S.) 331; *Patten* v. *Darling*, 1 Cliff. (U. S. C. C.) 254, 266; *Lee* v. *Grinnell*, 5 Duer (N. Y.), 400, 421, Hoffman, J. But see *Caze* v. *Reilly*, 3 Wash. (U. S. C. C.) 298, Fed. Cas. No. 2,538 (jettison unsuccessful); and *Marshall* v. *Garner*, 6 Barb. (N. Y.) 394 (no sacrifice, since stranding was involuntary).

[7] *Ralli* v. *Troop*, 157 U. S. 386, 15 S. Ct. 657. If master is disabled whoever is in active command may act for him, *Lawrence* v. *Minturn*, 17 How. (U. S.) 110; *Price* v. *Noble*, 4 Taunt. 123. Barges in tow of a steam tug are not under control of the master of a

water into the hold of the vessel to the injury of the cargo with the purpose of extinguishing a fire, is made at the request of the master, the damage is general average.[1]

A jettison must be made in good faith and with prudence, and ought, so far as possible, to begin with the most bulky and least valuable articles. But, of necessity, the master of the ship must be left free to take such steps as he deems necessary for the preservation of the interests intrusted to his care.[2]

§ 217. Negligence Cause of Sacrifice.—A party whose negligence has made the sacrifice necessary cannot claim contribution in general average;[3] and the shipowner may be responsible in this respect for the negligent acts of his master and crew.

tug to the same extent as the tug and its cargo, and where the master casts off and abandons the barges with the intention and effect of saving the tug no contribution can be had against the tug. There is no such community of interest between the owners of the tug and the owners of the barges and no such single maritime adventure as are contemplated within the meaning of the law of general average, *J. P. Donaldson*, 167 U. S. 599, 17 S. Ct. 951. "The sacrifice (a) must be voluntary and for the benefit of all; (b) must be made by the master or by his authority; (c) must not be caused by the fault of any party asking the contribution; (d) must be successful; (e) must be necessary," Hughes, Adm., 39. Where for the common safety it becomes necessary to land goods, according to the English rule when the goods have once been put in a place of security they cease thereafter to be at the risk of the general venture and being themselves in safety they are held to constitute no sacrifice and the act of interrupting the voyage to land them, *Iredale* v. *China Traders Ins. Co.* (1900), 2 Q. B. 515, or any expense incurred in reshipping them, *Svendsen* v. *Wallace*, 10 App. Cas. 404, is held to afford no justification for general average contribution. In this country the tendency of the courts is to extend the community of interest between the ship and the cargo if both are still subject to the master, though there may be physical separation, *Pacific Mail S.S. Co.* v. *California Vintage Co.*, 74 Fed. 564, 570; *Nelson* v. *Belmont*, 21 N. Y. 36; *Bevan* v. *Bank*, 4 Whart. (Pa.) 301.

[1] *The Roanoke*, 59 Fed. 161, 8 C. C. A. 67.

[2] "Much is deferred in such an emergency to the judgment and decision of the master," *Star of Hope*, 9 Wall. (U. S.) 203, 229. In former times, when merchants voyaged with their wares their consent was held necessary to a jettison, and the captain was also required to consult with his officers or with some of his crew, then perhaps more nearly his equals than in later times. But even then the final decision rested with the captain, *Ralli* v. *Troop*, 157 U. S. 386, 399, 15 S. Ct. 657. Although such a conference has long since been discontinued in practice, there is a sense in which it is still held in theory, inasmuch as the master becomes agent for the owner of the cargo as well as for the shipowner in times of emergency, with authority to bind both parties in the adoption of such measures as are expedient in the common interest, *Gratitudine*, 3 Chas. Robinson, 240; *Nimick* v. *Holmes*, 25 Pa. St. 366, 372, 64 Am. Dec. 710, per Lowrie, J. Although such consultation may be highly proper there is no weight in the objection that it is necessary, *Columbian Ins. Co.* v. *Ashby*, 13 Pet. (U. S.) 331, 343, 344, per Story, J. "It would defeat the main utility of general average, if at the moment of emergency, the captain's mind were to hesitate as to saving the adventure, through fear of casting a burden on his owners," *Shepherd* v. *Kottgen*, L. R. 2 C. P. D. 578, 583, per Grove, J.

[3] *Ralli* v. *Troop*, 157 U. S. 386, 403, 15 S. Ct. 657; *Portsmouth*, 9 Wall. (U. S.) 682; *Trinidad Shipping & Trad-*

The City of Para sailed from Aspinwall for New York with a general cargo, valued at $232,561,76. Through the negligence of the master she stranded upon a reef at the southwest corner of Old Providence Island. After ineffectual attempts to get her off, the master justifiably jettisoned part of the cargo and flooded the ship for the benefit of both ship and cargo. The ship and remaining cargo were salved. The court held that these measures were general average acts, and that the owners of the cargo jettisoned, but not the shipowners, were entitled to a general average contribution.[1]

§ 218. General Average Losses.—For the benefit of the common adventure imperilled, a carrier by water may scuttle the ship itself,[2] or cut away any of her appurtenances,[3] or jettison the whole or any part of the cargo,[4] or incur expenses with like purpose.[5] Thus it will be seen that the principal kinds of losses for which a general average contribution is appropriate are naturally classified under three heads:

ing Co. v. *Frame, Alston & Co.*, 88 Fed. 528; *Robinson* v. *Price*, L. R. 2 Q. B. D. 91; *The Parana*, L. R. 1 Prob. Div. 452; *Strang, Steel & Co.* v. *A. Scott & Co.*, 14 App. Cas. 601, 608. The Harter Act has not changed this rule, and where a vessel though seaworthy at the beginning of the voyage is afterward stranded through the negligence of the master, the shipowner has no right to general average contribution for sacrifices subsequently made in successful efforts to save vessel, freight, and cargo, since the negligence of the master is attributable to the shipowner, *The Irrawaddy*, 171 U. S. 187, 18 S. Ct. 831. But the shipowner in such a case may himself be liable to contribute for the benefit of the owners of cargo which has been justifiably sacrificed, *The Strathdon*, 94 Fed. 206.

[1] *Pacific Mail S. Co.* v. *N. Y., etc., Mining Co.*, 74 Fed. 564, 20 C. C. A. 349.

[2] *Achard* v. *Ring*, 31 L. T. 647, 2 Asp. Mar. Cas. 422.

[3] Tackle, *Birkley* v. *Presgrave*, 1 East, 220; masts, spars, rigging, *The Mary Gibbs*, 22 Fed. 463; *Patten* v. *Darling*, 1 Cliff (U. S.), 254; *Potter* v. *Prov. Wash. Ins. Co.*, 4 Mason (U. S.), 298; sails, *Margarethe Blanca*, 14 Fed. 59.

[4] To save her from foundering or to float her when stranded, or facilitate escape from enemy, *Ralli* v. *Troop*, 157 U. S 386, 393; *Lawrence* v. *Minturn*, 17 How. (U. S.) 100; *Johnson* v. *Chapman*, 19 C. B. (N. S.) 563, 15 L. T. 70; discharge of cargo, *Reliance Mar. Ins. Co.* v. *N. Y. Mail S.S. Co.*, 77 Fed. 317. Damage to cargo necessarily arising from a forced discharge is allowable as general average, *Gregory* v. *Orrall*, 8 Fed. 287. If unloading is necessary to the raising of a vessel for repair the expense is general average, but if the cargo is unloaded merely for its own benefit it is not a general average charge, *Firemen's Ins. Co.* v. *Fitzhugh*, 4 B. Mon. (Ky.) 160, 167. Damage to cargo caused by water entering the ship's hold through holes made by the fall of a mast cut away is general average, *Maggrath* v. *Church*, 1 Caines (N. Y.), 196; *Saltus* v. *Ocean Ins. Co.*, 14 Johns. (N. Y.) 138. Also damage to the cargo by water admitted into the ship's hold to extinguish a fire, *Whitecross Wire & Iron Co., Ltd.*, v. *Savill*, 51 L. J. Q. B. 426, 4 Asp. M. C. 531, 8 Q. B. D. 653. See *Nimick* v. *Holmes*, 25 Pa. St. 366, 64 Am. Dec. 710, and compare English rule, *Stewart* v. *West Indian & Pac. Steamship Co.*, 28 L. T. 742, L. R. 8 Q. B. 88. Also loss of cargo consumed as fuel to work a steamer's engines or a donkey engine in time of peril, provided the supply of fuel was originally sufficient, *Robinson* v. *Price*, 2 Q. B. D. 295, 3 Asp. M. C. 407, 36 L. T. 354. Also passengers' baggage, though itself not liable to contribute, *Heye* v. *North German Lloyd*, 33 Fed. 60, aff'd 36 Fed. 705, 2 L. R. A. 287. Provisions do not contribute, even when the cargo of the ship consists only of passengers, *Brown* v. *Stapyleton*, 4 Bing. 119.

[5] § 221.

sacrifices of parts of the ship, sacrifices of cargo, and extraordinary expenses.[1]

§ 219. Deck Load.—In the United States and England the courts allow a jettison of deck load to be included in general average, provided a custom of the trade can be shown justifying the loading of the goods on deck.[2] But, if no such custom is proved, a claim for jettison of deck load cannot be allowed in general average,[3] although if a deck load is saved by a general average act, it must itself contribute.[4]

§ 220. Voluntary Stranding.—In the United States the voluntary stranding of a ship when in peril is held to be a general average act, and that irrespective of the question whether the vessel ultimately becomes a total wreck or not.[5] And this includes repairs thereby necessitated.[6] A voluntary stranding is not allowed as a general average act by English practice in the absence of express agreement.[7]

§ 221. Port of Refuge and other Expenses.—The most frequent cause of general average expenses occurs where a vessel in peril puts into a port of refuge for repairs to enable her to continue the voyage.

[1] Lowndes, Gen. Av. (1888), 20. In America the whole ship may be sacrificed and perhaps totally lost by a general average stranding, § 220.

[2] *Taunton Co.* v. *Ins. Co.*, 22 Pick. (Mass.) 108; *Harris* v. *Moody*, 30 N. Y. 266, 86 Am. Dec. 375; *Wood* v. *Phœnix Ins. Co.*, 8 Fed. 27. See *Compania La Flecha* v. *Brauer*, 168 U. S. 104, 18 S. Ct. 12. But compare *Sproat* v. *Donnell*, 13 Shep. (Me.) 185, 45 Am. Dec. 103. As to English rule see recent case, *Apollinaris Co.* v. *Nord Deutsche Ins. Co.* (1904), 1 K. B. 252.

[3] *The Milwaukee Belle*, 2 Biss. (U. S. C. C.) 197, Fed. Cas. No. 9,627; *The John H. Cannon*, 51 Fed. 46; *The Hettie Ellis*, 20 Fed. 507. The reason why such a jettison of goods stowed on deck gives to their owner no claim to contribution is that they ought not to be there, I Parsons, Ship. & Ad. 354.

[4] There must be an actual intention to throw the deck cargo overboard in order to constitute a general average act, *The Adele Thackera*, 24 Fed. 809.

[5] *Fowler* v. *Rathbones*, 12 Wall. (U. S.) 102, 20 L. Ed. 281; *Star of Hope*, 9 Wall. (U. S.) 203, 19 L. Ed. 638; *Barnard* v. *Adams*, 10 How. (U. S.) 270, 13 L. Ed. 417; *Columbian Ins. Co.* v. *Ashby*, 13 Pet. (U. S.) 331, 10 L. Ed. 186; *Norwich & N. Y. Transp. Co.* v. *Ins. Co.*, 118 Fed. 307; *Emery* v. *Huntington*, 109 Mass. 431, 12 Am. Rep. 725.

[6] *N. W. Transfer Co.* v. *Cont. Co.*, 24 Fed. 171. But general average is not allowed in favor of the shipowner if the voluntary stranding was made necessary by negligent navigation of the ship, *The Irrawaddy*, 171 U. S. 187, 18 S. Ct. 831.

[7] Arnould, Mar. Ins. (7th ed.), § 938; MacArthur, Mar. Ins. (2d ed.), 195, note. The English rule is said to be defended mainly upon two grounds: (1) that the stranding is not a sacrifice at all, nor the result of any selective discrimination between different interests, but, on the contrary, is an attempt to put both ship and cargo into a situation of less peril; and (2) that in practice it is impossible to distinguish between damages received by the ship and cargo prior to stranding, which are admittedly particular and not general average, and losses sustained after or in consequence of stranding, which it is claimed should come into general average. The York Antwerp rules on this as on some other points, have struck a compromise between conflicting views, Appendix *infra*, ch. III.

The general average practice in such a case in the United States differs in some particulars from the rules prevailing in England.[1]

By the law of this country, wages and provisions of the crew are allowed, in general average, from the time of deviating from the voyage for the purpose of putting into a port of refuge, until the voyage is resumed, or until the cargo and vessel are separated, or until there is no longer a reasonable prospect that the voyage will be continued.[2]

The expenses of entering the port, and of unloading, warehousing, and reloading the cargo, are allowable, provided the voyage is resumed, or so long as there is a fair prospect of its continuance.[3] Before actually selling or pledging the cargo, however, in a port of refuge, the master is bound to communicate with its owners if it is possible, in order to take their instructions.[4]

Goods or money paid for ransom from capture[5] or for salvage,[6] or for other services rendered for the common benefit, are also allowed in general average. Thus the necessary expense for tugs to release a stranded vessel,[7] or the necessary expense to extinguish fire.[8] But if the expense is not incurred for the common safety, then it is chargeable, in particular average, to that interest which it was intended to benefit.[9]

§ 222. **Illustrations.**—The difficulty of determining whether stranding should be regarded as a general average act is shown in some of the cases following.

The brig *Hope* bound for Barbadoes was assailed by a hurricane in Chesapeake Bay. She was steered towards a point in the shore for safety, and anchored in three fathoms of water. Sails were furled, and all efforts made by use of cables and anchors to prevent her going

[1] *Svendsen* v. *Wallace*, L. R. (1885) 10 App. Cas. 404. In America the scope of general average is much broader than in England, and often extends to expenses incurred after the common danger has ceased, *The Star of Hope*, 9 Wall. 203, 19 L. Ed. 638; *Hobson* v. *Lord*, 92 U. S. 397, 23 L. Ed. 613.

[2] *Hobson* v. *Lord*, 92 U. S. 397; *The Star of Hope*, 9 Wall. (U. S.) 203, 19 L. Ed. 638.

[3] *The Joseph Farwell*, 31 Fed. 844; *Da Costa* v. *Newnham*, 2 Term R. 407. When expense of refitting not general average, see *Jackson* v. *Charnock*, 8 Term R. 509, 5 Rev. R. 425.

[4] *The Julia Blake*, 107 U. S. 418.

[5] *Woods* v. *Olsen*, 99 Fed. 451.

[6] *S.S. Balmoral Co.* v. *Marten* (1901), 2 K. B. 896; *The Eliza Lines*, 102 Fed. 184.

[7] *Magdala S.S. Co.* v. *H. Baars Co.*, 101 Fed. 303.

[8] *The Strathdon*, 101 Fed. 600.

[9] *McGaw* v. *Ocean Ins. Co.*, 23 Pick. 405; *Douglas* v. *Moody*, 9 Mass. 548; *McAndrews* v. *Thatcher*, 3 Wall. (U. S.) 347; *Ocean St. C. Co.* v. *Anderson*, 13 Q. B. D. 651. Salvage charges, allowable in general average, include all liabilities for services rendered by persons, other than the ship's company, for the joint preservation of ship and cargo from the marine peril, McArthur, Mar. Ins. (2d ed.), 171.

on shore. The gale increased, the brig struck adrift, and dragged three miles; the windlass was ripped up, and the chain cable parted. The vessel then brought up below Craney Island, where she thumped on the shoals, and her head swinging round brought her broadside to the sea. The captain finding no possible means of saving the vessel and cargo, and preserving the lives of the crew, ran her on shore. After the storm she was left high and dry on a bank. The vessel was substantially a total loss; the lives aboard and the whole cargo were saved. The court by Justice Story *held*, that the insurers of cargo were liable for general average in favor of the owners of the brig; and that the values of both brig and the freight which she was earning were proper subjects of the general average.[1]

The ship *Brutus*, with cargo aboard for New York was lying at anchor in charge of the first mate in the outer roads at Buenos Ayres, about seven miles from shore. A gale had commenced, and next morning the ship began to drag her anchors. About nine o'clock in the evening, the gale increasing, the best bower anchor parted with a loud report. About ten o'clock, the small bower parted, and the ship commenced drifting broadside with the wind and waves. The chains were then shipped, and the vessel got before the wind; two men were put to the wheel and one to the lead, and it was determined to run the ship ashore for the preservation of the cargo and the lives of the crew. The shore towards which the ship had been drifting had banks and shallows. If the vessel had been driven on these by the tempest she would have been lost, together with cargo and crew. For the purpose of saving the cargo and crew anyhow, and possibly the ship, she was steered up the river and beached. The ship was not broken up, though somewhat damaged, and the cargo being uninjured was transshipped to destination. It being found that it would cost more than the ship was worth to get her off, she was sold. The court held that the voluntary stranding of the vessel in a less perilous place than that towards which she seemed to be drifting was a general average act and that the owners of the cargo must contribute to make good the general average loss.[2]

[1] *Columbian Ins. Co.* v. *Ashby*, 13 Pet. (U. S.) 331, 10 L. Ed. 186. Similarly the same court held that a voluntary stranding because of a smouldering but extensive fire in the hold of the ship was a good general average act although the master had no knowledge of the existence of the particular reef upon which the vessel grounded, *Star of Hope*, 9 Wall. 203, 19 L. Ed. 638 (elaborate opinion by Justice Clifford regarding general average).

[2] *Barnard* v. *Adams*, 10 How. 270, 13 L. Ed. 117 (Daniel, J., rendering a dissenting opinion). The court also held that, as to a part of the cargo seriously damaged on continuance of the voyage after transshipment, contribution should be assessed on its value at the home port, and not at place of disaster.

The schooner *Major William H. Tantum,* loaded with a cargo of iron, went for refuge inside the Delaware breakwater. The bad weather developed into a great storm, and the vessel gradually dragged her anchors until but a single anchor chain remained, and the vessel was drifting towards the beach broadside on. The master, fearing for the lives of those on board, determined to ship his cable and run ashore, head on. The cable was accordingly shipped, and the vessel, without canvas, paid off and went head on the beach. Afterwards she turned broadside to the sea and became a total loss. Part of the cargo was saved and forwarded to destination. The court concluded that while the master by slipping his cable, hastened the inevitable result, and also bettered the chance of safety to those aboard, yet, as no benefit accrued to the cargo, no case of general average was made out by the shipowner.[1]

The libellant, claiming general average contribution, had shipped his cargo of flour on the steamship *Wordsworth* for Rio de Janeiro. On leaving Sandy Hook the steamer met a heavy sea and shipped much water. The next day the carpenter reported the fore-peak full of water. This compartment held 150 tons. The master after examination, conjectured that a hole must have been stove in below, and opened the sluices of the collision bulkhead to transfer the water to the engine room where there were powerful pumps. Water was thus accumulated in a compartment where the flour was stored and the damage in question was incurred. The master knew that water damage would be thus caused but, believing that there was a hole forward, thought that his method furnished the only means of safety to the adventure. In fact the leak arose from a break in the port hawse-pipe, and when discovered was quickly repaired. The court decided that the opening of the sluices was a necessary condition of any further prosecution of the voyage, as the situation appeared to the master at the time, and that the loss attending his act, though it turned out to be a mistake, was a sacrifice in the interest of all concerned, which would support a decree for the libellant.[2]

The plaintiffs shipped a deck cargo of cattle and sheep on board the *Edenbridge* for carriage from Buenos Ayres to Deptford, under contract which provided that the ship should call at no Brazilian port. By order of the Board of Agriculture foreign animals could not land in the United Kingdom if the ship conveying them had touched at a Brazilian port. During the voyage the ship sprung a leak, and the master, for the safety of all concerned, put into a Brazilian port

[1] *The Major William H. Tantum*, 49 Fed. 252, 1 C. C. A. 236.

[2] *The Wordsworth*, 88 Fed. 313.

for repairs. In consequence the plaintiffs were obliged to sell their live stock elsewhere and at lower prices than would have been realized in the English market. The court held that this depreciation must be made good in general average.[1]

Shippers chartered the iron ship *Lodore* to carry a cargo of coals from Cardiff to Esquimault. During the voyage the coal heated to such an extent that it was necessary for the safety of the whole adventure for the vessel to bear up the River Plate and subsequently put into Buenos Ayres. In this port of refuge the coal was landed, and upon survey was found to be in such a condition as to be incapable of being carried with safety to its destination. The master accordingly abandoned the voyage, and the chartered freight was lost to the owners. The coal was condemned and sold. The insurers of chartered freight were willing to recognize liability to the owners of the ship, but claimed by way of set-off that the loss of freight was the subject of general average contribution. The court held that while the bearing up the river to Buenos Ayres was a general average act, nevertheless there had been no sacrifice of freight for the common safety in time of danger. This conclusion was put upon the ground that the coal was condemned by reason of its inherently worthless condition and the voyage abandoned after the common danger had ceased.[2]

[1] *Anglo-Argentine, etc., Agency* v. *Temperly Shipping Co.* (1899), 2 Q. B. 403.

[2] *Iredale* v. *China Traders' Ins. Co.* (1900), 2 Q. B. 515. Illustrations from Chalmers & Owen, Ins. (1907), p. 99: (1) Policy on goods. Certain goods are jettisoned by a general average act. The insurer of these goods must pay the insured value of them as an ordinary loss under the policy, but he then stands in the place of the assured as regards claims for contribution from the other contributories, *Dickinson* v. *Jardine* (1868), L. R. 3 C. P. 639. (2) Policy on ship from London to Liverpool and thence to Calcutta. The ship strands on a bank in Ireland. Half the cargo, consisting of salt, is jettisoned. The remainder is brought back much damaged to Liverpool. The amount to be made good in general average must be ascertained by valuing the jettisoned salt at the price it would have fetched in Liverpool, and the probability that it would have been damaged like the rest must be taken into account, *Fletcher* v. *Alexander* (1868), L. R. 3 C. P. 375. (3) Policy on cargo of corn from Varna to Marseilles, general average "as per foreign statement." The ship springs a leak, part of the corn is sea-damaged, and the voyage has to be broken up at Constantinople. Average is adjusted according to the law prevailing there, and the damage to the wheat is charged to general average, though, according to English law, it would be particular average excluded by the memorandum. The insurer is liable to pay this sum, *Mavro* v. *Ocean Mar. Ins. Co.* (1875), L. R. 10 C. P. 415. (4) Policy on goods. Both ship and goods belong to same owner. In stormy weather the mast has to be cut away for the safety of ship and cargo. The shipowner is entitled to a general average contribution from the insurer on goods in respect of the general average sacrifice, *Montgomery* v. *Indemnity Mut. Mar. Ins. Co.* (1901), 1 Q. B. 147, aff'd (1902) 1 K. B. 734. (5) Policy on ship. Under charter party the ship sails in ballast for Savannah, where she is to load a cargo of cotton for England. On the voyage out the ship grounds and a

§ 223. The Lien for Contribution.—After a sacrifice, the master has a maritime lien for the contributory amounts due from the interests that have been saved and still in his possession.[1] Although this contributory sum cannot be ascertained until after discharge, the lien is enforceable before parting with the goods, and the master is authorized to exact security in the form of a general average bond.[2] The execution of such a bond is not an admission of liability. It merely stands as a security in place of the goods.

In New York, the practice is for the consignee of the goods to sign the bond, which is guaranteed by his insurer, or in the absence of any local insurer, the usage is to take a cash deposit sufficient to secure the eventual contribution from such merchandise. Such a bond often contains the cargo owner's express promise (which would probably be implied) to give full particulars of the value of his goods for the information of the adjusters, as may be required.

§ 224. The Adjustment.—It is the duty of the shipowner and his agents to take such steps as may be reasonable, and within a reasonable time, to provide that all general average contributions whether due to himself or others are adjusted and collected.[3] The sacrifices and expenses allowed in general average are apportioned over the aggregate value of the property saved, as computed at the time and place of adjustment;[4] but the property which has been sacrificed must bear its share as a contributor no less than if it had been saved, for, in legal theory, general average contribution is to be so regulated as to make it in result immaterial to each interest at risk, whose property shall in the first instance have been taken, whose money spent, or whose credit pledged, for the safety of all.[5] The practical effect of such an adjustment is that the party upon whom the general average loss most heavily falls in the first instance receives the benefit

general average loss is incurred in respect of the ship's machinery. The chartered freight is liable to contribute and the amount of the contribution can be deducted from the sum due under the policy on ship, *Steamship, etc., Co.* v. *London, etc., Ins. Co.* (1901), 6 Com. Cas. 291.

[1] *Dupont de Nemours & Co.* v. *Vance*, 19 How. (U. S.) 162.

[2] *Wellman* v. *Morse*, 76 Fed. 573; *Huth* v. *Lamport* (1885), 16 Q. B. D. 442.

[3] *Wavertree Sailing S. Co.* v. *Love*, 66 L. J. P. C. 77, 76 L. T. 576 (1897), App. Cas. 373; *Crooks* v. *Allan* (1879), 5 Q. B. D. 38; *Strang S. & Co.* v. *Scott* (1889), 14 App. Cas. 607.

[4] McArthur, Mar. Ins. (2d ed.), 196.

[5] Lowndes, Gen. Av., 38; Arnould, Ins., §§ 970, 974. See *Royal Mail Co.* v. *English Bank* (1887), 19 Q. B. D. 371, 372. Wages of the crew do not contribute, Arnould, § 972. As to passenger luggage see *Heye* v. *North German Lloyd*, 33 Fed. 60, 36 Fed. 705. An illustration of a general average adjustment is given in Arnould, Ins., § 991.

of the general average contribution, and the payment is thus made proportionate to the benefit received.[1]

The proper time for adjustment is the time of the completion of the voyage, or of the separation of the interests. An adjustment made at the end of the voyage, if valid there, is, in general, valid anywhere. Any port reached, subsequent to the general average act, at which the interests are separated, may be the end of the voyage for this purpose.[2]

An adjustment of general average begins by a statement of the facts, usually embodying an extract from the master's protest, together with copies of the local surveys if they are relied on to justify the course pursued. In dealing with the various expenditures, the adjuster has to separate those items which are chargeable to all interests, from those that are applicable only to cargo, or which may apply only to certain parts of the cargo (special charges) as distinguished from the expenses that are to be borne solely by the shipowner. This separation is usually shown by the use of different parallel columns. A detailed statement of the contributing interests (ship, freight, and cargo) follows, from which is found the ratio of contribution stated in a percentage carried out to six or more decimal places. Where the insurance on the properties is known to the adjuster, a settlement under the policies is often appended, showing the sums due from each underwriter. Harrington Putnam, Esq., of the New York bar has courteously prepared for this book the example of a general average adjustment given in the Appendix.[3]

[1] *Harris* v. *Moody*, 30 N. Y. 266; *Wheaton* v. *China Mut. Ins. Co.*, 39 Fed. 879. As to rule for ascertaining general average contribution in respect to goods jettisoned, see *Fletcher* v. *Alexander*, L. R. 3 C. P. 375, 380. As to general rule for adjustment of general average see *Gillett* v. *Ellis*, 11 Ill. 579, and *The Eliza Lines*, 102 Fed. 184. The general principle of contribution may be summed up in one sentence: "It must be determined how much better off, in a pecuniary sense, each owner of property exposed to hazard on shipboard would be in the event of a safe arrival than in the event of a total loss; and on this amount, which represents the benefit derived by each from the sacrifice which has saved the ship, each must contribute," Lowndes, Gen. Av., 304. The contributory value, for the purpose of general average and the insurable value may differ, inasmuch as the former is the value at the port of adjustment, *Star of Hope*, 9 Wall. 203, 19 L. Ed. 638. Whereas the latter is the value at the commencement of the voyage. So that even when the subject-matter is fully insured, the insurers are not liable for the whole amount of the general average contribution assessed against that subject-matter if the contributory value is greater," De Hart & Simey, Ins. (1907), 83, citing *S.S. Balmoral Co.* v. *Marten* (1902), App. Cas. 511, 71 L. J. K. B. 819.

[2] *Barnard* v. *Adams*, 10 How. (U. S.) 270, 13 L. Ed. 417; *Eliza Lines*, 102 Fed. 184; *Bradley* v. *Cargo of Lumber*, 29 Fed. 648. The policy often states by what rules or customs the adjustment shall be made, *De Hart* v. *Compania, etc.* (1903), 1 K. B. 109, aff'd (1903), 2 K. B. 503; *Hendricks* v. *Australasian Ins. Co.*, L. R. 9 C. P. 460.

[3] Appendix, ch. III.

§ 225. York Antwerp Rules.—The rules of practice for the adjustment of general average losses vary greatly in detail in different countries and in different ports. The regulations most frequently used by agreement are the York-Antwerp rules, adopted at Antwerp in 1877 by the Association for the Reform and Codification of the Law of Nations, and amended at their Liverpool conference in 1890.[1]

By aid of these rules, set forth in the Appendix, the practice of adjusting general average has been brought into harmony on many important points.

§ 226. Contributory Value of Freight.—In respect to the contributory value of the freight interest, which cannot always be easily ascertained, an arbitrary rule has been adopted in New York. While the full amount of freight is contributed for in general average where the loss of freight is total, only fifty per cent of that amount is called upon for contribution.[2] That is supposed to be a rough estimate of its net value at the end of the voyage, after expenses have been deducted from gross freight.[3]

Other ports in the United States deduct one-third.[4] The usage in England is to compute the net freight interest for contribution by deducting the estimated amounts saved, such as wages and port charges, instead of relying on any arbitrary ratio,[5] and this is also the provision of the York-Antwerp Rules.[6]

[1] These as amended are given in the Appendix, ch. III. *De Hart* v. *Compania, etc.* (1903), 1 K. B. 109 (general average payable as per foreign statement). For Lloyd's Rules, see Arnould (7th ed.), 1523–1538.

[2] *Rathbone* v. *Fowler*, 6 Blatch. (U. S. C. C.) 296.

[3] Chartered freight of homeward voyage is held liable to contribute to a general average sacrifice made on the outward voyage, *Steamship Carisbrook Co.* v. *London & Provincial Mar. & Gen'l Ins. Co.*, L. R. (1902) 2 K. B. 681.

[4] Gourlie, Gen. Average, p. 534; *Humphreys* v. *Union Ins. Co.*, 3 Mason, 429 (1824).

[5] 2 Arnould, Ins., § 989.

[6] Rule XVII.

PART II

MEANING AND LEGAL EFFECT OF THE CLAUSES OF THE POLICIES

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CHAPTER XI

The Standard Fire Policy

§ 227. **Introductory.**—All our labor hitherto has been in a sense preparatory. General principles in insurance law may be called instruments, with the aid of which the rights and obligations of the parties, insurers and insured, created under the contracts between them, must be investigated and developed. It is comparatively seldom that the insured, or the beneficiary appointed by him, calls upon his legal adviser until he finds himself in difficulty. An appreciation of difficulty usually means that the casualty insured against has occurred, and that a claim under the insurance policy exists. Then at once starts up the practical inquiry on the one side, is the claim well founded in the law? And on the other, the equally practical question, does the law furnish a good defense? All the clauses of the principal contracts of insurance, fire, life, accident, and marine, merit our attention. And among the conventional forms of policies, first in order of importance come the standard fire policies.

The dissimilarities existing in earlier times between numerous forms of fire policies in common use, resulted in inconveniences and uncertainties,[1] especially in cases where the same property was insured by policies in different companies, which often thus furnished inconsistent provisions for the adjustment of the one loss sustained by the one party. It frequently happened that, though overinsured, the plaintiff could not recover full indemnity. Moreover, many policy clauses devised in the interest of the companies, were unreasonably technical, and were commonly printed in type so fine as to be well-nigh unintelligible without the aid of a magnifying glass.[2] Such

[1] *Peabody* v. *Satterlee*, 166 N. Y. 174, 59 N. E. 818; *Bourgeois* v. *Northwestern Nat. Ins. Co.*, 86 Wis. 606, 57 N. W. 347.

[2] *De Laney* v. *Ins. Co.*, 52 N. H. 581.

considerations[1] have influenced the legislatures of many states to adopt a uniform fire policy,[2] the use of which is made compulsory so far as property situated within the particular state is concerned.[3]

A legislature has the constitutional power to prescribe the form of a policy of insurance, and to provide, as some state legislatures have enacted, that copies of all papers referred to in the policy as parts thereof, shall be attached thereto; and it may also prescribe, as a penalty for the nonobservance of this regulation, that, if this is not done, such papers shall not be considered a part of the policy or be received in evidence.[4] The New York law, however, does not require that the application shall be attached to the standard fire policy.

In framing a statutory form of fire policy Massachusetts was the pioneer state.[5] In 1886 New York adopted a standard fire policy,[6] the terms of which are in great part followed either by statutory enactment or by the usual practice of the stock fire companies throughout all the country, with the exception of a few states, the statutory policies of some of these taking as their basis the Massachusetts form.[7] As the Minnesota court says, "the Massachusetts

[1] *Moore* v. *Hanover F. Ins. Co.*, 141 N. Y. 219, 224, 36 N. E. 191.

[2] Forms of the standard policies given in Clement, Ins. (1905), to that date.

[3] Appendix, ch. I.

[4] *Considine* v. *Met. Life Ins. Co.*, 165 Mass. 462, 43 N. E. 201. And see *Business Men's League* v. *Waddill*, 143 Mo. 495, 45 S. W. 262, 40 L. R. A. 501.

[5] L. 1873, c. 331. The use was not compulsory. Repealed 1881, c. 161, Connecticut passed an act, L. 1867, c. 121, for a policy, but none was framed under it. Repealed L. 1868, c. 7. The Massachusetts policy now in use was framed under a later act. Closely following many of its provisions are the forms of policies since adopted by New Hampshire, Minnesota, Maine, and South Dakota; but the standard policies in use in South Dakota and New Hampshire, at the close of 1907, contain numerous important departures. The legislatures of New York and other states have been bombarded with crude and ill-advised measures proposed from time to time to alter the standard policy. Any such measure should be framed in the interest of the whole country and by some expert commission, representative of many states, so as to diminish and not multiply the dissimilarities now existing between the various statutory fire policies. Compare the method of drafting, revising, and enacting the English codification of marine insurance law as described in the preface to Chalmers & Owen, Ins. (1907).

[6] L. 1886, c. 488. General Laws, 1892, c. 38; N. Y. Ins. L., § 121. Policy framed by a committee of the New York Board of Fire Underwriters, E. R. Kennedy, Esq., chairman, in conference with a committee of the National Board of Fire Underwriters, and by William Allen Butler, Esq., and other counsel of New York and Connecticut.

[7] P. 278, n. 5, *supra*. A form of English fire policy is given in Bunyon, Ins. (1906), 5 *et seq.* Where the act providing for a policy has turned over to a commissioner or a commission the legislative function of framing in future an exclusive form of contract it has been held to be unconstitutional as in the case of the Michigan, *King* v. *Concordia Ins. Co.*, 140 Mich. 258, 103 N. W. 616; Minnesota, *Anderson* v. *Manchester Assur. Co.*, 59 Minn. 182, 63 N. W. 241 (but see later Minn. Act Appendix, ch. I); Pennsylvania, *O'Neill* v. *American Ins. Co.*, 166 Pa. St 72, 30 Atl. 943; South Dakota, *Phenix*

and New York standard policies went into effect about the same time and have formed the models for the legislation in other states." [1]

The use of a standard policy, including its provisions and type, is, in general, made obligatory by the statute upon all corporations, and in some states a penalty is imposed for violating the act, but any policy, though in purport inconsistent with the provisions of the act, is nevertheless binding upon the company issuing it, and may be enforced against the company according to its terms as written.[2]

The standard policies, like earlier forms, having been drafted by insurance men or largely under their superintendence, the same general rules of construction are said to prevail as of old.[3] But the standard policy has been declared by at least one court to be a statutory law as well as a contract,[4] and, giving recognition to the fact that its provisions are drawn with better regard to the interests of both parties than those of fire policies formerly in vogue, the courts in construing them are giving less emphasis to the maxim "the law abhors a forfeiture," and more to the rule that the terms of the contract should be enforced fairly, according to their plain import.[5]

In connection with the subject of warranties in an earlier chapter, a general comparison was instituted between the provisions of the marine policy, and those of the fire policy; and the attitude of the courts in the past towards each policy was adverted to, as evinced by their interpretation of the meaning and legal effect of the con-

Ins. Co. v. *Perkins*, 101 N. W. 1110, and Wisconsin, *Dowling* v. *Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738, statutes. But after such a policy has been framed by agencies outside the legislature, the legislature may, without violating the federal constitution, adopt an exclusive form of policy, affecting property within the state, to be used by incorporated companies, *Re Opinion of Justices*, 97 Me. 590, 55 Atl. 828; *Kollitz* v. *Eq. Mut. F. Ins. Co.*, 92 Minn. 234, 99 N. W. 892; *O'Neill* v. *American Ins. Co.*, 166 Pa. St. 72, 30 Atl. 943. Companies doing business in the state need not use the statutory policy of that state if the property is located in another state, *Loomis* v. *Lewis*, 62 App. Div. 433, 71 N. Y. Supp. 62.

[1] *Wild-Rice Lumber Co.* v. *Royal Ins. Co.* (Minn., 1906), 108 N. W. 871 (insurer has no authority to add to the New York standard policy a clause warranting the maintenance of a designated clear space about the insured premises).

[2] *Hewins* v. *London Assur. Corp.*, 184 Mass. 177, 68 N. E. 62, 64.

[3] *Chichester* v. *New Hampshire F. Ins. Co.*, 74 Conn. 510, 51 Atl. 545; *Reed* v. *Wash. Ins. Co.*, 138 Mass. 572, 577 (construed as a contract rather than a statute); *Davis & Co.* v. *Ins. Co. of N. A.*, 115 Mich. 382, 73 N. W. 393; *Kollitz* v. *Eq. Mut. Fire Ins. Co.*, 92 Minn. 234, 99 N. W. 892; *Matthews* v. *American Cent. Ins. Co.*, 154 N. Y. 449, 48 N. E. 751, 61 Am. St. R. 627, 39 L. R. A. 433; *Maisel* v. *Fire Assn. of Phila.*, 59 App. Div. (N. Y.) 461, 69 N. Y. Supp. 181.

[4] *Temple* v. *Niagara Ins. Co.*, 109 Wis. 372, 85 N. W. 361.

[5] *Armstrong* v. *Western Man. M. I. Co.*, 95 Mich. 137, 54 N. W. 637; *Nelson* v. *Traders' Ins. Co.*, 86 App. Div. 66, 67, 83 N. Y. Supp. 220, aff'd 181 N. Y. 472, 74 N. E. 421; *Quinlan* v. *Prov. Wash. Ins. Co.*, 133 N. Y. 356, 365, 31 N. E. 31; *Hart* v. *Stand. Mar. Ins. Co.*, L. R. 22 Q. B. D. 499, 501.

ventional forms of the marine policy on the one hand and of the fire policy on the other.[1]

We shall in this and following chapters examine the clauses of the New York standard policy, in the sequence in which they occur in the instrument itself, noticing the more important variations contained in the standard policies of other states, but giving only scant attention to those numerous decisions, which the general use of standard forms of fire policies has rendered largely obsolete in this country.[2]

§ 228. In Consideration of the Stipulations and Premium.—The policy is not an absolute agreement to grant indemnity to the insured [3] for the loss occasioned by the casualty insured against, but the insurer's promise to pay is made dependent upon the fulfillment by the insured of certain provisions of the contract which are called conditions or warranties. As already shown, if any one of these is violated or unperformed, the policy is avoided,[4] and there can be no recovery unless the policy is subsequently revived by the insurer.[5] The conditions for the most part are expressed in the contract itself, and to solve their proper meaning, force, and effect, must be a chief concern in the study of fire insurance law.[6] These conditions may be divided into three classes; those precedent to a valid inception of the contract, those relating to the contract during the pendency of

[1] See § 107, p. 140, note 3, *supra*.

[2] Precisely, or in the main, following the New York form, are the standard policies of Connecticut, Louisiana, Michigan, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, West Virginia, and Wisconsin; but in some, especially those of Michigan and Wisconsin, there are important differences. The standard policies of Iowa and South Dakota do not adhere to the phraseology either of the New York or Massachusetts forms, and contain important modifications in favor of the insured. In Pennsylvania the standard policy law adopting the New York form was adjudged unconstitutional; but in practice the New York form is used. In Missouri the companies were required by statute to adopt a uniform policy to be approved by the fire insurance commissioner. The New York form was so adopted with the following clause added: "it is hereby agreed on the part of the company issuing the policy that any provisions of said policy in conflict with the statutes of the state of Missouri are distinctly held and acknowledged to be inoperative and of no avail." Sometimes valued policy and other statutory provisions intervene; in some standard policies the company's permit may be by oral assent or agreement; in some standard policies there are provisions as to breaches of certain warranties limiting forfeiture to such breaches as contribute to the loss; in some there are special provisions relating to cancellation, subrogation, proofs of loss, and appraisal; and in some there are special provisions making the insurance company responsible for the knowledge or acts of the agent or solicitor. The state legislatures are industrious, and the status at the close of 1907 is no safe guide for a later date. It is obvious, therefore, that the contents of every policy in question must be critically examined as occasion demands.

[3] *Chichester* v. *N. H. Fire Ins. Co.*, 74 Conn. 510, 513, 51 Atl. 545.

[4] There are exceptions to this rule.

[5] *Imperial F. Ins. Co.* v. *Coos Co.*, 151 U. S. 452, 14 S. Ct. 379.

[6] See Appendix, ch. II.

the risk, and those which appertain to the presentation and enforcement of the claim of the assured after loss.

As regards the premium, the insurer is entitled to its payment upon the delivery of the policy or closing of the contract,[1] unless otherwise understood;[2] but ordinarily the payment of the premium is not made a condition of the fire policy, nor its non-payment a ground of forfeiture.[3] A premium is generally paid in cash or check,[4] but may be paid by notes or credit.[5] While on the one hand, as just shown, the insured is in general presumed to have allowed credit for the premium if the policy is delivered without requiring payment in advance;[6] so also, on the other hand, a promise to pay the premium is implied as against the insured from his acceptance of the policy, although shortly thereafter he may change his mind and return it as not wanted.[7]

If the company accepts a credit with its agent instead of actual payment as required by the policy, such a transaction is equivalent to payment so far as the company is concerned.[8]

[1] *Mauck* v. *Merchants' & M. Fire Ins. Co.* (Del. Super.), 54 Atl. 952; *Taylor* v. *Lowell*, 3 Mass. 331, 3 Am. Dec. 141; *N. Y. Lumber, etc., Co.* v. *Peoples' F. Ins. Co.*, 96 Mich. 20, 55 N. W. 434; *Schaffer* v. *Mut. F. Ins. Co.*, 89 Pa. St. 296. The delivery of the policy and the payment of the premium are declared to be reciprocal or concurrent considerations, *Ins. Co.* v. *Lewis*, 187 U. S. 335, 235 Ct. 126.

[2] *Firemen's Ins. Co.* v. *Kuessner*, 164 Ill. 275, 45 N. E. 540; *Western Assur. Co.* v. *McAlpin*, 23 Ind. App. 220, 55 N. E. 119.

[3] *Ohio F. Ins. Co.* v. *Stowman*, 16 Ind. App. 205, 44 N. E. 558. And credit is inferred if agent delivers policy without exacting advance payment, *Germania F. Ins. Co.* v. *Muller*, 110 Ill. App. 190; *Kollitz* v. *Equitable Mut. Ins. Co.*, 92 Minn. 234, 99 N. W. 892; *Church* v. *La Fayette F. Ins. Co.*, 66 N. Y. 222. Under cancellation clause company often cancels for non-payment, *Citizens' Fire Ins. Co.* v. *Swartz*, 21 Misc. 671, 47 N. Y. Supp. 1107. But mutual companies often require prepayment of the premium, *Wainer* v. *Milford Mut. F. Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; *Mulrey* v. *Shawmut Mut. F. Ins. Co.*, 4 Allen (Mass.), 116, 81 Am. Dec. 689; *Buffum* v. *Fayette Mut. Fire Ins. Co.*, 3 Allen (Mass.), 360. But the company may accept payment by giving credit to the broker in a personal account with him, *White* v. *Connecticut Fire Ins. Co.*, 120 Mass. 330. A promise by the insurer to temporarily "hold" certain expired policies, credit for the premium being given to the assured, is binding, *Baker* v. *Westchester Fire Ins. Co.*, 162 Mass. 358, 38 N. E. 1124.

[4] *Penn. L. Mut. F. Ins. Co.* v. *Meyer*, 126 Fed. 352, 61 C. C. A. 254; *Walls* v. *Home Ins. Co.*, 114 Ky. 611, 71 S. W. 650; *Greenwich Ins. Co.* v. *Oregon Imp. Co.*, 76 Hun, 194, 27 N. Y. Supp. 794.

[5] *Carson* v. *Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584. A note taken in place of cash for premium becomes a binding obligation when the risk attaches, *Merchants' Ins. Co.* v. *Clapp*, 11 Pick. (Mass.) 56; *Lynn* v. *Burgoyne*, 13 B. Mon. (Ky.) 400. But note may be collected though insurance is suspended for default in its payment, *Robinson* v. *German Ins. Co.*, 51 Ark. 441, 11 S. W. 686; *Phenix Ins. Co.* v. *Rollings*, 44 Neb. 745, 63 N. W. 46. A note given for premium is negotiable, *McIntire* v. *Preston*, 5 Gilman (Ill.), 48, 48 Am. Dec. 321; *Union Ins. Co.* v. *Greenleaf*, 64 Me. 123. A voidable policy is sufficient consideration for a premium note, *Plympton* v. *Dunn*, 148 Mass. 523, 527, 20 N. E. 180.

[6] See also § 75, *supra*.

[7] *Western F. Ins. Co.* v. *Gurian*, 115 App. Div. (N. Y.) 610.

[8] *Jones* v. *Ætna Ins. Co.*, 13 Fed. Cas.

In mutual companies premiums are often paid, in whole or in part, by premium or deposit notes of the insured, which are held by the company, and from time to time assessed to pay losses and expenses.[1]

938; *Lungstrass* v. *German Ins. Co.*, 57 Mo. 107; *Gaysville Mfg. Co.* v. *Phœnix Mut. F. Ins. Co.*, 67 N. H. 457, 36 Atl. 367; *Train* v. *Holland-Purchase Ins. Co.*, 62 N. Y. 598; *Wytheville Ins. & B. Co.* v. *Teiger*, 90 Va. 277, 18 S. E. 195; and see *Mechanics' & T. Ins. Co.* v. *Mut., etc., Bldg. Assn.*, 98 Ga. 262, 25 S. E. 457. And if agent pays the company, latter cannot forfeit the policy, though it provides that company will not be liable, "until the premium be actually paid," *Home Ins. Co.* v. *Gilman*, 112 Ind. 7, 13 N. E. 118. Compare *Herring* v. *Am. Ins. Co.*, 123 Iowa, 533, 99 N. W. 130; *Dunham* v. *Morse*, 158 Mass. 132, 32 N. E. 1116. Credit was given to the broker in *White* v. *Conn. F. Ins. Co.*, 120 Mass. 330. Where the standard policy has been delivered by the insurer without payment of the premium recovery thereon for a loss cannot be defeated on the ground of non-payment of premium, *Healy* v. *Insurance Co.*, 50 App. Div. 327, 63 N. Y. Supp. 1055; see § 172, *supra*. And see *Weisman* v. *Commercial F. I. Co.*, 3 Penn. (Del.) 224, 50 Atl. 93. Unless the company has repudiated liability on other grounds, *Knickerbocker L. Ins. Co.* v. *Pendleton*, 112 U. S. 696; *Stokes* v. *Mackay*, 147 N. Y. 223, 41 N. E. 496; *Howe Ins. Co.* v. *Adler*, 71 Ala. 516, the premium, if unpaid, should be duly tendered by the insured before the commencement of action on the policy, *Farnum* v. *Phœnix Ins. Co.*, 83 Cal. 246, 23 Pac. 869; *Van Tassel* v. *Greenwich Ins. Co.*, 28 App. Div. 163, 169, 51 N. Y. Supp. 79; *Hardwick* v. *State Ins. Co.*, 20 Oreg. 547, 26 Pac. 840. Any unearned premium, however, paid to the company need not be tendered back by it as a condition of defending action, unless required by statute, *Georgia Home Ins. Co.* v. *Rosenfield*, 95 Fed. 358 (no waiver of forfeiture to retain it); *Parsons* v. *Lane*, 97 Minn. 98, 106 N. W. 485; *Senor* v. *Western M. Mut. F. Ins. Co.*, 181 Mo. 104, 79 S. W. 687. Insured who seeks to rescind is liable for premium until time of rescission, *Am. Ins. Co.* v. *Garrett*, 71 Iowa, 243, 32 N. W. 356. As to obligation for premium when company is insolvent see *Ins. Commissioner* v. *Peoples' F. Ins. Co.*, 68 N. H. 51, 44 Atl. 82; *Merchants' Mut. Ins. Co.* v. *Underwood*, 3 N. Y. Super. Ct. 474; *Equit. Ins. Co.* v. *Harvey*, 98 Tenn. 636, 40 S. W. 1092.

[1] *New Hampshire Mut. F. Ins. Co.* v. *Rand*, 4 Fost. (N. H.) 428. Power to assess is ordinarily limited by losses and expenses, *Farmers' Mut. F. Ins. Co.* v. *Knight*, 162 Ill. 470, 44 N. E. 834; *Sinnissipi Ins. Co.* v. *Farris*, 26 Ind. 240, 342; *Ionia, etc., Ins. Co.* v. *Ionia C. Judge*, 100 Mich. 606, 59 N. W. 250; excluding those accrued prior to membership, *Mutual F. Ins. Co.* v. *Jean*, 96 Md. 252, 53 Atl. 950; *Detroit Mfrs. M. F. Ins. Co.* v. *Merrill*, 101 Mich. 393, 59 N. W. 661; *Sands* v. *Lilienthal*, 46 N. Y. 541. Liability to assessment continues so long as member's insurance continues, *Planters' Ins. Co.* v. *Comfort*, 50 Miss. 662; *Morgan* v. *Hog Raisers' Mut. Ins. Co.*, 62 Neb. 446, 87 N. W. 145. But is limited by face value of premium note, *Davis* v. *Oshkosh, etc., Co.*, 82 Wis. 488, 52 N. W. 771. Member is liable for losses occurring prior to his withdrawal, *Peake* v. *Yule*, 123 Mich. 675, 82 N. W. 514; or during term of his policy though assessment is subsequent, *Raegener* v. *Willard*, 44 App. Div. 41, 60 N. Y. Supp. 478; *Susquehanna, etc., Ins. Co.* v. *Mardorf*, 152 Pa. St. 22, 25 Atl. 234. Sometimes there is a cash premium and assessments besides, *Dwinnell* v. *Felt*, 90 Minn. 9, 95 N. W. 579; *Buckley* v. *Columbia Ins. Co.*, 83 Pa. St. 298; *Whipple* v. *U. S. Fire Ins. Co.*, 20 R. I. 260, 38 Atl. 498. Levy of assessment is not always a condition precedent to liability of the company under its charter, *Wood* v. *Farmers' L. Assn.*, 121 Iowa, 44, 95 N. W. 226; *Thornburg* v. *Farmers' L. Assn.*, 122 Iowa, 260, 98 N. W. 105; *Nashua F. Ins. Co.* v. *Moore*, 55 N. H. 48. But usually notes are conditional and a due assessment is essential to fix liability of maker, *Hagan* v. *Merchants' & B. Ins. Co.*, 81 Iowa, 321, 46 N. W. 1114. Validity of assessment ordinarily is determined by laws of state where company is incorporated, *Warner* v. *Delbridge, etc., Co.*, 110 Mich. 590, 68 N. W. 283. In general, the company cannot make an assessment until a

If the risk attaches, the premium is not returnable,[1] except as provided by the terms of the agreement, as in the case of the standard fire policy or by statute; but if the policy is void *ab initio*, or if the risk never attaches and there is no fraud on the part of the insured, and the contract is not against law or good morals, the insured is entitled to recover back the premium paid,[2] but if the policy is void for fraud the premium is not returnable,[3] unless the policy so provide.

§ 229. **Premium—To whom Payable.**—A general or local agent with power to countersign policies has apparent authority to collect premiums. In that regard his acts are those of the company.[4]

§ 230. **The Term.**—*From the ——— day of ——— at noon.* "Noon" in the absence of statutory provisions to the contrary, or evidence of a different intent, has been held to refer to solar and not standard time.[5]

loss has occurred, *Wolcott* v. *State F. Mut. Ins. Co.* (Neb., 1906), 110 N. W. 628. Premium notes in mutual companies are generally made a lien upon the property insured, *Woodfin* v. *Asheville Mut. Ins. Co.*, 6 Jones (N. C.), 558. The Iowa standard fire policy provides that the company shall not be liable if insured defaults in payment of premium or assessment note, provided notice as required by law has been given, but acceptance of payment is waiver.

[1] *Parsons* v. *Lane*, 97 Minn. 98, 119, 106 N. W. 485 (citing many cases); *Hendricks* v. *Ins. Co.*, 8 Johns. (N. Y.) 1, 5.

[2] *Parsons* v. *Lane*, 97 Minn. 98, 119, 106 N. W. 485 (citing many cases); *Ins. Co.* v. *Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781.

[3] *Blaeser* v. *Milwaukee Mut. Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747.

[4] *Mauck* v. *Merchants' & Mfrs.' F. Ins. Co.* (Del.), 54 Atl. 952. As to payments to solicitors, see *Andes F. Ins. Co.* v. *Loehr*, 6 Daly (N. Y.), 105; *Long Creek Bldg. Assn.* v. *State Ins. Co.*, 29 Oreg. 569, 46 Pac. 366. As to payments to brokers, see *Am. Fire Ins. Co.* v. *Brooks*, 83 Md. 22, 34 Atl. 373; *Globe & R. Fire Ins. Co.* v. *Robbins*, 43 Misc. 65, 86 N. Y. Supp. 493; *Lounsbury* v. *Duckrow*, 22 Misc. 434, 50 N. Y. Supp. 927; *Citizens' F. Ins. Co.* v. *Swartz*, 21 Misc. 671, 47 N. Y. Supp. 1107.

[5] *Jones* v. *German Ins. Co.*, 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860 (cases cited); *Meier* v. *Phœnix Ins. Co.*, 12 Ins. L. J. (N. S.) 192. And see *Searles* v. *Averhoff*, 28 Neb. 668, 44 N. W. 872; *Parker* v. *State*, 35 Tex. Cr. R. 12, 29 S. W. 480. Whether solar or standard, may be construed as a question of intent, *Globe & R. F. Ins. Co.* v. *Moffat*, 154 Fed. 13 (May, 1907) (citing cases); or of well-known custom, *Rochester German Ins. Co.* v. *Peaslee Co.* (Ky.), 87 S. W. 1115. In marine insurance time is to be taken at the place where the contract is made, *Walker* v. *Protection Ins. Co.*, 29 Me. 317. In fire insurance, however, the *locus* of the property has been regarded as controlling, *Globe & R. F. Ins. Co.* v. *Moffat*, 154 Fed. 13 (May, 1907). The lack of a definite term does not of necessity render the contract incomplete, *Petrie* v. *Phœnix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380. Reasonable time sometimes is presumed, *Schrœder* v. *Traders' Ins. Co.*, 109 Ill. 157. Policy for thirty days construed in *Barr* v. *Ins. Co.*, 61 Ind. 488. Where the term is not so precisely defined the law does not regard fractions of a day and construes liberally to the insured. Policy then runs till midnight and first and last days are both included, *Isaacs* v. *Royal Ins. Co.* (1870), L. R. 5 Exch. 296, 39 L. J. Exch. 189, 22 L. T. 681. But "noon" as employed in the standard policy

§ 231. Insures Against all Direct Loss by Fire, Except as Provided.—Loss by fire means the result of the ignition of the property insured or of some substance near to it.[1] Thus, the action of fire in charring, scorching, cracking, smoking or heating may be included though no flame be seen.[2]

Again, it is said that if the fire is in no respect a hostile fire, that is, if the fire itself does not pass beyond the limits assigned for it, as, for example, a stove, furnace, lamp or similar receptacle intended to hold fire, then the results of smoke and heat, where there is no ignition outside the agencies employed, are not covered by the policy. If the fire, however, extend beyond the place where it belongs it becomes a hostile fire, which, indeed, is the peril insured against. Thus loss by soot caused by an accidental fire in the chimney was held to be included though the fire originated in the stove.[3] The word "direct" in the policy means immediate, or proximate, as distinguished from remote;[4] but the proximate results of fire within the rule of law establishing the liability of the insurer may include other

makes it definite, *Matthews* v. *Continental Cas. Co.*, 78 Ark. 81.

[1] *Babcock* v. *Montgomery Co. Mut. Ins. Co.*, 6 Barb. (N. Y.) 637. As to what is fire see recent and interesting opinions in *Western Woolen Mill Co. cases, infra.*

[2] *Scripture* v. *Lowell Mut. F. Ins. Co.*, 64 Mass. 356, 57 Am. Dec. 111; *Singleton* v. *Phœnix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839. But no degree of heat alone without ignition is covered by the policy, *Gibbons* v. *German Ins. & Savings Inst.*, 30 Ill. App. 263, 265. Before heat, or decomposition in animal or vegetable matter reaches the point of ignition it has recently been held, there must be more than "charring." There must be "a flame or a glow," or something that can be called "luminosity," *Western Woolen Mill Co.* v. *Northern Assur. Co.*, 72 U. S. C. C. A. 1, 139 Fed. 637 (in which court dismissed the action); *Sun Ins. Office* v. *Western Woolen Mill Co.*, 72 Kan. 48, 82 Pac. 513 (in which jury was allowed to find for plaintiff).

[3] *Way* v. *Abington M. F. I. Co.*, 166 Mass. 67, 74, 43 N. E. 1032, 32 L. R. A. 608, 55 Am. St. R. 379. But where sugar was spoiled by great heat from a fire in ordinary use because of the closing of a register, the company was held not liable, *Austin* v. *Drewe*, 6 Taunt. 436, and so also where the heat of the sun contracted timber without any actual combustion, *Babcock* v. *Montgomery Co. Mut. Ins. Co.*, 6 Barb. (N. Y.) 637. Similarly where the interior of a boiler was damaged by overheating from regular furnace fires owing to absence of water in the boiler, *American Towing Co.* v. *Ger. Fire Ins. Co.*, 74 Md. 25, 21 Atl. 553, in which the court says: "When fire is employed as an agent, either for the ordinary purposes of heating the building, for the purpose of manufacturing, or as an instrument of art, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limit of the agencies employed; as from the effects of smoke or heat evolved thereby, or escaping therefrom, from any cause, whether intentional or accidental. In order to bring such consequences within the risk, there must be actual ignition outside of the agencies employed, not purposely caused by the assured, and these, as a consequence of such ignition, *dehors* the agencies." *Fitzgerald* v. *German-American I. Co.*, 30 Misc. 72, 60 N. Y. Supp. 824.

[4] *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 415, 10 S. Ct. 365. In *Lynn Gas & El. Co.* v. *Meriden F. Ins. Co.*, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. R. 540 "direct and proximate" cause is defined and explained. For further discussion of proximate cause see

things than combustion; as, for example, the resulting fall of the building or parts thereof,[1] injuries to the insured property by water from the fire engines, and operations of firemen and others,[2] or exposure of goods during the fire, or expense for or damage during their reasonable removal;[3] also the loss of goods by theft[4] during the fire, or during a reasonable removal to a place of safety,[5] also injury to buildings blown up to stay a conflagration,[6] except as such results of fire are expressly excluded by the terms of the contract.

A comparison between the two cases following brings out the distinction between a hostile and a friendly fire, though both kinds of fire may be the cause of damage to the insured. Way, the plaintiff, had a policy on his cigars, manufactured and in process of manufacture, located at 25 Doane Street, Boston. One night the soot in the chimney accidentally became ignited, and the room in which the cigars were located was filled with dense smoke, which injured their flavor. The court held that a fire in a chimney, especially when not intentionally kindled with a purpose to burn out the soot, should be considered a hostile rather than a friendly fire; and that damage caused by it is covered by the ordinary policy.[7]

About four years later, apparently without having its attention directed to the *Way case*, the Georgia court decided in favor of the insurer, on a somewhat different state of facts. Cannon's insurance was on her stock of dry goods, hats, clothing, etc., in a building at Dalton, Georgia. In arranging a stove, the pipe became disengaged at the ceiling of the floor immediately below the floor where the goods were located. When the fire was built in the stove, the escaping smoke and soot and also water used to cool the ceiling, but not to prevent ignition, did the damage to the goods. No actual burning

ch. XX. Whether fire is the proximate cause is often for the jury, *N. Y. Boston Ex. Co.* v. *Traders' & Mech. Ins. Co.*, 132 Mass. 377, 135 Mass. 221, and see *Milwaukee R. R. Co.* v. *Kellogg*, 94 U. S. 469.

[1] *Ermentrout* v. *Girard F. & M. Ins. Co.*, 63 Minn. 305, 65 N. W. 635. Compare the interesting case in which insured recovered where a wall injured by fire fell over seven days later in a strong wind and damaged the plaintiff's property, *Russell* v. *German F. Ins. Co.* (Minn., 1907), 111 N. W. 400 (no fire reached the plaintiff's premises).

[2] *Davis & Co.* v. *Insurance Co. of N. A.*, 115 Mich. 382, 73 N. W. 393; *Boak Fish Co.* v. *Manchester F. Assur. Co.*, 84 Minn. 419, 87 N. W. 932.

[3] *White* v. *Republic Fire Ins. Co.*, 57 Maine, 91, 2 Am. Rep. 22.

[4] *Cohn* v. *National Ins. Co.*, 96 Mo. App. 315, 70 S. W. 259; *Sklencher* v. *Fire Asso.* (N. J. L.), 60 Atl. 232.

[5] *Stanley* v. *Western Ins. Co.*, L. R. 3 Exch. 74; 37 L. J. Exch. 73.

[6] *City F. Ins. Co.* v. *Corlies*, 21 Wend. 367; *Heuer* v. *Westchester Fire Ins. Co.*, 44 Ill. App. 429. But the standard policy expressly excludes certain classes of losses, for example, damage by theft and by order of civil authority, and these express exemptions prevail.

[7] *Way* v. *Abington M. F. Ins. Co.*, 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608, 55 Am. St. R. 379.

of anything except the material put in the stove purposely to burn was alleged in the proofs of loss. The court was of opinion that the fire did not break out from where it was intended to operate, and that, therefore, being a friendly fire, the effects of it though detrimental were not covered as a fire loss within the meaning of the policy.[1]

If a policy were silent upon the subject, loss by fire would include loss by a gunpowder explosion,[2] but not loss by a steam explosion or by the wind.[3] It would not include loss by lightning [4] unless ignition resulted; [5] but a lightning clause may be, and usually is, attached to the policy.

The fire, however, may be the proximate, that is, the dominant and efficient cause of the loss, though it starts outside the premises insured and never extends to them in the form of combustion.[6] But any express provisions of the contract govern.[7]

A three story building known as "Russell Block," in Minneapolis, was insured against loss by fire. To the northwest of it, first came the Peck Building of five stories, then an alley twelve feet wide and then the Boutelle Building. A fire starting in the Boutelle Building, extended to the Peck Building, and gutted the contents of both, but did not reach "Russell Block." The five story wall of the Peck Building, adjacent to the "Russell Block," was left standing. For a

[1] *Cannon* v. *Phœnix Ins. Co.*, 110 Ga. 563, 35 S. E. 775, 78 Am. St. R. 124.

[2] Hence the explosion clause of standard policy.

[3] *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 218; *Mallaudon* v. *New Orleans Ins. Co.*, 4 La. Ann. 15; 50 Am. Dec. 550; *Transatlantic Fire Ins. Co.* v. *Dorsey*, 56 Md. 70, 40 Am. Rep. 403; *Scripture* v. *Lowell Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 356, 57 Am. Dec. 111.

[4] *Kennistan* v. *Ins. Co.*, 14 N. H. 341, 40 Am. Dec. 193; *Everett* v. *The London Assurance*, 19 C. B. N. S. 126.

[5] *Babcock* v. *Montgomery, etc., Ins. Co.*, 4 N. Y. 326. Fire originating in spontaneous combustion is within the risk. Damage caused solely by concussion, if the result of an explosion in a distant building, is not within the risk, *Hustace* v. *Phœnix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651 (Tarrant explosion in New York); *Hall* v. *National F. Ins. Co.* (Tenn.), 92 S. W. 402, 35 Ins. L. J. 507 (citing many authorities and criticizing *Hustace case*); *Caballero* v. *Home Mut. Ins. Co.*, 15 La. Ann. 217; *Everett* v. *The London Assurance*, 19 C. B. N. S. 126. Nor damage from a smoking lamp chimney, *Samuels* v. *Ins. Co.*, 2 Pa. Dist. R. 397; *Fitzgerald* v. *German-Am. Ins. Co.*, 30 Misc. 72, 62 N. Y. Supp. 824. Nor damage from soot from a defective stove pipe, *Cannon* v. *Phœnix Ins. Co.*, 110 Ga. 563, 35 S. E. 775. Nor damage caused by escaping steam, *Gibbons* v. *German Ins. Co.*, 30 Ill. App. 263. Nor damage caused by a fire engine on its way to a fire, *Foster* v. *Fidelity Ins. Co.*, 24 Pa. S. Ct. 585. Nor the fall of a wall several days after the fire, heavy rains intervening to weaken the wall, *Cuestu* v. *Royal Ins. Co.*, 98 Ga. 720, 27 S. E. 172.

[6] *Russell* v. *German F. Ins. Co.* (Minn., 1907), 111 N. W. 400; *Ermentrout* v. *Girard Fire & M. Ins. Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. R. 481.

[7] See, for example, *Conner* v. *Manchester Assur. Co.*, 130 Fed. 743, as to order of civil authority.

week after the fire a high wind prevailed, at times amounting to a gale; and on the seventh day after the fire, while a strong wind was blowing, this high wall fell over on "Russell Block," crushing in its roof and doing considerable damage. The court sustained the finding of the jury that this damage was a proximate loss by the fire, and therefore covered by the standard policy.[1]

The policy includes loss by the incendiary act of the insured if insane, and by his carelessness, though sane,[2] and includes the unintentional or careless acts of third persons, whether his agents or not,[3] as well as their criminal acts,[4] but if the fire is caused by the fraudulent act of the insured himself, or of someone acting with his privity or consent, the insurer is exonerated.[5] Arson by the wife of the insured without his connivance furnishes no defense to the company.[6]

The word "direct" is not in the corresponding clause of the Massachusetts policy, but the doctrine of proximate cause applicable is substantially the same.[7] Thus in a case in that state, the plaintiff had insured its building and machinery against loss by fire. A fire occurred in a tower of the building. It was confined to the tower, and did only slight damage there. Through this tower, however, wires for electric lighting were carried. The fire acted upon the wires in such a way that a connection called a short circuit was made between lightning arresters. The electricity because of the short circuit affected the dynamo in such a way as to cause greater resistance to the machinery. This resistance, transmitted to a pulley through a belt, in turn destroyed the pulley, which destruction in turn disturbed the main shaft and ruptured other pulleys. By reason of

[1] *Russell* v. *German Fire Ins. Co.* (Minn., 1907), 111 N. W. 400.

[2] *Karow* v. *Continental Ins. Co.*, 57 Wis. 56, 46 Am. Rep. 17.

[3] *Wertheimer-Swarts Co.* v. *U. S. Cas. Co.*, 172 Mo. 135, 72 S. W. 635, 61 L. R. A. 766, 95 Am. St. R. 500.

[4] *Union Ins. Co.* v. *McCullough*, 96 N. W. 79; *Henderson* v. *Western M. & F. Ins. Co.*, 10 Rob. (La.) 164; *Feibelman* v. *Manchester F. Assur. Co.*, 108 Ala. 180, 19 So. 540.

[5] *Waters* v. *Ins. Co.*, 11 Pet. (U. S.) 213.

[6] Same rule applies to arson by husband of assured, *Midland Ins. Co.* v. *Smith*, L. R. 6 Q. B. D. 568; *Plinsky* v. *Germania F. & M. Ins. Co.*, 32 Fed. 47; *Perry* v. *Mech. Mut. Ins. Co.*, 11 Fed. 485. Arson or fraud, by an officer of an insured corporation, or by an agent of any insured principal, without connivance of the principal, furnishes no defense to the insurer, because a principal does not impliedly authorize his representative to commit such acts, *Plinsky* v. *Germania F. & M. Ins. Co.*, 32 Fed. 47; *Feibelman* v. *Manchester F. Assur. Co.*, 108 Ala. 180, 201, 19 So. 540; *Henderson* v. *Western Ins. Co.*, 10 Rob. (La.) 164, 43 Am. Dec. 176. But see where substantially all the stock was in hands of one family, *Meily Co.* v. *London & L. F. Ins. Co.* (U. S. Cir. Ct., Jan., 1906), 142 Fed. 873.

[7] *Lynn Gas & Elec. Co.* v. *Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N. E. 690.

pieces flying from the jack-pulley or other similar cause, the fly-wheel of the engine was destroyed, the governor broken, and the machinery disrupted generally. The disruption and damage to the machinery occurred in a part of the building remote from any fire or combustion. The court held, however, that the whole loss was by fire, within the meaning of the Massachusetts standard policy.[1]

§ 232. **The Following Described Property.**—The description of the property is written into the printed form, usually in brief and general terms. Hence, if the language of the description leaves it doubtful what goods or buildings or other property it was intended to cover, the courts construe the ambiguity liberally in favor of the insured, with a purpose to give a full indemnity for all that might reasonably be considered included in the description.[2] Accordingly, the description of the policy covers not only what is specifically mentioned but also whatever is reasonably appurtenant to it or included in it.[3] And oral evidence is freely received to identify the subject-

[1] *Lynn Gas & Elec. Co.* v. *Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N. E. 690, 29 L. R. A. 297, 35 Am. St. R. 540 ("when it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. . . . The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end. . . . In the present case the electricity was one of the forces of nature—a passive agent working under natural laws—whose existence was known when the insurance policies were issued. . . . The fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and, working precisely as the defendants would have expected it to work if they had thoroughly understood the situation and the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened."). Mere negligence on the part of the insured though the direct cause of the fire is no defense, *Johnson* v. *Berkshire Mut. F. Ins. Co.*, 4 Allen (Mass.), 388.

[2] *Rickerson* v. *Hartford Fire Ins. Co.*, 149 N. Y. 307, 313; *Saunders* v. *Agricultural Ins. Co.*, 39 App. Div. 631, 57 N. Y. Supp. 683; *Rickerson* v. *German-Am. Ins. Co.*, 6 App. Div. 550, 39 N. Y. Supp. 547; *Graybill* v. *Penn Township Mut. F. Ins. Asso.*, 170 Pa. St. 75, 32 Atl. 632. These cases also hold that if there is ambiguity, the question is for the jury.

[3] *Phœnix Ins. Co.* v. *Favorite*, 49 Ill. 259; *Clarke* v. *Firemen's Ins. Co.*, 18 La. 431; *Lovewell* v. *Westchester Fire Ins. Co.*, 124 Mass. 418, 26 Am. Rep. 671; *Medina* v. *Builders' Mut. Fire Ins. Co.*, 120 Mass. 225; *Buchanan* v. *Exchange Fire Ins. Co.*, 61 N. Y. 26. See many instances, 1 Clement, Ins. (1905), 79–81. Thus a furnace and boiler were held to be part of the house insured, *West* v. *Farmers' Mut. Ins. Co.*, 117 Iowa, 147, 90 N. W. 523. An annex to the building was held to be covered by the policy on the building, *Boak Fish Co.* v. *Manchester F. Assur. Co.*, 84 Minn. 419, 87 N. W. 932. And the word "sheds" means not only those adjoining a mill or factory but also more distant sheds, *Wolverine Lumber Co.* v. *Palatine Ins. Co.*, 139 Mich. 432, 102 N. W. 991. The term "grain" has been construed as including broom corn in the bale, *Reavis* v. *Farmers' Mut. F. I. Co.*, 78 Mo. App. 14, 2 Mo. App. Rep. 119. And "grain and seed" as covering flax seed afterwards converted into oil cake, *Marsh Oil Co.* v. *Ætna Ins. Co.*, 79 Mo. App. 21, 2 Mo. App. Rep. 400. But the plain import

matter of the contract.[1] So also a general understanding in the trade or a well-established custom may be shown to clarify the meaning of words or terms of technical, indefinite, or doubtful import, used in the description of the property insured.[2] But oral evidence is not admissible to disturb the plain import of the description as written.[3]

§ 233. Additions, Alterations, etc.—The word "additions" is

of the language employed must not be disregarded. See many instances, 1 Clement, Ins. (1905), 81–84. Thus "decorations to walls and ceilings" will not cover painting of outside walls, *Sherlock* v. *German-Am. F. Ins. Co.*, 21 App. Div. 18, 47 N. Y. Supp. 315, aff'd 162 N. Y. 656, 57 N. E. 1124; And "machinery used" must not be extended to include "machinery kept for sale," *Michel* v. *American Cent. I. Co.*, 17 App. Div. 87, 44 N. Y. Supp. 832. And "building occupied as tannery" does not include engine and machinery, *Sunderlin* v. *Ætna Ins. Co.*, 18 Hun (N. Y.), 522 (other policies indicated the restrictive meaning). In *Bigler* v. *N. Y. C. Ins. Co.*, 20 Barb. (N. Y.) 635, the words "steam saw mill" were held to include machinery. As to whether description of character of building is a warranty, see *Dougherty* v. *Greenwich Ins. Co.*, 64 N. J. L. 716, 42 Atl. 485; *Aiple* v. *Boston Ins. Co.*, 92 Minn. 337, 100 N. W. 8; *Massell* v. *Protective Mut. F. I. Co.*, 19 R. I. 565, 35 Atl. 209. But where the words "while occupied as dwelling" were inserted in application and policy by mistake of agent, and without knowledge of assured, company was held estopped, *Mead* v. *Saratoga & Wash. Fire Ins. Co.*, 81 App. Div. 282, 80 N. Y. Supp. 885, aff'd 179 N. Y. 537, 71 N. E. 1134. As before shown, evidence of usage is admissible to show the meaning of ambiguous words as employed in any trade. Thus, in an action upon a fire policy described to cover a junk dealer's stock of "rags" and "old metals," evidence was admitted to show that by trade custom those terms had acquired a broader signification than belongs to them in common usage, *Mooney* v. *Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277. Where a stock of goods is insured as "drugs" and "chemicals" it has been decided that it includes benzine though benzine is one of the articles prohibited in the general printed clause, *Phœnix Ins. Co.* v. *Flemming*, 65 Ark. 54, 44 S. W. 464, 67 Am. St. R. 900, 39 L. R. A. 789. But compare *Johnston* v. *Niagara F. Ins. Co.*, 118 N. C. 643 (patterns); *Banyer* v. *Albany F. Ins. Co.*, 85 App. Div. 122, 83 N. Y. Supp. 65, aff'd 179 N. Y. 554, 71 N. E. 1140 (fixtures). Whether benzine is "usually kept in a country store" is for jury, *Carrigan* v. *Lycoming F. I. Co.*, 53 Vt. 418, 38 Am. Rep. 687.

[1] *Westfield Cigar Co.* v. *Ins. Co. of N. A.*, 169 Mass. 382, 47 N. E. 1026. See § 85, *supra*. A granite front satisfies the description of "a granite building," *Medina* v. *Ins. Co.*, 120 Mass. 225. A jeweler's "stock in trade" does not cover blankets hung upon the building to stay the fire, *Welles* v. *Boston Ins. Co.*, 6 Pick. (Mass.) 182 (insurer held liable to a share of the value of the blankets destroyed, because they resulted in salvage). Stock of "watches, watch trimmings, etc.," was held to cover also silver and plated ware, clocks, jewelry, etc., *Crosby* v. *Franklin Ins. Co.*, 5 Gray (Mass.), 504. "Stock in trade" of furniture dealer covers also paints and varnish, *Haley* v. *Dorchester Mut. F. Ins. Co.*, 12 Gray (Mass.), 545. "Merchandise" means property kept for sale. "Property" includes also articles kept for use. *Burgess* v. *Alliance Ins. Co.*, 10 Allen (Mass.), 221. "Patterns" may be construed as "tools." *Lovewell* v. *Westchester Fire Ins. Co.*, 124 Mass. 418, 26 Am. Rep. 671. A "hotel" is not a "dwelling house," *Thomas* v. *Commercial Union Assur. Co.*, 162 Mass. 29, 37 N. E. 672, 44 Am. St. R. 323.

[2] *Westfield Cigar Co.* v. *Ins. Co. of N. A.*, 169 Mass. 382, 47 N. E. 1026; *Daniels* v. *Hudson R. R. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192. See § 89, *supra*.

[3] *Ferguson* v. *Lumbermen's Ins. Co.* (Wash., 1907), 88 Pac. 128. And see §§ 85, 86.

frequently used both in the description of the property, if one or more buildings, and also in a special privilege, commonly attached, permitting "additions, alterations, and repairs." This word is held to have a more restricted meaning when the subject of insurance is a single building, or a building insured by separate amount;[1] though sometimes, even in that event, the circumstances may warrant a broad construction including an independent and additional structure.[2] But where the insurance is upon a factory or mill, and particularly if the policies are in blanket form, as is frequently the case, that is, each in one lump amount upon the entire group of buildings or upon the establishment in its entirety, including buildings and contents, then the word "additions" may reasonably signify "an addition to the plant," and may include an entirely separate and independent building added to the property described.[3]

For instance, the Arlington Manufacturing Company had over forty policies, each a blanket, on the buildings and their contents together constituting their manufacturing establishment at Arlington, N. J., two buildings alone out of sixteen being excepted for special reasons, and the contents of only one of them being excepted. Many companies were on the risk, and the description of the property and also special clauses were contained in a printed rider, a copy of which was attached to each policy. The description in the rider enumerated the buildings which were standing when the rider was prepared and alluded to a map on file with the broker which also portrayed the buildings enumerated in the rider. Every policy also contained a one hundred per cent coinsurance clause. One of the special clauses in the rider was a privilege to make "additions, alterations and repairs, the policy to cover thereon and therein." For several years new and independent structures had been added to the plant at the

[1] *Peoria Sugar Ref. Co.* v. *Peoples' Fire Ins. Co.*, 24 Fed. 773; *Franklin Ins. Co.* v. *Hellerick* (Ky.), 49 S. W. 1066; *Forbes* v. *Am. Ins. Co.*, 164 Mass. 402, 41 N. E. 656; *Hannan* v. *Williamsburgh City F. Ins. Co.*, 81 Mich. 556, 45 N. W. 1120; *Evanston Golf Club* v. *Home Ins. Co.*, 119 Mo. App. 175, 95 S. W. 980.

[2] *Cargill* v. *Millers' Ins. Co.*, 33 Minn. 90, 22 N. W. 6; *Phenix Ins. Co.* v. *Martin* (Miss.), 16 So. 417; *Rickerson* v. *Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856 (a separate five-story rear factory, *held*, covered, though the front was a store and dwelling); *Maisel* v. *Fire Assn. of Phila.*, 59 App. Div. 461, 69 N. Y. Supp. 181 (the rear was for a depth of only about two inches on the lot mentioned); *Carpenter* v. *Allemania Ins. Co.*, 156 Pa. St. 37, 26 Atl. 718; *Cummins* v. *German-Am. Ins. Co.*, 197 Pa. St. 62, 46 Atl. 902; *Home Ins. Co.* v. *Roe*, 71 Wis. 33, 36 N. W. 594.

[3] *Arlington Mfg. Co.* v. *Colonial Ins. Co.*, 180 N. Y. 337, 73 N. E. 34. *Contra*, *Arlington Mfg. Co.* v. *Norwich Union F. Ins. Co.*, 107 Fed. 662, 46 C. C. A. 542 (facts the same as in the later case cited first). And see *Southwest L. & Z. Co.* v. *Phœnix Ins. Co.*, 27 Mo. App. 446; *Marsh* v. *N. H. Ins. Co.*, 70 N. H. 590, 49 Atl. 88; *Marsh* v. *Concord Ins. Co.*, 71 N. H. 253, 51 Atl. 898; *Griffing Iron Co.* v. *L. & L. & G. Ins. Co.*, 68 N. J. L. 368, 54 Atl. 409; *Home Mut. Ins. Co.* v. *Roe*, 71 Wis. 33, 36 N. W. 594.

rate of more than one a year, new maps and riders being prepared at much longer intervals. After this rider, before the court for construction, was prepared for the policies a large and valuable building was erected, separated about thirty or forty feet from the nearest building of the plant, and into it machinery from one of the old buildings was transferred. On its completion more blanket insurance was taken out by binding slips, all the insurance fully covering the value of the buildings and their contents. The new building, of course, was not shown on the map or rider which were made before the construction of the latest building was begun. The court, interpreting the privilege as allowing reasonable additions to the plant held that the new building and its contents were covered by the policy.[1]

If a building though physically separate from the building described in the policy is connected with it in use the court may readily conclude that it is covered by the term "additions;" for instance, where the addition was four feet distant from the main building.[2] And clearly applicable is the rule where there is no other structure except the independent building to answer to the description of "additions."[3]

§ 234. **Fluctuating Stock, etc.**—A policy upon merchandise in a store applies to the stock successively in the store from time to time.[4] It would be incredible to suppose that the parties to the policy intended that the merchant, on protecting himself with insurance, must discontinue his regular business of buying and selling goods, in order to reap the benefit of his insurance on his business stock.[5] Therefore it is wholly immaterial whether the merchandise, on hand

[1] *Arlington Mfg. Co.* v. *Colonial Ins. Co.*, 180 N. Y. 337, 73 N. E. 34. *Contra, Arlington Mfg. Co.* v. *Norwich Union F. Ins. Co.*, 107 Fed. 662, 46 C. C. A. 542.

[2] *Guthrie Laundry Co.* v. *Northern Assur. Co.* (Okla., 1906), 36 Ins. L. J. 146 (citing many cases); *Gross* v. *Mil. Mech. Ins. Co.*, 92 Wis. 656, 66 N. W. 712 (three feet away). And see *Ferguson* v. *Lumbermen's Ins. Co.* (Wash., 1907), 88 Pac. 128 (eighteen inches away, but connected with shaft and belt).

[3] *Phœnix Ins. Co.* v. *Martin* (Miss., 1894), 16 So. 417 (laundry covered though independent. "Two-story brick building and additions thereto.").

[4] *Manchester F. A. Co.* v. *Feibelman*, 118 Ala. 308, 23 So. 759; *Am. Cent. Ins. Co.* v. *Rothchild*, 82 Ill. 166; *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 405; *Hooper* v. *Hudson River Fire Ins. Co.*, 17 N. Y. 424. The same rule applies to machinery, furniture, and clothing, *Cummings* v. *Cheshire Co. Mut. F. Ins. Co.*, 55 N. H. 457; horses and cattle, *Mills* v. *Farmers' Ins. Co.*, 37 Iowa, 400; *Tomkins* v. *Hartford Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184; grain, *Coleman* v. *Phœnix Ins. Co.*, 3 App. Div. 65, 38 N. Y. Supp. 985; *Johnston* v. *Ins. Co.* (Neb.), 102 N. W. 72; vehicles, *Beyer* v. *St. Paul F. & M. Ins. Co.*, 112 Wis. 138, 88 N. W. 57; implements generally, *Johnson* v. *Farmers' Ins. Co.*, 126 Iowa, 565, 102 N. W. 502; contents of barn, *Farmers' Mut. F., etc., Assn.* v. *Kryder*, 5 Ind. App. 430, 31 N. E. 851.

[5] *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 405.

at the time of the loss, be acquired before or after the issuance of the policy. Such merchandise whenever acquired will be covered to the amount of the policy, simply by virtue of a general description, without the aid of any special permit.

§ 235. **Location.**—*While located and contained as described herein and not elsewhere.* Place is ordinarily material to the contract and of the very essence of the risk.[1] With varying location the risk is apt to vary, and whether it does or not the insurers have the right to know what risk they are assuming,[2] and often decline an insurance because of the amount already placed by them upon, or in, the same building.[3]

If a permit for removal is obtained, goods are not protected in transit [4] unless the policy so provides,[5] but are protected in the old place until removed.[6]

But it has been held that where the clause in the policy is simply in the words, "the following described property contained in" a certain building, the location is not material, if the nature of the property makes it clear that it must have been the intention of the parties to protect it by the policy whether in the particular place or not. In that event a designation of place is looked upon as merely descriptive and to be controlled by the necessary use of the thing insured.[7] In the case of furniture [8] or stock [9] described as contained

[1] *Bryce* v. *Lorillard Fire Ins. Co.*, 55 N. Y. 240; *Davison* v. *London & Lan. Fire Ins. Co.*, 189 Pa. St. 132, 42 Atl. 2.

[2] *Ohio Farmers' Ins. Co.* v. *Burget*, 65 Ohio St. 119, 122, 61 N. E. 712, 55 L. R. A. 825.

[3] *Bradbury* v. *Fire Ins. Asso.*, 80 Me. 396; *Sampson* v. *Security Ins. Co.*, 133 Mass. 49; *English* v. *Franklin Fire Ins. Co.*, 55 Mich. 273, 54 Am. Rep. 377; *Wall* v. *East River Mut. Ins. Co.*, 7 N. Y. 370; *London and Lancashire Ins. Co.* v. *Lycoming Fire Ins. Co.*, 105 Pa. St. 424, 432; *Lyons* v. *Providence Washington Ins. Co.*, 14 R. I. 109, 51 Am. Rep. 364; *Theobald* v. *Railway Passengers' Assur. Co.*, 10 Exch. 45.

[4] *Goodhue* v. *Ins. Co.*, 184 Mass. 41, 67 N. E. 645.

[5] *Kratzenstein* v. *Western Assur. Co.*, 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799.

[6] *Kunzze* v. *Amer. Exch. Fire Ins. Co.*, 41 N. Y. 412; *Sharpless* v. *Ins. Co.*, 140 Pa. St. 437. Standard policy has special clause regarding removal of property endangered by fire.

[7] *Boyd* v. *Miss. Home Ins. Co.*, 75 Miss. 47, 21 So. 708; *Niagara Fire Ins. Co.* v. *Elliott*, 85 Va. 962, 9 S. E. 694. For example, where a horse, described as in a barn, was insured against fire or lightning, the court was of opinion that it was not the intention of the parties to retain the protection of the policy only in the event that the horse was kept in the barn all the time waiting for a fire or a stroke of lightning, *Haws* v. *Fire Asso.*, 114 Pa. St. 431; *Longueville* v. *West. Assn. Co.*, 51 Iowa, 553, 33 Am. Rep. 146. Where an oil-tank was carried away by a flood to another part of the tract named in the policy and took fire there, the company was held, *Western, etc., Pipe Lines* v. *Home Ins. Co.*, 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. R. 703. And a trotting horse was held covered outside the counties in which defendant was authorized to do business, there being no restriction in the policy, *Eddy* v. *Farmers' Mut. Ins. Co.*, 20 App. Div. 109, 46 N. Y. Supp. 695.

[8] *Green* v. *Ins. Co.*, 91 Iowa, 615, 60

[9] *English* v. *Ins. Co.*, 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377.

in a certain building, however, the designated location is without doubt an essential element of the contract.

The addition of the words "and not elsewhere" in the New York standard policy seems to eliminate all ground for contention. Under it, location is a warranty;[1] and parol evidence to show that the agent knew at the time the policy issued that the property was in another building was held inadmissible in an action on the contract.[2] Clothes on a clothes-line outside in the yard are not covered where the location is described as the building.[3] But it is held that the building itself may be moved if the risk is not increased.[4] And personal property may be moved from one structure to another within the described premises insured, if the nature of the business or occupancy involves notice that such shifting might be expected.[5]

This clause is not a part of the Massachusetts standard policy;[6] but the Massachusetts court limits location to the premises as described in the policy.[7]

§ 236. **Held in Trust.**—*Their own, or held by them in trust or on commission, or sold but not delivered.*

Such special phrases connected with the description are sometimes employed in the policies of carriers, warehousemen, commission and other merchants, to show that the assured though holding property of others is to secure the full measure of insurance upon all the property insured, whether the title is or is not vested in him.

"Held in trust" means simply that the goods or property are in the

N. W. 189; *Lyons* v. *Prov. Wash. Ins. Co.*, 14 R. I. 109, 51 Am. Rep. 364. Ambiguity of description was construed against the plaintiff preparing it in *London Assur. Corp.* v. *Thompson*, 170 N. Y. 94, 62 N. E. 1066.

[1] *Village of L'Anse* v. *Fire Assn. of Phila.*, 119 Mich. 427, 78 N. W. 465; *Bahr* v. *Nat. Fire Ins. Co.*, 80 Hun, 309, 62 N. Y. St. R. 341, 29 N. Y. Supp. 1031; *Brit.-Am. Assur. Co.* v. *Miller*, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. R. 901.

[2] *Ætna Fire Ins. Co.* v. *Brannon* (Tex. Civ. App.), 81 S. W. 560 (1904).

[3] *Leventhal* v. *Home Ins. Co.*, 32 Misc. 685, 66 N. Y. Supp. 502.

[4] *Hannon* v. *Hartford Fire Ins. Co.*, 41 App. Div. (N. Y.) 226.

[5] *McKeesport Mach. Co.* v. *Ben Franklin Ins. Co.*, 173 Pa. St. 53, 34 Atl. 16. Permit for removal is a privilege and not obligation, *Sharpless* v. *Hartford F. Ins. Co.*, 140 Pa. St. 437, 21 Atl. 451.

[6] *Westfield Cigar Co.* v. *Ins. Co. of North Am.*, 169 Mass. 382, 47 N. E. 1026 (question of location of goods in building communicating, but with different street number, was sent to jury).

[7] *Westfield Cigar Co.* v. *Ins. Co. of N. A.*, 165 Mass. 541, 43 N. E. 504 (if ambiguity, issue is for jury); *Mead* v. *Phœnix Ins. Co.*, 158 Mass. 124, 32 N. E. 945; *Sampson* v. *Security Ins. Co.*, 133 Mass. 49; *Hews* v. *Atlas Ins. Co.*, 126 Mass. 389. But during the term of the contract the property insured may be shifted within the insured premises, *Fair* v. *Manhattan Ins. Co.*, 112 Mass. 320. And see *Fitchburg R. Co.* v. *Ins. Co.*, 7 Gray (Mass.), 64 (cars on track belonging to another railroad).

custody or care of the insured. He may hold them as agent[1] or as bailee, or in any capacity.[2] The word "trust" is not to be given its strict technical, but rather its mercantile, significance.[3] The clause is practically a privilege to the insured. Its important function is to supersede the warranties regarding sole and absolute ownership elsewhere contained in the policy, and thus to prevent forfeiture. Under such a policy the assured may collect the whole amount due,[4] holding, as trustee for the owner or principal, any balance over and above his own interest in the property.[5] The owner, though knowing nothing about the insurance and having given no authority for its procurement, may ratify and take the benefit of it after loss.[6]

§ 237. As Interest may Appear.—The policy not infrequently insures one or more persons "as interest may appear." It is sometimes convenient to use this phrase where the interests are shifting or uncertain;[7] for example, where owner and creditors or lienors desire protection by one policy,[8] or where the owner has died and the vesting of interests may be ill defined, or contingent and for a time, perhaps, unrepresented by any executor or administrator, or where owner and tenant require security under the same insurance,

[1] *Roberts* v. *Firemen's Ins. Co.*, 165 Pa. St. 55, 30 Atl. 450.

[2] *Burke* v. *Continental Ins. Co.*, 100 App. Div. 108, 91 N. Y. Supp. 402.

[3] *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365; *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527; *Snow* v. *Carr*, 61 Ala. 363; *Hough* v. *People's Fire Ins. Co.*, 36 Md. 398; *Lucas* v. *Ins. Co.*, 23 W. Va. 258, 48 Am. Rep. 383.

[4] *Ferguson* v. *Pekin Plow Co.*, 141 Mo. 161, 42 S. W. 711.

[5] *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 409, 10 S. Ct. 365; *Roberts* v. *Firemen's Ins. Co.*, 165 Pa. 55, 30 Atl. 450; *Waters* v. *Monarch Assur. Co.*, 5 El. & Bl. 870. His own interest may be that of owner or it may be represented by his commissions, *De Forest* v. *Fulton Fire Ins. Co.*, 1 Hall (N. Y.), 94, 101; or charges, *South. Cold Storage Co.* v. *Dechman* (Tex. Civ. App.), 73 S. W. 545; or liens on the property, *Pittsburg Storage Co.* v. *Scottish Union & Nat. Ins. Co.*, 168 Pa. St. 522, 32 Atl. 58; or by an obligation to insure for others, *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365; or by liability to the owners on contract, *Johnson* v. *Campbell*, 120 Mass. 449; or in tort for the loss, *Hough* v. *People's Fire Ins. Co.*, 36 Md. 398. Common carriers may insure against their liability for negligence, *Phœnix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 6 S. Ct. 750, 1176.

[6] *Larsen* v. *Thuringia Am. Ins. Co.*, 208 Ill. 166, 70 N. E. 31; *Marts* v. *Cumberland Mut. F. Ins. Co.*, 15 Vroom (N. J.), 478; *Waring* v. *Indemnity Ins. Co.*, 45 N. Y. 606; *Ferguson* v. *Pekin Plow. Co.*, 141 Mo. 161, 42 S. W. 711; *South Cold Storage Co.* v. *Dechman* (Tex. Civ. App.), 73 S. W. 545; Eng. Mar. Ins. Act (1906), ch. 41, § 86. But see as to mutuality of contract required, *Reynolds* v. *Mut. F. Ins. Co.*, 34 Md. 280; *Ins. Co.* v. *Schall*, 96 Md. 225, 53 S. W. 925.

[7] *Dakin* v. *L. & L. & G. Ins. Co.*, 77 N. Y. 600; *Sullivan* v. *Spring Garden Ins. Co.*, 34 App. Div. 128, 54 N. Y. Supp. 629; *De Wolf* v. *Capital City Ins Co.*, 16 Hun, 116; *Watson* v. *Swann*, 11 C. B. N. S. 755.

[8] *Dakin* v. *Ins. Co.*, *supra*; *Brown* v. *Commercial Fire Ins. Co.*, 21 App. D. C. 325; *Kent* v. *Ætna Ins. Co.*, 84 App. Div. 428, 82 N. Y. Supp 817

or where vendor and vendee wish to be covered during a pending contract of sale in part performed.[1]

In considering the application and effect of the phrase a clear distinction must be observed between the frequent use of the words "as interest may appear" in connection with the names of the assured, and the frequent use of the same words in connection with any third party named in the policy as a mere payee or appointee to receive the insurance money.[2] In the latter instance the payee takes only what the assured is entitled to receive, and if the assured has broken a warranty the payee gets nothing.[3]

§ 238. **For Whom it may Concern.**—These words, which are now seldom used in a fire policy, but frequently in the marine policy, protect all those who have any insurable interest in the property, but are held, like other general descriptions of the insured, to include only such classes of persons as are intended by the assured, when he

[1] Each party in such and similar instances naturally might not be willing to pay a separate premium for the full value of the property; even assuming that the separate interests could be properly and safely described in the respective policies and with due regard to its exacting warranties on the subject of ownership. Theoretically, indeed, a vendor and a vendee under contract of sale may each, under certain circumstances, have an insurable interest to the full value of the property, *Tiemann* v. *Citizens' Ins Co.*, 76 App. Div. 5, 78 N. Y. Supp. 620; *Ryan* v. *Agricultural Ins. Co.*, 188 Mass. 11, 73 N. E. 849, where purchaser was obligated for full purchase price (1905); but see *Tabbut* v. *Am. Ins. Co.*, 185 Mass. 419, 70 N. E. 430, and *contra*, in England, *Castellain* v. *Preston*, L. R. 11 Q. B. D. 380. But underwriters will seldom, without a struggle, consent to pay in the aggregate more than the value of the property destroyed; and, moreover, the doctrine of subrogation is supposed to prevent an ultimate recovery of more than the insurable value of the property from the whole body of insurers, see De Hart & Simey, Ins. (1907), 19. In many instances, therefore, prudence dictates that the parties in interest adopt a form of insurance by which they may obtain their full indemnity for any loss without delay and without complications with the underwriters, arranging among themselves to divide up, at their convenience, the insurance moneys collected. The clause at the head of the section provides for this desirable result, and supersedes the warranties regarding sole and absolute ownership. The only safe practice is to join all the assured as parties, either plaintiff or defendant, *Lewis* v. *Guardian Ins. Co.*, 181 N. Y. 392; *Kent* v. *Ætna Ins. Co.*, 84 App. Div. 428, 82 N. Y. Supp. 817; *Besant* v. *Glens Falls Ins. Co.*, 72 App. Div. 276, 76 N. Y. Supp. 35; *Davis* v. *Fire Ins. Co.*, 70 Vt. 217, 30 Atl. 1095.

[2] *West Coast Lumber Co.* v. *Ins. Co.*, 98 Cal. 502, 33 Pac. 258; *Graham* v. *Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323; *Donaldson* v. *Ins. Co.*, 95 Tenn. 280, 32 S. W. 251. Such indorsement "as interest may appear" does not excuse a chattel mortgage without permit, *Atlas Reduction Co.* v. *Ins. Co.*, 138 Fed. 497.

[3] *Heyl* v. *Ætna Ins. Co.*, 144 Ala. 549, 38 So. 118; *Grosvenor* v. *Atl. Ins. Co.*, 17 N. Y. 391; *Wunderlich* v. *Palatine Ins. Co.*, 104 Wis. 382, 80 N. W. 471. But it has been held that an accord and satisfaction between owner and insurer does not bind payee if his interest is described in policy as that of mortgagee, *Hathaway* v. *Ins. Co.*, 134 N. Y. 409, 32 N. E. 40. See § 290, *infra*. And the burden is on the payee to show what his interest is, *Wilcox* v. *Mut. Fire Ins. Co.*, 81 Minn. 478, 84 N. W. 334.

takes the policy, to be included.[1] Who these are may be shown by parol.[2]

§ 239. Measure of Damages.—*Not liable beyond actual cash value of the property at the time of loss, with proper deduction for depreciation, however caused.*

This in express terms excludes remote damages, such as loss from interruption of business, prospective rent or profit, except as these are specifically insured; it also excludes any *pretium affectionis*. The actual cash, or market, value at the time of the fire rules,[3] and the purchase price is relevant, if at all, only as bearing upon that.[4]

If at the place of the fire there is no market price, the fair value must be ascertained;[5] the market value at the nearest place, with cost of transportation, may properly be taken as the criterion.[6]

[1] *Hooper* v. *Robinson*, 98 U. S. 528; *Duncan* v. *China Mut. Ins. Co.*, 129 N. Y. 237, 29 N. E. 76; *Boston Fruit Co.* v. *Brit., etc., Co.* (1906), App. Cas. 336.

[2] *Newson* v. *Douglass*, 7 Har. & J. (Md.) 417; *Pacific Ins. Co.* v. *Catlett*, 4 Wend. (N. Y.) 76. But it is not necessary that the insured should have any specific individual in mind to give effect to the clause, *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423, 429, 22 S. Ct. 862. The owners, or others, intended to be covered by such a form may ratify the insurance and take the benefit of it, though ignorant of its existence at the time of the issuance of the policy, *Waring* v. *Indemnity Ins. Co.*, 45 N. Y. 606. They may ratify even after loss, *Hooper* v. *Robinson*, 98 U. S. 528; *Fire Ins. Asso.* v. *Merchants', etc., Trans. Co.*, 66 Md. 339; *Herkimer* v. *Rice*, 27 N. Y. 163; *Bobbitt* v. *Liverpool, etc., Ins. Co.*, 66 N. C. 70. If the insured collects the whole amount of the policy, he will hold as trustee the portion of the proceeds belonging to the others, *Protection Ins. Co.* v. *Wilson*, 6 Ohio St. 553; *Hagedorn* v. *Oliverson*, 2 Maule & Selw. 485. "Legal representatives" construed in *Alford* v. *Consolidated Fire & M. I. Co.*, 88 Minn. 478, 93 N. W. 517. "Estate" construed in *Phœnix Ins. Co.* v. *Hancock*, 123 Cal. 222, 55 Pac. 905; *Weed* v. *H. B. F. Ins. Co.*, 133 N. Y. 394, 31 N. E. 231. Extrinsic evidence is admissible to show who were intended, *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454.

[3] *Stenzel* v. *Penn. Fire Ins. Co.*, 110 La. 1019, 35 So. 271 (actual value of a building); *Mitchell* v. *Ins. Co.*, 92 Mich. 594, 52 N. W. 1017; *Hickerson* v. *Ins. Cos.*, 96 Tenn. 193, 33 S. W. 1041; *German Ins. Co.* v. *Everett* (Tex. Civ. App.), 36 S. W. 125.

[4] *Snell* v. *Delaware Ins. Co.*, 4 Dallas, 430; *Birmingham Fire Ins. Co.* v. *Pulver*, 126 Ill. 329; *Brown* v. *Quincy Ins. Co.*, 105 Mass. 396; *Hilton* v. *Phœnix Assur. Co.*, 92 Me. 272, 42 Atl. 412; *Waynesboro Mut. Fire Ins. Co.* v. *Creaton*, 98 Pa. St. 451, 42 Am. Rep. 618. Market value rules more clearly in case of personal property, *State Ins. Co.* v. *Taylor*, 14 Colo. 499, 24 Pac. 333 (actual value of a building); *Boyd* v. *Royal Ins. Co.*, 111 N. C. 372, 16 S. E. 389.

[5] *Gere* v. *Council Bluffs Ins. Co.*, 67 Iowa, 272, 23 N. W. 137.

[6] *Western Assur. Co.* v. *Studebaker*, 124 Ind. 176, 23 N. E. 1138. Values are largely a matter of opinion. After the property is destroyed it is often difficult to obtain precise proofs of value, *Glaser* v. *Home Ins. Co.*, 47 Misc. 89, 93 N. Y. Supp. 524. They must be reasonably precise under the circumstances of the case, *Goldberg* v. *Besdine*, 76 App. Div. (N. Y.) 451, 78 N. Y. Supp. 776. And the courts have allowed very vague and indefinite proof of value when it seemed to be the best obtainable, *Thomason* v. *Capital Ins. Co.*, 92 Iowa, 72; *Tubbs* v. *Garrison*, 68 Iowa, 44, 25 N. W. 921; *Tubbs* v. *Mechanics' Ins. Co.* 131 Ia. 217, 108 N. W. 324 (cases cited). And see *Lycoming Ins. Co.* v. *Jackson*, 83 Ill. 302, 25 Am. Rep. 386. But compare *Metzger* v. *Manchester Assur. Co.* 102

The purchase price, in usual course of business, if not at too remote a period, may properly be received and, though not at all conclusive, generally furnishes some evidence of present value.[1] But the assured is entitled to the actual cash value of articles destroyed though they may have cost him nothing.[2]

Where a manufacturer insures machines of his own make, a usual test of value is what it would cost him to reconstruct them.[3] He is not entitled to his selling price, since that would include profit.[4]

The cost of replacing real [5] or personal property often furnishes a fair criterion for estimating the amount of loss; [6] but this alone gives no true measure of present value or damage in the case of an old building.[7] Neither is the original cost of articles which have been in use for a long time reliable, in itself, to establish present value, inasmuch as proper allowance for depreciation must always be made.[8] The selling price of damaged goods after the fire often furnishes evidence of the extent of damage.[9]

Mich. 334, 63 N. W. 650; *Teerpenning* v. *Corn. Ex. Ins. Co.*, 43 N. Y. 279. If company's agent inspects before issuing the policy, its amount furnishes some evidence, it is said, that property is worth as much, *Maryland Home F. Ins. Co.* v. *Kimmell*, 89 Md. 437, 43 Atl. 764.

[1] *Johnston* v. *Farmers' Ins. Co.*, 106 Mich. 96, 64 N. W. 5; *Matter of Johnston*, 144 N. Y. 563, 567, 39 N. E. 643; *Hawver* v. *Bell*, 141 N. Y. 140, 143, 36 N. E. 6; *Cheever* v. *Scot. Union & Nat. Ins. Co.*, 86 App. Div. 328, 83 N. Y. Supp. 730.

[2] *Chapman* v. *Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405. Actual cash value is not what the goods or articles would bring at a forced sale, *Sun Fire Office* v. *Ayerst*, 37 Neb. 184, 55 N. W. 635.

[3] *Standard Sewing Machine Co.* v. *Royal Ins. Co.*, 201 Pa. St. 645, 51 Atl. 354; but see *Mitchell* v. *St. Paul Fire Ins. Co.*, 92 Mich. 594, 52 N. W. 1017; and *Hartford F. Ins. Co.* v. *Cannon*, 19 Tex. Civ. App. 305, 46 S. W. 851.

[4] *Niagara Ins. Co.* v. *Heflin*, 22 Ky. L. R. 1212, 60 S. W. 393. But machinery might be out of fashion or well-nigh worthless. The actual value at time of fire is the legal measure, *Hercules Ins. Co.* v. *Hunter*, 15 S. S. C. 800, 1st series; *Vance* v. *Foster*, Ir. Circ. R. 47. Even a manufacturer may be able to establish a market value as the measure of his indemnity, *Frick* v. *Ins. Co.* (Pa.), 67 Atl. 743. In England the doctrine of indemnity was enforced against a landlord in favor of his insurer where the tenant was obligated to make certain repairs, *Yates* v. *Dunster*, 11 Exch. 15, 24 L. J. Exch. 227.

[5] *Ætna Ins. Co.* v. *Johnson*, 11 Bush (Ky.), 587, 21 Am. Rep. 223; *Holter L. Co.* v. *Firemen's Fund Ins. Co.*, 18 Mont. 282, 45 Pac. 207.

[6] *Cummins* v. *German-Am. Ins. Co.*, 192 Pa. St. 359, 43 Atl. 1016; *Clovre* v. *Greenwich Ins. Co.*, 101 N. Y. 277, 283, 4 N. E. 724; *Post Printing Co.* v. *Ins. Co.*, 189 Pa. St. 300, 42 Atl. 192; *Tex. Moline Plow Co.* v. *Niagara Ins. Co.* (Tex. Civ. App.), 87 S. W. 192 (1905). As to how loss of merchandise is computed, see 1 Clement, Ins. (1905), 101–103. As to retail stock see *Sherlock* v. *German-Am. Ins. Co.*, 21 App. Div. 18, 47 N. Y. Supp. 315, 81 N. Y. St. R. 315, aff'd 162 N. Y. 656, 57 N. E. 1124. Loss of manufacturers patterns, see *Michels* v. *Western Underwriters' Assn.*, 129 Mich. 417, 89 N. W. 56 (1902).

[7] *Scott* v. *Security Fire Ins. Co.*, 98 Iowa, 67, 71; *Hilton* v. *Phœnix Assur. Co.*, 92 Me. 272, 281, 42 Atl. 412.

[8] *Germier* v. *Springfield F. & M. Ins. Co.*, 109 La. 341, 33 So. 361.

[9] *Clement* v. *Brit.-Am. Assur. Co.*, 141 Mass. 298, 5 N. E. 847. But is not conclusive, *Reading Ins. Co.* v. *Engelhoff*, 115 Fed. 393. As to growing crops insured against hail, see *Condon* v. *Des Moines, etc., Assn.*, 120 Iowa, 80, 94 N. W. 477; *McIlrath* v. *Farmers'*

And the difference between the actual cash value of the property just before the fire and its value after the fire, is the measure of indemnity where the property has been injured and not destroyed.[1]

The word "indemnity" indicates the general rule. Therefore, it has been held that in reinstating a building, damaged or destroyed, any increased cost of rebuilding necessitated by building laws must be taken into account,[2] except where the terms of the contract, like those of the standard fire policy, provide otherwise.[3] For the same reason the company is entitled to an allowance for any depreciation, since the prime purpose to be accomplished is not profit but reinstatement.[4]

If, during the pendency of the risk, there has been more than one loss under the policy, the recovery in the aggregate is limited to the face of the policy.[5] As has been observed, a somewhat different doctrine is applied in marine insurance law.

The word "cash" is omitted from the Massachusetts form. The omission is probably immaterial.[6]

Where valued policy laws prevail, the amount named in the policy indicates the amount payable on a building in case of total loss,[7] though such amount in fact exceed the cash value of the property.[8]

Mut., etc., Assn., 114 Iowa, 244, 86 N. W. 310; *Barry* v. *Same*, 110 Iowa, 433, 81 N. W. 690. Experts who have seen the property or who are familiar with similar property may testify as to values, *Home Ins. Co.* v. *Sylvester*, 25 Ind. App. 207, 57 N. E. 991; *Reed* v. *Washington F. & M. Ins. Co.*, 138 Mass. 572; *Burnett* v. *Am. Cent. Ins. Co.*, 68 Mo. App. 343; *Clark* v. *Baird*, 9 N. Y. 183; *Teerpenning* v. *Com. Exch. Ins. Co.*, 43 N. Y. 279. This is the regular and usual method of furnishing proof upon the trial. And if they have not examined the property, hypothetical questions may be put as in other classes of actions, *Latimer* v. *Burrows*, 163 N. Y. 7, 9, 57 N. E. 95; *Chi. & Al. R. R.* v. *Glenny*, 175 Ill. 238, 51 N. E. 896. An owner, *Union Pac. R. Co.* v. *Lucas*, 136 Fed. 374; *Tubbs* v. *Mechanics' Ins. Co.*, 131 Iowa, 217, 108 N. W. 324 (citing authorities); or housekeeper, though not strictly an expert, may be allowed to testify to values if suitable foundation of knowledge or experience be first established, *Rademacher* v. *Greenwich Ins. Co.*, 75 Hun, 83.

[1] *Commercial Ins. Co.* v. *Allen*, 80 Ala. 571; *Burkett* v. *Georgia Home Ins. Co.*, 105 Tenn. 548, 58 S. W. 848.

[2] *Hewins* v. *London Assur. Co.*, 184 Mass. 177, 68 N. E. 62; *Penn. Co.* v. *Phila. Contributorship*, 201 Pa. St. 497, 51 Atl. 351.

[3] The provisions of the standard policy would seem to be quite as consistent with the doctrine of indemnity. If a man by letting his wooden house burn down could get a brick or stone house in place of it, he would greatly profit. Which new material should furnish the criterion of value, brick or stone?

[4] *Erb* v. *German-Am. Ins. Co.*, 98 Iowa, 606, 67 N. W. 583.

[5] *Mechanics' Ins. Co.* v. *Hodge*, 149 Ill. 298, 37 N. E. 51.

[6] As to measure of recovery see also ch. II, *supra*.

[7] *Westinghouse Electric Co.* v. *Western Assur. Co.*, 42 La. Ann. 28, 7 So. 73; *Murphy* v. *North Brit. & M. Co.*, 61 Mo. App. 323; *Queen Ins. Co.* v. *Jefferson Ice Co.*, 64 Tex. 579.

[8] *Borden* v. *Hingham Mut. F. Ins. Co.*, 18 Pick. (Mass.) 523, 29 Am. Dec. 614. Sometimes a deduction may be made for depreciation occurring since date of the insurance, *Caledonia Ins Co.* v. *Cooke*, 101 Ky. 412, 41 S. W. 279; *Marshall* v. *Ins. Co.*, 80 Mo. App. 18. Valued policy law held to be binding

By accepting a policy with a provision repugnant to the law the policyholder does not waive the benefit of the law.[1] But the insurer is not bound by the valuation named in the policy, if it is the result of fraud on the part of the assured.[2] Where under such a law, there are several policies on a building, their sum total indicates the whole insurable value.[3]

§ 240. The Same—Total Loss of Building.—A building becomes a "total loss," under the valued policy laws, when it is so far destroyed that it cannot properly be designated as a building, though some parts of it may remain standing after the fire.[4]

though contract was made in another state, *Seyk* v. *Ins. Co.*, 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523; *Scottish U. & N. Ins. Co.* v. *Eustie*, 78 Miss. 157, 28 So. 822.

[1] *Western Assur. Co.* v. *Phelps*, 77 Miss. 625, 27 So. 745; *Havens* v. *Germania F. Ins. Co.*, 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. R. 570.

[2] *Hartford F. Ins. Co.* v. *Redding* (Fla.), 37 So. 62, 67 L. R. A. 518.

[3] *Wensel* v. *Property Mut. Ins. Ass.*, 129 Iowa, 295.

[4] *American Cent. Ins. Co.* v. *Noe*, 75 Ark. 406, 88 S. W. 572 (only a glass door was left intact); *Palatine Ins. Co.* v. *Weiss*, 109 Ky. 464, 59 S. W. 509; *O'Keefe* v. *L. & L. & G. Ins. Co.*, 140 Mo. 558, 41 S. W. 922 (a total loss if to utilize standing walls would cost as much as to rebuild them); *Corbett* v. *Spring Garden Ins. Co.*, 155 N. Y. 389, 50 N. E. 282, 40 App. Div. 628, 58 N. Y. Supp. 148, aff'd 167 N. Y. 596 *Penn. F. Ins. Co.* v. *Drackett*, 63 Ohio St. 57, 57 N. E. 962; *Am. Cent. Ins. Co.* v. *Murphy* (Tex. Civ. App.), 61 S. W. 956; *Lindner* v. *St. Paul F. & M. Ins. Co.*, 93 Wis. 526, 67 N. W. 1125. The question is, has the building lost its identity and specific character as such, has it become so far disintegrated that it can no longer be properly designated as a building, though some parts may remain standing. *Stevens* v. *Norwich Union F. Ins. Soc.*, 120 Mo. App. 88, 96 S. W. 684 (citing cases, and *held* a question for the jury though the larger part of the house was left standing). "Phrase 'total loss' or 'wholly destroyed,' as used, when applied to the subject of insurance, does not contemplate the entire annihilation or extinction of the property insured. Neither does it require that any portion of the property remaining after loss shall have no value for any purpose whatever but does mean only that the destruction of the property insured is to such extent as to deprive it of the character in which it was insured. Although some portion of the building may remain after the fire, yet if such portion cannot be reasonably used to advantage in the reconstruction of the building, or will not for some purpose bring more money than sufficient to remove the ruins, such building is in contemplation of law a 'total loss,' or 'wholly destroyed,'" *Liverpool & L. & G. I. Co.* v. *Heckman*, 64 Kan. 388, 67 Pac. 879. See also *Williams* v. *Hartford Ins. Co.*, 54 Cal. 442, 35 Am. Rep. 77; *Northwestern Mut. L. I. Co.* v. *Rochester German Ins. Co.*, 85 Minn. 48, 88 N. W. 265 ("total loss" considered as applied to one plant with several buildings); *Ins. Co.* v. *Bachler*, 44 Neb. 549, 62 N. W. 911. So of words "wholly destroyed," *Trustees, etc.*, v. *Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. 767. There is no total loss if remnant standing is reasonably adapted to be used as a basis and part of restoration, *Prov. Wash. Ins. Co.* v. *Board of Education*, 49 W. Va. 360, 38 S. E. 679; *Royal Ins. Co.* v. *McIntyre*, 90 Tex. 170, 37 S. W. 1068 (would a reasonably prudent owner utilize the standing portions in rebuilding, is the test). But there is a total loss if remnant standing is unsafe, *Thuringia Ins. Co.* v. *Mallott*, 111 Ky. 917, 64 S. W. 991; *Murphy* v. *Am. Cent. Ins. Co.*, 25 Tex. Civ. App. 241, 54 S. W. 407 (foundation walls are not to be taken into account). Bunyon says: "A 'total loss' in the language of fire insurance,

Under the valued policy laws, if the loss is not total, the measure of damage is the actual loss.[1] Valued policy provisions relating to total loss of buildings have been introduced into several of the standard fire policies.[2] Under such a form of policy the Minnesota court has given careful attention to this subject and has established the following tests: A building is not a total loss unless it has been so far destroyed by the fire that no substantial part or portion of it above the foundation remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire. The words "total loss," when applied to a building, mean totally destroyed as a building; that is, that the walls, although some portion of them remain standing, are unsafe to use for the purpose of rebuilding, and would have to be torn down and a new building erected throughout. There can be no total loss of a building so long as the remnant of the structure left standing above the foundation is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question whether a reasonably prudent owner of a building uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as such basis. If he would, then the loss is not total.[3]

§ 241. Measure of Damage—As Affected by Provision as to Repairing.—The provision that the liability of the underwriters shall in no event exceed what it would then cost the insured to repair or replace with materials of like kind and quality, is not restricted to a

does not then mean, as in marine insurance, the total destruction of the property, but its destruction or injury to such an extent as to render the insurer liable to pay the total sum insured," Bunyon, F. Ins. (5th ed.), 244. Question of total loss when for jury, see § 93. Statutes allowing counsel fee to successful plaintiff in case of total loss not unconstitutional, § 6.

[1] *Lancashire Ins. Co.* v. *Bush*, 60 Neb. 116, 82 N. W. 313. Under a use and occupancy policy on a hotel the loss is total where, though the damage by fire and water does not extend to all the rooms, nevertheless, the building is so far destroyed that the business cannot be carried on until repairs are made, *Chatfield* v. *Ætna Ins. Co.*, 71 App. Div. 164, 75 N. Y. Supp. 620. And where a building insured is located within the fire limits and its repair after fire is prevented under the terms of a city ordinance defining the character of authorized construction, the insured may recover as for a total loss, deducting for any value of the remains in excess of the cost of removal, *Larkin* v. *Glens Falls Ins. Co.*, 80 Minn. 527, 83 N. W. 409. It is permissible for a plaintiff to allege a total loss and recover a partial loss, *Moore* v. *Ins. Co.*, 100 Minn. 374, 111 N. W. 260.

[2] For example, Minnesota, New Hampshire, and South Dakota.

[3] *Northwestern Mut. L. Ins. Co.* v. *Rochester German Ins. Co.*, 85 Minn. 48, 88 N. W. 265 (citing many authorities); *Northwestern Mut. L. Ins. Co.* v. *Sun Ins. Office*, 85 Minn. 65, 88 N. W.

case where the underwriter elects to rebuild, but fixes the extreme limit of liability in all cases.[1]

§ 242. Coinsurance and Other Special Clauses Modifying Measure of Liability.—The extent of the insurer's liability is often modified by particular clauses; as, for example, one of the various forms of coinsurance clauses or average clauses of which specimens are given in the Appendix, or a special clause limiting liability to two-thirds or three-fourths of the value of the property.

The object of the coinsurance clause is to compel the insured to take out insurance to the designated percentage of the value of his property, usually either eighty or one hundred per cent,[2] or else become his own insurer to the amount of the deficiency; and the average clause applies where property is insured as an entirety, though located in several places or buildings in proportions perhaps unknown to the insurers, or in shifting proportions, and its object is to ratably distribute the insurance over all the properties, so that in case of a loss in one place, the insured cannot call upon the total amount, but only the ratable amount of insurance, for contribution to such a localized loss.

In determining the measure of the underwriter's liability, full effect must be given to these restrictive clauses;[3] but not when they are inconsistent with statutory requirements.[4] In the absence of a coinsurance clause, the assured collects his whole loss, if that does not exceed his insurance, and his whole insurance, if that does not exceed

272; *Poppitz* v. *German Ins. Co.*, 85 Minn. 118, 88 N. W. 438.

[1] *Hewins* v. *London Assur. Co.*, 184 Mass. 177, 68 N. E. 62; *McCready* v. *Hartford Fire Ins. Co.*, 61 App. Div. (N. Y.) 583, 70 N. Y. Supp. 778; *Stand. Sewing Mach. Co.* v. *Royal Ins. Co.*, 201 Pa. St. 645, 51 Atl. 354 (1902); *Ins. Co.* v. *Board*, 49 W. Va. 360, 38 S. E. 679.

[2] Where assured has option to choose either eighty per cent or full coinsurance clause, the latter usually carries a lower rate of premium, *Belt* v. *American Central Ins. Co.*, 148 N. Y. 624, 43 N. E. 64, 29 App. Div. 546, 53 N. Y. Supp. 316, aff'd 163 N. Y. 555, 57 N. E. 1104, resulting difference in recovery is given.

[3] *Blinn* v. *Ins. Co.*, 85 Me. 389, 27 Atl. 263 (two-thirds value clause); *Chesebrough* v. *Home Ins. Co.*, 61 Mich. 133, 28 N. W. 1[illegible] (four-fifths clause); *Millis* v. *Scot. Union & Nat. Ins. Co.*, 95 Mo. App. 211 (three-fourths clause); *Catoosa S. Co.* v. *Linch*, 18 Misc. (N. Y.) 209, 41 N. Y. Supp. 377 (coinsurance clause); *Penn. Fire Ins. Co.* v. *Moore*, 21 Tex. Civ. App. 528, 51 S. W. 878 (coinsurance clause).

[4] For example, valued policy laws, *Sachs* v. *L. & L. Fire Ins. Co.*, 113 Ky. 88, 67 S. W. 23; *Hickerson* v. *Ins. Co.*, 96 Tenn. 193, 33 S. W. 1041. The Michigan court has decided that under its statutes the insurer cannot add a coinsurance clause, *Attorney General* v. *Commissioner of Ins.* (Mich., 1907), 112 N. W. 132 (reasons for coinsurance clauses explained). But see following cases in which it is held that coinsurance clauses are not inconsistent with statutes, *Firemen's Fund Ins. Co.* v. *Pekor*, 106 Ga. 1, 31 S. E. 779; *Quinn* v. *Fire Assn.*, 180 Mass 560, 62 N. E. 980.

his loss. With a coinsurance clause present, the foregoing rule of recovery is modified, and the recovery reduced, but only if the insurance and the loss are both below the percentage of value, usually eighty, or one hundred per cent, as named in the clause. If either insurance or loss equals or exceeds the specified percentage of values, the clause is inoperative. Simple examples, prepared by Mr. Willis O. Robb, secretary of the loss committee of the New York Board of Fire Underwriters, showing in figures the operation of the coinsurance clauses, are given in the Appendix.[1]

Certain states have passed statutes prohibiting the insertion of a coinsurance clause in the policy, except as the insured may voluntarily accede to it in consideration of a lower rate of premium.[2] Such statutes are enforcible.[3]

§ 243. Insurance Payable Sixty Days After Satisfactory Proofs.—Any insurance money due under the terms of the policy is not payable until after sixty days from receipt by the insurer of proofs of loss.[4]

§ 244. Reinstatement Clause.—*Optional with company to take all or any part of the articles at ascertained or appraised value, or to rebuild or replace property, lost or damaged, within reasonable time, on giving notice within thirty days after receipt of proofs, but there can be no abandonment to the company of the property.*

The company reserves these options to protect itself against extravagant claims, and to prevent disputes as to the amount of damage.[5]

The right of giving notice of election to rebuild or replace expires

[1] Ch. III. As to the effect of the coinsurance clause on apportionments see Mr. Robb's discussion, last note to § 318, *infra*. As to measure of recovery when some of the policies contain, and some do not contain, a coinsurance clause, see § 317, *infra*.

[2] Appendix, ch. I.

[3] *Bloch* v. *American Ins. Co.* (Wis., 1907), 112 N. W. 45.

[4] *Gillon* v. *Northern Assur. Co.*, 127 Cal. 480, 59 Pac. 901; *Putze* v. *Saginaw, etc., Ins. Co.*, 132 Mich. 670, 94 N. W. 191. And see *Kelly* v. *Supreme Council*, 46 App. Div. 79, 61 N. Y. Supp. 394. "Sixty days" *held* to run from receipt of regular proofs, not of subsequently required duplicate bills, *Ætna Ins. Co.* v. *McLead*, 57 Kan. 95, 45 Pac. 73. "Satisfactory proofs" means proofs that ought to be so regarded under the circumstances of the case, not necessarily satisfactory to the insurer, *Robinson* v. *Palatine Ins. Co.*, 11 N. M. 162, 66 Pac. 535; *Boyle* v. *Hamburg-Bremen F. Ins. Co.*, 169 Pa. St. 349; *Georgia Home Ins. Co.* v. *Goode*, 95 Va. 751, 30 S. E. 366; *Billmyer* v. *Hamburg-Bremen F. Ins. Co.*, 57 W. Va. (1905), 42, 49 S. E. 901 (substantial compliance sufficient). Where the insurer denies liability some cases hold that the insured need not wait sixty days, but may sue at once, *Frost* v. *North Brit. & M. Ins. Co.* 77 Vt. 407, 60 Atl. 803.

[5] Without such clause insurer would have no such option, *Branigan* v. *Jefferson, etc., Ins. Co.*, 102 Mo. App. 70, 76 S. W. 643. In practice reinstatement is for the most part limited to buildings and machinery.

thirty days after service of the proofs of loss and does not begin to run from any subsequent award or appraisal.[1] But the right of the company to take the damaged goods at the appraised value certainly must survive until after the award.[2] Therefore, until after the award, if there be one, and in any event until after the expiration of thirty days succeeding service of proofs, it would be highly imprudent for the assured, except in case of necessity, or with notice to the company,[3] to sell or dispose of the damaged property, since thereby he may incur forfeiture of his insurance.[4]

If the company once elect to do so, they must reinstate, and cannot afterwards repudiate their election.[5] And the converse is also true, for the selection of either alternative constitutes an abandonment of the other.[6]

The election to restore or rebuild involves not only the rejection of the right to pay the amount of damage estimated on a cash basis,[7]

[1] *Ins. Co.* v. *Hope*, 58 Ill. 75, 11 Am. Rep. 48; *McAllaster* v. *Niagara Fire Ins. Co.*, 156 N. Y. 80, 50 N. E. 502; *Maryland Home Ins. Co.* v. *Kimmel*, 89 Md. 437, 43 Atl. 764; compare *Kelly* v. *Sun Fire Office*, 141 Pa. St. 10, 21 Atl. 447. But the court will readily infer a waiver of this right, *Davis* v. *Am. Central Ins. Co.*, 7 App. Div. 488, aff'd 158 N. Y. 688. If proofs are waived period of option begins to run from waiver, *Farmers,' etc., Ins. Co.* v. *Warner*, 70 Neb. 803, 98 N. W. 48. The option may be exercised at any time within the thirty days, *Lancashire Ins. Co.* v. *Barnard*, 111 Fed. 702, 49 C. C. A. 559. Option may be shown without formal notice by sending workmen, starting work, etc., *Fire Assn.* v. *Rosenthal*, 108 Pa. St. 474, 1 Atl. 303. It is said that an offer to repair cannot be coupled with one of compromise, *Rieger* v. *Mechanics' Ins. Co.*, 69 Mo. App. 674.

[2] *Hamilton* v. *L. & L. & G. Ins. Co.*, 136 U. S. 242, 10 S. Ct. 945.

[3] *Davis* v. *Grand Rapids Fire Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, aff'd 157 N. Y. 685, 51 N. E. 1090; *Palatine Ins. Co.* v. *Morton Scott Co.*, 106 Tenn. 558, 61 S. W. 787; *North German Ins. Co.* v. *Morton Scott Co.*, 108 Tenn. 384, 67 S. W. 816.

[4] *Hamilton* v. *L. & L. & G. Ins. Co.*, 136 U. S. 242; *Astrich* v. *German-Am. Ins. Co.*, 131 Fed. 13; *Kelly* v. *Sun Fire Office*, 141 Pa. St. 10, 21 Atl. 10. Valued policy laws are not necessarily inconsistent with the election to rebuild or repair contained in a standard policy established by legislative enactment of the same state, *Temple* v. *Niagara Fire Ins. Co.*, 109 Wis. 372, 85 N. W. 361. But as to effect of valued policy laws in rendering option to rebuild nugatory, see *Mil. Mech. Ins. Co.* v. *Russell*, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159; *Marshal* v. *Ins. Co.*, 80 Mo. App. 18, 23; *Commercial Union Assur. Co.* v. *Meyer*, 9 Tex. Civ. App. 7, 29 S. W. 93; *Royal Ins. Co.* v. *McIntyre* (Tex. Civ. App.), 34 S. W. 669.

[5] *Henderson* v. *Crescent Ins. Co.*, 48 La. Ann. 1176, 20 So. 658; *Fire Assn.* v. *Rosenthal*, 108 Pa. St. 474, 1 Atl. 303.

[6] *Times Fire Assur. Co.* v. *Hawke*, 1 Fost. & F. 406; *Scottish, etc., Assn.* v. *Northern Assur. Co.*, 11 S. S. C. 4th series, 287. A positive refusal to rebuild is an irrevocable election, *Platt* v. *Ætna Ins. Co.*, 153 Ill. 113, 38 N. E. 580. Reinstating of machinery does not of necessity mean putting it back in the same building, if that is impossible, *Anderson* v. *Commercial Union Assur. Co.*, 55 L. J. Q. B. N. S. 146, 34 W. R. 189. But if after notice of election the insurer fails to rebuild or repair then the insured, at his option, may maintain action for the insurance money, *Langan* v. *Ætna Ins. Co.*, 99 Fed. 374, aff'd 108 Fed. 985, 48 C. C. A. 174 (the company has no right to refuse to go on with rebuilding because cost of construction has increased).

[7] *Zalesky* v. *Iowa State Ins. Co.*, 102

but also the waiving of all those provisions of the contract having reference to that method of performance. From the time of such election the contract between the parties becomes a new and independent undertaking on the part of the insurers to build or repair the subject insured, and to restore it to its former condition,[1] and the measure of damages for a breach of this substituted contract of replacing does not necessarily depend on the amount of damage inflicted by the peril insured against,[2] nor is it limited by the amount of insurance.[3] But, if the insured refuses to permit the insurer to replace, the latter having seasonably elected to do so, the former can maintain no action upon the policy.[4] If the insurers, in the attempt to restore the property, do more than their contract obligates them to do, they cannot claim allowance for the excess of value.[5] If, without fault of the insured, the company either neglects to complete the work or is prevented from doing so by the interference of the public authorities, the loss will fall upon the insurers.[6] So, also, if during the rebuilding or repairing, the property is again burned; for here, too, through no fault of the insured, the insurers have failed to fulfill their contract.

Whether the work of repairing or rebuilding is done properly and within a reasonable time, must generally be a question for the jury,[7] and for any breach of their obligations the insurers will be held responsible, according to the ordinary rules of damage.[8]

Iowa, 512, 70 N. W. 187; *Heilmann* v. *Westchester Ins. Co.*, 75 N. Y. 7.

[1] *Hartford Ins. Co.* v. *Peeble's Hotel Co.*, 82 Fed. 546, 27 C. C. A. 223; *Zalesky* v. *Iowa State Ins. Co.*, 102 Iowa, 512, 70 N. W. 187; *Heilmann* v. *Westchester F. Ins. Co.*, 75 N. Y. 7. A building substantially the same as to material, size, and form, *Beals* v. *Home Ins. Co.*, 36 N. Y. 522.

[2] *Wynkoop* v. *Niagara Fire Ins. Co.*, 91 N. Y. 478, 43 Am. Rep. 686; *Morrell* v. *Irving Fire Ins. Co.*, 33 N. Y. 429, 88 Am. Dec. 396. Election to rebuild waives all known forfeitures, *Bersche* v. *Globe Ins. Co.*, 31 Mo. 546.

[3] *Henderson* v. *Crescent Ins. Co.*, 48 La. Ann. 1176, 20 So. 658. If construction costs less than amount of policy, it has been said the balance remains in force during term of policy, *Trull* v. *Roxbury Ins. Co.*, 3 Cush. (Mass.) 263.

[4] *Daul* v. *Firemen's Ins. Co.*, 35 La. Ann. 98 (there must be a clear refusal); *Beals* v. *Home Ins. Co.*, 36 N. Y. 522. Not so if opportunity to repair was afforded, *Northwestern Ins. Co.* v. *Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185. Assured may meanwhile make necessary repairs, *Eliot Savings Bank* v. *Commercial Union Assur. Co.*, 142 Mass. 145, 7 N. E. 550.

[5] *Brinley* v. *National Ins. Co.*, 11 Metc. (Mass.) 195.

[6] Thus where during reinstatement the commissioner of sewers considered the premises dangerous, and caused the buildings to be removed, *Brown* v. *Royal Ins. Co.*, 1 El. & El. 853, 28 L. J. Q. B. 275. The company must comply with city ordinances, *Fire Assoc.* v. *Rosenthal*, 108 Pa. St. 474; *Hewins* v. *London Assur. Co.*, 184 Mass. 177, 68 N. E. 62. And if police authorities prohibit rebuilding assured may recover as for a total loss, *Monteleone* v. *Royal Ins. Co.*, 47 La. Ann. 1563, 18 So. 472.

[7] *Haskins* v. *Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432.

[8] For defective construction, *Henderson* v. *Sun Mut. Ins. Co.*, 48 La. Ann. 1031, 20 So. 164. For delay, *Am.*

The rebuilding clause has been held to have no application to a mortgagee's policy, or to a standard mortgagee clause;[1] but where there is simply an indorsement "loss if any payable to mortgagee," the mortgagee is not a contracting party but a mere appointee to receive payment and the rebuilding clause is operative.[2]

The Massachusetts standard policy has a similar provision allowing the company to restore upon giving notice within fifteen days after the proofs of loss are submitted, and the company is declared not liable for more than the sum insured with interest.[3]

§ 245. There Can be no Abandonment to Insurer.—The marine doctrine of constructive total loss is thus expressly excluded; it has been held in this country that an insurer, though covering full value by his policy, does not, upon settling for a total loss, become entitled to take any damaged remains of the property, or salvage subsequently realized from them.[4]

§ 246. This Entire Policy Shall be Void.—Before this phrase was inserted in the policy, the better opinion was that the contract of insurance was severable in those cases where it covered several classes of property which were insured in separate amounts, either at separate rates or for a gross premium, and provided the breach of warranty related only to a portion of the items.[5]

The phraseology of the New York standard policy was doubtless intended by its framers to prevent the application of this equitable rule of construction, and courts of many jurisdictions, in passing upon this important question, have held that such is its legal intendment.[6]

Cent. Ins. Co. v. *McLanathan*, 11 Kan. 533. Must make property as serviceable and valuable as before, *Commercial F. Ins. Co.* v. *Allen*, 80 Ala. 571, 1 So. 202, if several insurers have joined they must contribute towards the damage, *Hartford Ins. Co.* v. *Peeble's Hotel Co.*, 82 Fed. 546, 27 C. C. A. 223.

[1] *Hastings* v. *Westchester Fire Ins. Co.*, 73 N. Y. 141.

[2] *Heilmann* v. *Westchester Fire Ins. Co.*, 75 N. Y. 7. A demand for appraisal is a waiver of option to reinstate, *Elliott* v. *Merchants', etc., Ins. Co.*, 109 Iowa, 39, 79 N. W. 452; *Alliance, etc., Ins. Co.* v. *Arnold*, 65 Kan. 163, 69 Pac. 174.

[3] Option to rebuild is denied by statute in Missouri, *Branigan* v. *Jefferson Ins. Co.*, 102 Mo. App. 70, 76 S. W. 643.

[4] *Thuringia Ins. Co.* v. *Mallot*, 111 Ky. 917, 64 S. W. 991; *Liscom* v. *Boston, etc., F. Ins. Co.*, 50 Mass. 205; *St. Clara Academy* v. *Ins. Co.*, 98 Wis. 257, 73 N. W. 767. *Contra*, *German Ins. Co.* v. *Eddy*, 36 Neb. 461, 54 N. W. 856; Bunyon, Ins. (1906), 23, 236, 244. This author concludes that under English policy the insurer on paying a total loss is entitled to salvage though it chance to exceed the amount of insurance, *ibid.*, 245.

[5] See § 115, *supra*.

[6] Some of the following cases so hold even without the aid of the phraseology contained in the standard form, *Dumas* v. *Northwestern Nat. Ins. Co.*, 12 App.

An example may be taken from the Washington reports. The policy of the insured issued for the gross premium of $42.75 was distributed, $125 on beds; $350 on furniture; and $300 on piano. A total loss by fire occurred. The company refused to make any payment, basing its refusal on the ground that the insured was not the owner of the piano. On the trial it appeared that the piano was held under a contract of conditional sale taken in the name of the daughter of the insured, title not to pass until the full purchase price of $325 was paid, insurance thereon meanwhile to be maintained for the benefit of the sellers. At the time of the fire only $120 had been paid on account. The court held that though the plaintiff had an insurable interest in the piano, nevertheless, the warranty respecting unconditional and sole ownership having been broken, the entire contract was avoided, and there could be no recovery, even for the loss of the other items of furniture.[1]

To similar effect is a Georgia case in which the court reviewed many authorities. Knight, the insured, paid a gross premium for his policy, covering in separate amounts his building, and stock of merchandise therein. The policy contained an iron safe clause requiring the insured to take and preserve an annual inventory of

D. C. 245, 40 L. R. A. 358 (chattel mortgage on part of household effects avoids whole policy); *Essex Savings Bk.* v. *Meriden Fire Ins. Co.*, 57 Conn. 335 (breach as to building avoids as to contents also); *Southern F. Ins. Co.* v. *Knight*, 111 Ga. 622, 36 S. E. 821 (breach as to stock avoids as to building also); *Geiss* v. *Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99 (breach as to ownership of part avoids the whole); *Kahler* v. *Iowa State Ins. Co.*, 106 Iowa, 380, 76 N. W. 734 (breach as to building avoids as to machinery); *Republic Co. Mut. F. Ins. Co.* v. *Johnson*, 69 Kan. 146, 76 Pac. 419 (vacancy avoids entire contract); *Germier* v. *Springfield F. & M. Ins. Co.*, 109 La. 341, 33 So. 361 (breach as to building avoids also as to contents); *Thomas* v. *Commercial Union Assur. Co.*, 162 Mass. 29, 37 N. E. 672; *Parsons* v. *Lane*, 97 Minn. 98 (building on leased ground avoids also as to personalty); *Agricultural Ins. Co.* v. *Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. R. 457 (unoccupancy avoids also as to contents); *Baldwin* v. *Hartford F. Ins. Co.*, 60 N. H. 422, 49 Am. Rep. 324 (sale of one building avoids as to all); *Martin* v. *Ins. Co. of N. A.*, 57 N. J. L. 623, 31 Atl. 213; *Cuthbertson* v. *N. C. Home Ins. Co.*, 96 N. C. 480, 2 S. E. 258 (breach as to building avoids as to contents); *Coggins* v. *Ætna Ins. Co.*, 56 S. E. 506, 36 Ins. L. J. 354 (breach of iron safe clause avoids as to building also); *Germania Fire Ins. Co.* v. *Schild*, 69 Ohio St. 136, 68 N. E. 706, 100 Am. St. R. 663 (insurance was on contents of which one item was not owned absolutely; policy avoided); *Elliott* v. *Teutonia Ins. Co.*, 20 Pa. Super. Ct. 359 (breach as to ownership of machinery avoids as to building and stock); *Dow* v. *Nat. Assur. Co.*, 26 R. I. 379, 58 Atl. 999 (breach as to ownership of part of contents avoids entire policy); *McWilliams* v. *Cascade F. & M. Ins. Co.*, 7 Wash. 48, 34 Pac. 140 (misstatement as to piano; whole policy avoided); *Carey* v. *Ger.-Am. Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 36 Am. St. R. 907, 20 L. R. A. 267 (attachment of part of goods avoids as to all; but see *Loomis* v. *Rockford Ins. Co.*, 77 Wis. 87). Following case holds that policy is entire as to all articles insured as a separate class, *Home F. Ins. Co.* v. *Bernstern*, 55 Neb. 260, 75 N. W. 839.

[1] *McWilliams* v. *Cascade Fire, etc., Ins. Co.*, 7 Wash. 48, 34 Pac. 140.

stock, which he failed to do. The court held that the premium being entire, the breach of warranty was a bar to recovery not only for loss of stock, but also for loss of building; and reversed the judgment rendered for the plaintiff below.[1] So also in a late case the Federal Circuit Court, interpreting the New York standard policy, concludes that by weight of reason and authority, a chattel mortgage on personalty will forfeit the policy also as to realty, though the insurance covers them by separate amounts.[2]

Several other courts, however, regarding it as incredible to suppose that for some trifling mistake, relating perhaps only to one of many items of property insured, the parties should intend to abrogate the entire contract, have endeavored to give effect to the main purpose of the policy by practically ignoring the words "this entire policy shall be void," and by applying the same rule of interpretation that formerly prevailed without them. This conclusion is sought to be justified by the New York Court of Appeals on the ground that unlike the policy construed in *Smith* v. *The Agricultural Ins. Co.*,[3] the standard policy does not make breaches of warranty apply to "any part of the property," but only to the property generally.[4] This lack of precise definition, it is thought, permits a narrowing of the effect of the breach to the portion or class of property actually affected by the breach.

A policy of $2,000 issued to Knowles for a single premium, insured $1,200 on hops grown in 1889, and $800 on hops grown in 1890, separately stored in one hophouse. Without the required written permit from the company, the crop of 1889 was incumbered by a chattel mortgage; the court decided, though "with

[1] *Southern Fire Ins. Co.* v. *Knight*, 111 Ga. 622, 36 S. E. 821.

[2] *Fries-Breslin Co.* v. *Star Fire Ins. Co.*, 154 Fed. 35, 36 Ins. L. J. 804.

[3] 118 N. Y. 522, 23 N. E. 883 (often cited without reference to particular wording of the policy).

[4] *Donley* v. *Glens Falls Ins. Co.*, 184 N. Y. 107, 76 N. E. 914. Thus in spite of word "entire" the policy is held not to be avoided as to the whole by a breach affecting only a part, *Firemen's Fund Ins. Co.* v. *Barker*, 6 Colo. App. 535, 41 Pac. 513; *Trabue* v. *Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. R. 523 (change of title as to real estate does not avoid as to personalty); *Kiernan* v. *Dutchess Co. Mut. Ins. Co.*, 150 N. Y. 190, 194, 44 N. E. 698 (chattel mortgage does not avoid as to building); *Knowles* v. *Am. Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50, aff'd 142 N. Y. 641, 37 N. E. 567 (chattel mortgage on one of two crops does not avoid as to other); *King* v. *Tioga Co. Fire R. Asso.*, 35 App. Div. 58, 54 N. Y. Supp. 1057; *Kiernan* v. *Agricultural Ins. Co.*, 81 Hun, 373, 30 N. Y. Supp. 892 (breach, either as to realty or personalty, does not avoid as to the other); *Adler* v. *Germania F. Ins. Co.*, 17 Misc. 347 (chattel mortgage on part of personalty does not avoid as to the whole); *Miller* v. *Del. Ins. Co.*, 14 Okla. 81, 75 Pac. 1121 (if different classes of property are insured, contract is severable). See many cases cited in § 115, *supra*, also in *Parsons* v. *Lane*, 97 Minn. 124, 106 N. W. 485.

hesitation," that the breach of warranty avoided the insurance only as to the crop of 1889.[1]

Other courts hold that the contract being entire, the breach must affect the entire subject-matter before any forfeiture at all will result, a doctrine which certainly presents an ingenious, if not reasonable method of turning the tables upon the underwriters who framed the clause.[2] Such a construction, however, is not only strained, but involves a wide departure from principles established at common law.[3]

More satisfactory than the last rule, doubtless, is the following, that where the facts constituting an alleged breach affect the item of property in question, or where the risk itself must fairly be considered indivisible, the contract should not be severed for the purpose of avoiding forfeiture as to part.[4]

Parsons, Rich & Co. took out a policy for $1,000 apportioned over building, machinery, stock, supplies, etc. Without permit of the insurer the building stood on leased ground and not on ground owned by the insured in fee simple. The court concluded that by reason of the breach the moral hazard was increased on the contents of the building as well as on the building itself, and therefore the entire contract was avoided.[5]

If, however, there be not only a gross premium but also no separate apportionment of amounts of the insurance, then, by the clear weight of authority as deduced from numerous decisions cited in this section, a breach affecting part of the subject-matter avoids the whole contract.[6]

[1] *Knowles* v. *American Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50, aff'd 142 N. Y. 641, 37 N. E. 567. In a later case the court intimates a doubt as to the soundness of this rule on the merits, 184 N. Y. 111. A chattel mortgage on cattle does not avoid the policy as to the house and furniture, *Taylor* v. *Anchor Mut. F. Ins. Co.*, 116 Ia. 625, 88 N. W. 807, 57 L. R. A. 328, 93 Am. St. R. 261.

[2] *McQueeny* v. *Phœnix Ins. Co.*, 52 Ark. 257, 12 S. W. 498, 5 L. R. A. 744, 20 Am. St. R. 179 (vacancy in one of two houses *held* to be harmless even as to the vacant house). And see *Central Montana Mines Co.* v. *Firemen's Fund Ins. Co.*, 92 Minn. 223, 99 N. W. 1120, 100 N. W. 3.

[3] *Hoffecker* v. *New Castle, etc., Ins. Co.*, 4 Houst. (Del.) 306; *Hoffecker* v. *Ins. Co.*, 5 Houst. (Del.) 101.

[4] *Republic Co. Mut. F. Ins. Co.* v. *Johnson*, 69 Kan. 146, 76 Pac. 419 (1904) (vacancy of house avoids as to stable, corncrib and contents); *Agricultural Ins. Co.* v. *Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. R. 457 (vacancy of house avoids as to its contents); *Parsons* v. *Lane*, 97 Minn. 98, 124, 106 N. W. 485 (citing many recent cases. If building is on leased ground a breach is incurred as to contents also); *Brehm Lumber Co.* v. *Svea Ins. Co.*, 36 Wash. 520, 526, 79 Pac. 34 (shutting down main factory thirty days avoids as to other structures and contents though the latter were somewhat in use); *Dohlantry* v. *Blue Mounds F. & L. Ins. Co.*, 83 Wis. 181, 53 N. W. 448.

[5] *Parsons* v. *Lane*, 97 Minn. 98, 106 N. W. 485 (elaborate citation of authorities).

[6] *Fitzgerald* v. *Allerton Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp.

Again in case of fraud of any kind, and though directly affecting only a single item, whether committed to procure the policy, or during its life or in the proofs of loss, no indulgence is extended to the insured. By the plain terms of the policy as well as at common law, fraud as to a part vitiates the whole.[1]

The word "entire" is omitted from the similar clause of the Massachusetts form. Nevertheless, the Massachusetts court holds, that if the premium be an entire amount, though the insurance be apportioned, the contract is not severable, and forfeiture as to any one item defeats the whole claim of the insured.[2]

§ 247. **Temporary Breach.**—Where, as in the case of the New York standard fire policy, it is expressly provided that the entire contract shall be avoided by breach of a condition or warranty, it is held by the weight of reason and by the better authority that a temporary breach avoids, and that the contract can thereafter be revived only by the insurer's consent, or by his misleading conduct from which, under the doctrine of estoppel, the court may infer his consent,[3] though in many courts the opposite view prevails. These

552, 72 App. Div. 629, 76 N. Y. Supp. 1013, aff'd 175 N. Y. 494, 67 N. E. 1082.

[1] *German Ins. Co.* v. *Reed*, 9 Ky. Law R. 929; *Hamberg* v. *St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. 388; *Ins. Co.* v. *Connelly*, 104 Tenn. 93, 56 S. W. 828; *Worachek* v. *New Denmark Ins. Co.*, 102 Wis. 88, 78 N. W. 411.

[2] *Thomas* v. *Commercial Union Assur. Co.*, 162 Mass. 29, 37 N. E. 672, 44 Am. St. R. 323 (house and stable); *Lee* v. *Howard F. Ins. Co.*, 3 Gray (Mass.), 583; *Brown* v. *People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280; *Friesmuth* v. *Agawam Mut. F. Ins. Co.*, 10 Cush. (Mass.) 587. But if a portion of the property is sold without the insurer's consent, that portion simply is removed from the operation of the policy, *Bullman* v. *North Brit. & Mer. Ins. Co.*, 159 Mass. 118, 34 N. E. 169.

[3] *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231 (full compliance with all warranties a condition precedent to recovery); *Georgia Home Ins. Co.* v. *Rosenfield*, 95 Fed. 358, 37 C. C. A. 96 (temporary other insurance); *German-Am. Ins. Co.* v. *Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. R. 297 (temporary incumbrance); *Replogle* v. *Am. Ins. Co.*, 132 Ind. 360, 31 N. E. 947 (temporary other insurance); *German Ins. Co.* v. *Russell*, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234 (temporary vacancy); *Concordia F. Ins. Co.* v. *Johnson*, 4 Kan. App. 7, 45 Pac. 722 (illegal use); *Kyte* v. *Connecticut Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508 (temporary increase of risk); *Home F. Ins. Co.* v. *Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. R. 111 (vacancy, but court thrust on company burden of actively taking advantage of known forfeiture); *Moore* v. *Phœnix Ins. Co.*, 62 N. H. 240, 13 Am. St. R. 556 (vacancy); *Wheeler* v. *Traders' Ins. Co.*, 62 N. H. 450 (use of prohibited articles); *Newport Improvement Co.* v. *Home Ins. Co.*, 163 N. Y. 237, 242, 57 N. E. 475 (building alterations); *Mead* v. *Northwestern Ins. Co.*, 7 N. Y. 530 (temporary use of camphene); *Couch* v. *Farmers' F. Ins. Co.*, 64 App. Div. 367, 72 N. Y. Supp. 95 (temporary vacancy); *Gray* v. *Guardian Assur. Co.*, 82 Hun, 380, 31 N. Y. Supp. 237 (temporary chattel mortgage); Eng. Mar. Ins. Act (1906), § 34(2); *De Hahn* v. *Hartley* (1786), 1 T. R. 343 (1787), 2 T. R. 186 n. (ship warranted to sail with fifty hands made good the number before loss; policy void); *Quebec Mar. Ins. Co.* v. *Commercial*

courts, departing from the doctrine of the common law and ignoring the plain language of the contract, have seen fit to make a new contract for the parties which is deemed to be in fairer terms.[1]

Certain statutes, however,[2] and certain standard policies[3] provide that breach of certain warranties shall cause forfeiture only where the loss occurs during the breach or where the fact constituting the breach is a contributory cause of the loss.

§ 248. **Concealment—Misrepresentation.**—*If the insured has concealed or misrepresented, in writing or otherwise, any material fact.* As has been observed,[4] in this country by the prevailing rule, concealment of a material fact to avoid the fire policy must be shown to have been intentional if there be no express provision of the contract to the contrary. This clause, apparently, was intended to make obligatory here the rule on this subject obtaining in England without express provision, but the current of authority in this country construes the word "concealment," appearing in this clause, to mean as theretofore "an intentional withholding of a material fact." The

Bk. (1870), L. R. 3 P. C. 234 (ship unseaworthy with defect in boiler repaired before loss; policy void).

[1] *Sumter Tobacco Warehouse Co.* v. *Phœnix Ins. Co.* (S. C., 1907), 56 S. E. 654 (citing many cases *pro* and *con*); *Adair* v. *Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 73 Am. St. R. 122; *Tompkins* v. *Hartford F. Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184; *Organ* v. *Hibernia F. Ins. Co.*, 3 Mo. App. 576 ("an interruption is not a forfeiture"). So as to temporary increase of hazard, *Traders' Ins. Co.* v. *Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595. Temporary other insurance, *Phœnix Ins. Co.* v. *Johnston*, 42 Ill. App. 66; *Ins. Co. of N. A.* v. *McDowell*, 50 Ill. 120; *Royal Ins. Co.* v. *McCrea*, 8 Lea (Tenn.), 531, 41 Am. Rep. 565. Temporary vacancy, *Ins. Co. of N. A.* v. *Garland*, 108 Ill. 220; *Stephens* v. *Phœnix Assur. Co.*, 85 Ill. App. 671; *President, etc.*, v. *Pitts*, 88 Miss. 587, 41 So. 5; *East Tex. F. Ins. Co.* v. *Kempner*, 87 Tex. 229, 27 S. W. 122, 47 Am. St. R. 99. Temporary incumbrance, *Born* v. *Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, 80 Am. St. R. 300 (annotated with many cases *pro* and *con*); *Home F. Ins. Co.* v. *Johansen*, 59 Neb. 349, 80 N. W. 1047; *Omaha Fire Ins. Co.* v. *Dierks*, 43 Neb. 473, 61 N. W. 740. Excessive temporary incumbrance, *McKibban* v. *Des Moines Ins. Co.*, 114 Iowa, 41, 86 N. W. 38. Chattel mortgage, *Ins. Co. of N. A.* v. *Wicker*, 93 Tex. 390, 55 S. W. 740. Conveyance and reconveyance of real estate, *German Mut. F. Ins. Co.* v. *Fox* (Neb.), 96 N. W. 652, 63 L. R. A. 334. Compare two English cases in which it was held that where the master of a ship omitted, though not fraudulently, to advise the shipowner of a mishap causing a particular average loss, the non-disclosure did not avoid the policy but only precluded the assured from recovering for the loss in question, *Gladstone* v. *King* (1813), 1 M. & S. 35; *Stribley* v. *Imperial Mar. Ins. Co.* (1876), 1 Q. B. D. 507. These decisions, however, have since been criticised, *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531, 536, 540; Arnould, Ins., §§ 584, 585; De Hart & Simey, Ins. (1907), 24. And they are not followed in the codification, Eng. Mar. Ins. Act (1906), § 18(1). But the rule may well be more stringent in marine insurance. If a temporary breach contributes to the loss in fire or life insurance the company is apt to know it.

[2] See Appendix, ch. I.

[3] Iowa, New Hampshire, and Michigan, for example; also, as to unoccupancy clause, Wisconsin.

[4] See § 96, *supra*.

term is held to signify something more than "non-disclosure," and to imply a conscious or willful non-disclosure.[1] This express warranty, therefore, has little if any effect.[2]

Either with or without an express warranty, a misrepresentation of a material fact, made through mistake or by design, avoids a policy of insurance underwritten on the faith thereof.[3]

§ 249. Interest of the Insured not Truly Stated in the Policy.—Except for this requirement the insured might describe his interest in the most general terms, and if he had any insurable interest at all it would avail to sustain the contract.[4] He might describe the property as his or say that he was the owner, and if that were true in any substantial sense he could recover to the extent of his insurable interest.[5] But under this clause, which is a condition precedent or warranty,[6] he is bound to disclose the character of his insurable interest; whether, for example, he is owner, trustee, consignee, factor, agent, mortgagee, or lessee, and make sure that the description of his interest is truly noted in the policy.[7] It is only right that the insurers should know the nature and extent of his insurable interest, since the degree of care exercised in guarding the property from fire is likely to depend somewhat upon the character and extent of the

[1] *Clark* v. *Union Mut. F. Ins. Co.*, 40 N. H. 333, 77 Am. Dec. 721 (question of intent for jury); *Arthur* v. *Palatine Ins. Co.*, 35 Oreg. 27, 57 Pac. 62 (as to incumbrances); *Pelzer Mfg. Co.* v. *Sun Fire Office*, 36 S. C. 213, 268; *Mascott* v. *Ins. Co.*, 69 Vt. 116, 37 Atl. 255; *Sanford* v. *Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609; *Van Kirk* v. *Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798; *Johnson* v. *Scottish Union & Nat. Ins. Co.*, 93 Wis. 223, 67 N. W. 416. And see *Parker* v. *Otsego County Farmers' C. F. I. Co.*, 47 App. Div. 204, 62 N. Y. Supp. 199, aff'd 168 N. Y. 655, 61 N. E. 1132; *Baldwin* v. *German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326; *Greenlee* v. *Hanover Ins. Co.*, 104 Iowa, 481, 73 N. W. 1050; *McCarty* v. *Imperial Ins. Co.*, 126 N. C. 820, 36 S. E. 284.

[2] See § 97, *supra*.

[3] *Stetson* v. *Mass. Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217. But if application is written, the company has no right to rely on oral representation by broker's clerk, *Dolliver* v. *Ins. Co.*, 131 Mass. 39. Under the Massachusetts statute the insurer must show that the false answer was made also "with intent to deceive," *Levie* v. *Met. L. Ins. Co.*, 163 Mass. 117, 39 N. E. 792.

[4] *Farmers' Mutual Fire & L. I. Co.* v. *Lecroy*, 91 Ill. App. 41; *Buffum* v. *Bowditch Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 540.

[5] *Wainer* v. *Milford Mut. Fire Ins. Co.*, 153 Mass. 335; *Trade Ins. Co.* v. *Barracliff*, 45 N. J. L. 543, 46 Am. Rep. 792; *Dacey* v. *Agricultural Ins. Co.*, 21 Hun (N. Y.), 83. As, for example, where the insured called the property his but in reality had only a life estate, *Allen* v. *Charlestown Mut. Fire Ins. Co.*, 5 Gray (Mass.), 384.

[6] *Mers* v. *Franklin Ins. Co.*, 68 Mo. 127; *Weed* v. *L. & L. Fire Ins. Co.*, 116 N. Y. 106, 115, 22 N. E. 229; *Matthie* v. *Globe Fire Ins. Co.*, 68 App. Div. 239, 74 N. Y. Supp. 177, aff'd 174 N. Y. 489, 67 N. E. 57.

[7] The provisions of the policy amount to an express and pointed inquiry upon these subjects and the insured is conclusively bound to read and know its terms, *Parsons* v. *Lane*, 97 Minn. 98, 113.

insurable interest.[1] The warranty relates to the time of the inception of the contract.[2]

This clause, however, does not require him, unless particularly interrogated on the subject, to state the circumstances which relate to the value or permanency of his interest. For example, if the character of his title is a fee simple and the property is consequently described as his, he need not state that he is only a part owner;[3] or that there are mortgages, judgments or other incumbrances outstanding upon his property;[4] or that he has made an agreement to part with the title in the future;[5] or that his property has been seized on execution but not yet sold.[6] Any obligation which may rest upon him to make such disclosures does not come by virtue of this particular clause.

The word "interest" has been appropriately used in the standard form in place of the words "title or possession," for the reason that there are some insurable rights, like those of mortgagee, or surety, or stockholder, to which the attributes of title and possession are not necessarily incident. But it is apprehended that the substitution of this broad word does not impose any obligation upon the insured to make any fuller or other disclosure in respect to his title or possession than is required by the other form of words, although the ruling in cases cited in the notes might lead to a different conclusion.[7]

[1] Thus if insured represents that he is owner when in reality he is mortgagee, *Ordway* v. *Chace*, 57 N. J. Eq. 478, 42 Atl. 149; or that he owns in fee when in fact he has only an executory contract for purchase, the policy will be avoided, *Wooliver* v. *Boylston Ins. Co.*, 104 Mich. 132, 62 N. W. 149. There are many decisions holding that if the insurer makes no affirmative inquiries as to title or interest it must be presumed that he is content with any insurable interest, *Manchester Fire Assur. Co.* v. *Abrams*, 89 Fed. 932, 32 C. C. A. 426, citing cases; *Sharp* v. *Scottish U. & N. Ins. Co.*, 136 Cal. 542, 69 Pac. 253, 615; *Glens Falls Ins. Co.* v. *Michael* (Ind.), 74 N. E. 964; *Glens Falls Ins. Co.* v. *Michael* (Ind.), 79 N. E. 905 (citing cases); *Hartford F. Ins. Co.* v. *McClain* (Ky.), 85 S. W. 699 (1905); *Miotke* v. *Ins. Co.*, 113 Mich. 166, 71 N. W. 463 (Neb.), 100 N. W. 130; 16 Wash. 155. These decisions are not in accord with the current of authority, see § 141, *supra*, and were probably rendered without appreciation of the method of doing business in cities, where, as a rule, applications with detailed questions are not employed, the insurance companies relying upon the express warranties of the policy.

[2] *Collins* v. *Assur. Corp.*, 165 Pa. St. 398, 30 Atl. 924.

[3] *Peck* v. *New Lond. Co. Mut. Ins. Co.*, 22 Conn. 575; *Turner* v. *Burrows*, 5 Wend. (N. Y.) 541.

[4] *Dolliver* v. *St. Joseph F. & M. Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378; *Judge* v. *Conn. Fire Ins. Co.*, 132 Mass. 521; *Carson* v. *Jersey City Fire Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *Weed* v. *Hamburg-Bremen F. I. Co.*, 133 N. Y. 394, 45 N. Y. St. R. 105, 31 N. E. 231; *McClelland* v. *Greenwich Ins. Co.*, 107 La. 124, 31 So. 691. And see *Porter* v. *Orient Ins. Co.*, 72 Conn. 519, 45 Atl. 7.

[5] *Davis* v. *Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 113. But otherwise if he holds under an executory contract of purchase, *Brown* v. *Commercial Fire Ins. Co.*, 86 Ala. 189.

[6] *Strong* v. *Manuf'rs Ins. Co.*, 10 Pick. 40, 20 Am. Dec. 507.

[7] *Lee* v. *Agricultural Ins. Co.*, 79 Iowa, 379; *Edmands* v. *Mut. Safety*

If the policy is made payable to one "as his interest may appear," the interest need not be stated. The written words override the requirement of the printed form.[1]

This clause does not appear in the Massachusetts form. Therefore, under that form of contract, an applicant for insurance need not disclose the special nature of his title or interest, until it is asked for.[2] Accordingly it has been held in that state that the applicant, without fatal results, may in good faith describe the property as his, though in reality his only interest is that of a tenant by the curtesy initiate in his wife's property.[3]

§ 250. **Fraud or False Swearing.**—*In case of any fraud or false swearing, etc., whether before or after loss.* This provision makes clear the extension of the general rule of insurance law demanding good faith, to intentional misstatements made after loss. In fact, it is by the statements contained in the proofs of loss that the insured, if unscrupulous, is most tempted to deviate from strict honesty in order to swell the amount of his recovery.

False swearing in the examination under oath,[4] or in the proofs of loss, to vitiate the policy, must be intentionally false, whether by a fraudulent overvaluation of the goods destroyed, or a statement of items which really have no existence,[5] or by an undervaluation of what is saved, or as to ownership,[6] or incumbrances,[7] or origin of the fire,[8] or other particulars.[9] An innocent mistake,[10] or an innocent

Fire Ins. Co., 1 Allen (Mass.), 311; *Abbott* v. *Hampden Mut. Fire Ins. Co.*, 30 Me. 414.

[1] *Dakin* v. *Liverpool, L. & G. Ins. Co.*, 77 N. Y. 600.

[2] *Wainer* v. *Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598 (owner of undivided half of the legal title).

[3] *Doyle* v. *American Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 394. But an application may call for a true disclosure as to title, *Wilbur* v. *Bowditch Mut. F. Ins. Co.*, 10 Cush. (Mass.) 446; *Allen* v. *Charlestown Mut. F. Ins. Co.*, 5 Gray (Mass.), 384; *Jenkins* v. *Quincy Mut. F. Ins. Co.*, 7 Gray (Mass.), 370.

[4] *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, 3 S. Ct. 507, 28 L. Ed. 76.

[5] *Rovinsky* v. *Northern Assur. Co.*, 100 Me. 112, 60 Atl. 1025 (1905).

[6] *Beyer* v. *St. Paul F. & M. Ins. Co.*, 112 Wis. 138, 88 N. W. 57, holding also it is not enough that false swearing occurs through mistake, carelessness, or inadvertence or in unreasonable reliance on information derived from others. The assured had put into his schedules the original cost price of second-hand articles.

[7] *Fitzgerald* v. *Atlanta Home Ins. Co.*, 61 App. Div. 350, 356, 70 N. Y. Supp. 552, aff'd 175 N. Y. 494, 67 N. E. 1082.

[8] *White* v. *Merchants' Ins. Co.*, 93 Mo. App. 282.

[9] *Republic Fire Ins. Co.* v. *Weide*, 81 U. S. 375, 20 L. Ed. 894; *Hilton* v. *Phœnix Assur. Co.*, 92 Me. 272, 42 Atl. 412; *Atherton* v. *Brit.-Am. Assur. Co.*, 91 Me. 289, 39 Atl. 1006 (holding that an honest misstatement is not enough to avoid); *Dalton* v. *Milwaukee Mechanics' Ins. Co.*, 126 Iowa, 377, 102 N. W. 120; *Garner* v. *Mutual*

[10] *Tubb* v. *L. & L. & G. Ins. Co.*, 106 Ala. 651, 17 So. 615; *Am. Cent. Ins. Co.* v. *Ware*, 65 Ark. 336, 46 S. W. 129; *Little* v. *Phœnix Ins. Co.*, 123 Mass. 380; *Thierolf* v. *Universal Fire Ins. Co.*, 110 Pa. St. 37, 20 Atl. 412.

though exaggerated estimate of value, will not avoid the policy.[1] An overvaluation, in order to work a forfeiture, must be so plain that it cannot be accounted for upon the principle that every man is naturally prone to put a favorable estimate upon the value of his own property.[2] Thus in a Massachusetts case where goods, represented by the plaintiff to be worth $2,802.04, were valued by the arbitrators at only $761.68, the court refused to find fraud as a matter of law.[3]

The fatal effect, however, of a willful misstatement of fact is not disturbed because of the failure of the company to prove that prejudice was thereby occasioned,[4] or because it appears that the actual loss as truthfully stated exceeds the amount of insurance.[5] Within the terms of the policy the company establishes its defense when it shows that the statements made were relevant and willfully false. By the better rule it need not go further and assume the burden of satisfying a jury that the motives of the assured, in making the untruthful statements, were bad, for that is presumed, or that an actual injury to the company ensued.[6]

Fire Ins. Co., 86 N. W. 289; *Home Ins. Co.* v. *Winn*, 42 Neb. 331, 60 N. W. 575 (assured deliberately raised the amounts in invoices); *Titus* v. *Glens Falls Ins. Co.*, 81 N. Y. 410; *Cheever* v. *Scottish U. & Nat. Ins. Co.*, 86 App. Div. (N. Y.) 328 (schedule gave articles at cost price and not present value, *held*, no forfeiture); *Medley* v. *German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101; *Rickeman* v. *Williamsburg City Fire Ins. Co.*, 120 Wis. 655, 98 N. W. 960, in which the company contended that the assured had no such amount of stock as claimed, and that he had removed debris after the fire with intent to destroy evidence. *Held*, that it was relevant to show his straightened circumstances as bearing on the charge of fraud. Compare *Morley* v. *L. & L. & G. Ins. Co.*, 92 Mich. 590, 52 N. W. 939 (*held*, not relevant to show that assured was engaged in a losing business). A Lord Chief Baron says: "If the plaintiff deliberately introduced into his claim one article which he never possessed, or placed upon any one that he did possess a fraudulent and false value he was not in point of law entitled to recover," *Haigh* v. *De la Cour*, 3 Camp. 319; *Chapman* v. *Pole*, 22 L. T. N. S. 306. "Fraud" means any trick or artifice perpetrated on the company in proofs of loss or otherwise, *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. 283; *Dohmen* v. *Mfrs., etc., Ins. Co.*, 96 Wis. 38, 55, 71 N. W. 69. As to fraudulent removal of property after fire, see *Schmidt* v. *Phila. Underwriters*, 109 La. 884, 33 So. 907.

[1] *Towne* v. *Springfield Fire, etc., Ins Co.*, 145 Mass. 582; *Jersey City Ins. Co.* v. *Nichol*, 35 N. J. Eq. 291, 40 Am. St. Rep. 625; *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. 283; *Susquehanna Mut. Fire Ins. Co.* v. *Staats*, 102 Pa. St. 529; *Norton* v. *Royal F. & L. Assn. Co.*, 2 Times L. R. 460 (claimant may "put it on" to get full settlement, without fraud).

[2] *Franklin Fire Ins. Co.* v. *Vaughan*, 92 U. S. 516; *Sturm* v. *Atlantic Mut. Ins. Co.*, 63 N. Y. 77.

[3] *Goldstein* v. *Franklin Mut. F. Ins. Co.*, 170 Mass. 243, 49 N. E. 115. As to representation regarding ownership, see *Little* v. *Phœnix Ins. Co.*, 123 Mass. 380, 25 Am. Rep. 96 (policy not avoided).

[4] *Bannon* v. *Ins. Co. of N. A.*, 115 Wis. 290, 91 N. W. 666 (books of account fraudulently altered and displayed to the adjuster).

[5] *Dolloff* v. *Phœnix Ins. Co.*, 82 Me. 266, 19 Atl. 396; *Capital F. Ins. Co.* v. *Beverly*, 14 Ohio C. C. 468. *Contra*, for example, *Home Ins. Co.* v. *Lowenthal* (Miss.), 36 So. 1042 (1904).

[6] *Claflin* v. *Commonwealth Ins. Co.*,

There are decisions to the effect that false swearing in the proofs of loss by an agent will not avoid the policy, unless the assured himself is responsible for it, or has acquiesced in it, the theory being that authority from the insured to commit such a wrong should not be inferred.[1]

110 U. S. 81, 3 S. Ct. 507; *Linscott* v. *Orient Ins. Co.*, 88 Me. 497, 34 Atl. 405; *Virginia F. & M. Ins. Co.* v. *Vaughan*, 88 Va. 832, 14 S. E. 754 (in which invoices were intentionally and materially altered for presentation to the company). *Contra*, for example, *Petty* v. *Mut. F. Ins. Co.*, 111 Iowa, 358, 82 N. W. 767. A dishonest claimant is apt to include in the schedules of his proofs of loss at least some articles which he knows have altogether escaped the fire. If the underwriter can demonstrate this a defense is made good, *Wunderlich* v. *Palatine Ins. Co.*, 104 Wis. 382, 80 N. W. 467. The question of fraud or false swearing is generally for the jury, *Commercial Ins. Co.* v. *Friedlander*, 156 Ill. 595, 41 N. E. 183, and the company does not receive much consideration at their hands unless a clear case of dishonesty is established. In *Goulstone* v. *Royal Ins. Co.*, 1 F. & F. 276, claim for furniture was £260, estimate on schedule in insolvency was £50, jury found for defendant. Court directed jury to do so, "if the claim was willfully false in any substantial respect." But if it appears by the plaintiff's own showing, *Carson* v. *Jersey City Fire Ins. Co.*, 14 Vroom. (N. J.) 300, 39 Am. Rep. 584, that his statement of value was knowingly and intentionally exaggerated, a forfeiture ought to be found by the court, *American Ins. Co.* v. *Gilbert*, 27 Mich. 429. Where the discrepancy between the representation of the insured and the finding of the fact by the jury is very great, a limit will be reached where the court will intervene and decide as matter of law that the amount of the error is consistent only with bad faith. To illustrate, where a house was valued at $1,400, and the evidence showed its value to be about $1,000, it was held that this difference did not establish as matter of law that there had been a breach of warranty against overvaluation, *Smith* v. *Home Ins. Co.*, 47 Hun (N. Y.), 30. Putting the value of $2,000 upon goods worth $1,200 was held not to prove a fraudulent intent, *Goldstein* v. *St. Paul Fire & M. I. Co.*, 124 Iowa, 143, 99 N. W. 696; *Behrens* v. *Germania Fire Ins. Co.*, 64 Iowa, 19. Claim more than double the award was held fraudulent, *Larocque* v. *Royal Ins. Co.*, 23 Lr. Can. Jur. 217 (furniture, fixtures, liquor, etc.). Also, where a value of $5,000 was given to property worth $2,000, a finding of no fraudulent intent was not set aside. But there was also a finding that the actual value of the property destroyed exceeded the amount of insurance, *Dogge* v. *Northwestern Nat. Ins. Co.*, 49 Wis. 501. But in another case a rule *nisi* for a new trial was made absolute where the claim sworn to was £1,085, and the amount found by the jury was only £500, the court concluding that this finding of fact ought to be considered in effect a verdict for the defendant, *Levy* v. *Baillie*, 7 Bing. 349. In *Sibley* v. *St. Paul F. & M. Ins. Co.*, 22 Fed. Cas. 60, claim was for $957.87, A verdict for $567.50 was set aside by the court. And where the proofs made the loss three times as large as the amount found by the jury, no reason being disclosed for supposing that the misstatement arose inadvertently, the court was of opinion that fraud was shown as matter of law and that the policy should be held forfeited, notwithstanding the jury's verdict for the plaintiff, *Sternfield* v. *Park Fire Ins. Co.*, 50 Hun (N. Y.), 262. And see *Anibal* v. *Ins. Co. of N. A.*, 84 App. Div. 634, 82 N. Y. Supp. 600 (claim $6,780.30; a judgment at special term for $1,857 was set aside). In a California case, however, the assured in his proofs of loss claimed $1,875, and in his testimony $2,000. The verdict was for only $500, but the court held that this was not conclusive of fraud or false swearing, *Obersteller* v. *Commercial Assur. Co.*, 96 Cal. 645, 31 Pac. 587.

[1] *Ins. Co.* v. *Scales*, 101 Tenn. 628, 49 S. W. 743; *Metzger* v. *Manchester F. Ins. Co.*, 102 Mich. 334, 63 N. W. 650 (husband of insured); *Evans* v. *Ins. Co.* (Wis.), 109 N. W. 952 (wife of insured). But the insured must not willfully or recklessly adopt or take advantage of the fraudulent misstatements, *Mullin* v. *Vt. Mut. F. Ins. Co.*,

It will be observed that a distinction must be made between antecedent statements which form the inducement for the contract, and, whether material or not, are generally incorporated in the contract as warranties,[1] and those statements, on the other hand, which are made after the loss, in an attempt to give to the insurers such information as may be available respecting the origin, character, and extent of the loss already accrued. The latter must be willfully untrue to avoid the policy, and where the statements in the verified proofs of loss, or in the examination under oath, are shown to be intentionally false, the crime of perjury, or other crime, may also be established by statute,[2] in addition to forfeiture of the insurance.[3]

Fraud as to one item forfeits the entire contract. There is no equity to induce the court to construe the contract as severable in such a case;[4] and this was also the result at common law, without special provision in the policy.[5]

Several of the standard fire policies have no express provision regarding false swearing or fraud in proofs of loss;[6] but even under such a policy a fraudulent or dishonest misstatement by the insured will avoid his policy.[7]

58 Vt. 113, 4 Atl. 817. As to arson and fraud by assured and agents, see § 231, *supra*.

[1] *Northwestern Life Ins. Co.* v. *Montgomery*, 116 Ga. 799.

[2] N. Y. Penal Code, §§ 96, 579; *People* v. *Spiegel*, 75 Hun (N. Y.), 161; *People* v. *Vaughan*, 19 Misc. 298. And see *People* v. *Martin*, 175 N. Y. 315, Submitting a false affidavit to an insurer, in proof of loss, is not perjury at common law, because it is *extrajudicial*, *People* v. *Travis*, 4 Park. 213.

[3] *Avery* v. *Ward*, 150 Mass. 160. Negligent misstatement does not avoid, *Phœnix Ins. Co.* v. *Swann* (Tex. Civ. App.), 41 S. W. 519; *Beyer* v. *Ins. Co.*, 112 Wis. 138, 88 N. W. 57. Fraud will vitiate a past claim already matured, *F. Dohmen Co.* v. *Niagara F. Ins. Co.*, 96 Wis. 38, 71 N. W. 69. But the rights of the parties are determined by the status at time of commencement of action, *Deitz* v. *Prov. Wash. Ins. Co.*, 33 W. Va. 526, 11 S. E. 50.

[4] *Hamberg* v. *Ins. Co.*, 68 Minn. 335, 71 N. W. 388; *Hall* v. *Ins. Co.*, 106 Mo. App. 476, 81 S. W. 227; *Fowler* v. *Ins. Co.*, 35 Oreg. 559, 57 Pac. 421; *Home Ins. Co.* v. *Connelly*, 104 Tenn. 93, 56 S. W. 828. Misstatement as to irrelevant matter, it is said, will not forfeit, *Feibelman* v. *Manchester F. Assur. Co.*, 108 Ala. 180, 19 So. 540. Nor false statement in proofs as to matters not required, *Runkle* v. *Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. 712. Therefore, it is said, that if under valued policy laws the amount of recovery is fixed, misstatements regarding value will not forfeit, *Oshkosh Co.* v. *Mercantile Ins. Co.*, 31 Fed. 200; *Sullivan* v. *Hartford F. Ins. Co.*, 89 Tex. 665, 36 S. W. 73; but see *Walker* v. *Phœnix Ins. Co.*, 62 Mo. App. 209. A statement that damage was by fire when in fact it was by smoke and water is no fraud, *Kahn* v. *Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059.

[5] See § 94, *supra*. The corresponding clause in the Massachusetts standard policy is as follows: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured." This does not refer to statements in the proofs of loss, but only to the inducing representations upon which the contract is based, and the wording of the clause makes the question of fairness one for the jury, *Wainer* v. *Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598.

[6] Iowa, Maine, Massachusetts, Minnesota, New Hampshire, South Dakota.

[7] *Town* v. *Springfield F. & M. Ins. Co.*, 145 Mass. 582.

CHAPTER XII

The Standard Fire Policy—Continued

§ 251. Waivers Must be by Written Agreements.—*This entire policy, unless otherwise provided by agreement, indorsed hereon, or added hereto, shall be void, if, etc.*

The evident purpose is to do away with alleged parol permits and waivers, and with the uncertainties of oral testimony.[1] Modifications may, however, be made in writing;[2] but protective clauses of the standard form in favor of the assured must not be curtailed to his prejudice.[3] The question how far the doctrine of parol waiver and estoppel is enforced in spite of this clause of the policy has been considered in a preceding chapter.[4]

The standard policies of certain states in providing for the company's assent make no mention of a written agreement.[5]

§ 252. Other Insurance.—*If the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy without agreement indorsed hereon or added hereto.*

Other or double insurance exists where there are two or more policies on the same interest and subject, and against the same risk.[6] No matter how much insurance exists, recovery, in theory, is limited to actual loss, but evidence of the facts essential to define the loss is not always available to the company after the fire, and juries are often overliberal to the insured in the estimate of the amount and value of property. Therefore this clause of the policy is inserted. Its main function is to prevent an excessive amount of in-

[1] *Moore* v. *Ins. Co.*, 141 N. Y. 219, 224, 36 N. E. 191.

[2] *Nelson* v. *Traders' Ins. Co.*, 181 N. Y. 472, 474, 74 N. E. 421. And written permit obtained may be attached at any time, *Bennett* v. *Western Underwriters' Assn.*, 130 Mich. 216, 89 N. W. 702.

[3] *Wild Rice L. Co.* v. *Royal Ins. Co.*, 99 Minn. 190, 108 N. W. 871; *In re Miller*, Opinion N. Y. Atty. Gen., Dec. 18, 1902; *Re Globe & Rut. F. Ins. Co.*, *id.*, April 24, 1902.

[4] Ch. VIII, *supra*.

[5] See § 253, *infra*.

[6] *Ætna F. Ins. Co.* v. *Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *West Branch L. Exchange* v. *American Cent. Ins. Co.*, 183 Pa. St. 366, 385, 38 Atl. 1081.

surance which furnishes temptation to bring about a destruction by fire or inducement to be careless in preventing it. The condition must be complied with.[1] So far as it aims to prohibit overinsurance it is salutary and reasonable. In prohibiting all other insurance without special permit it is rigorous.[2] Nevertheless, almost all fire insurance policies contain such a printed provision.[3]

[1] *Northern Assur. Co.* v. *Grand View Bldg. Assoc.*, 183 U. S. 308, 22 S. Ct. 133; *Independent S. Dist.* v. *Fidelity Ins. Co.*, 113 Iowa, 65, 84 N. W. 956. *Bigelow* v. *Granite State F. Ins. Co.*, 94 Me. 39, 46 Atl. 808; *Sanders* v. *Cooper*, 115 N. Y. 279, 22 N. E. 212; *McSparran* v. *Southern Ins. Co.*, 193 Pa. St. 184, 44 Atl. 317; *Orient Ins. Co.* v. *Prather*, 25 Tex. Civ. App. 446, 62 S. W. 89, but in some jurisdictions a temporary breach merely suspends liability, *Germania F. Ins. Co.* v. *Klewer*, 129 Ill. 599, 22 N. E. 489; and see § 114.

[2] The underwriter often wants the insured to carry part of the risk as an incentive to care. Therefore a prohibition merely of insurance beyond property value would be unsatisfactory. Where the company has no suspicion of a moral hazard, indeed in the majority of instances, it grants a written or printed permit for "other insurance without notice," indorsed on the face of the policy at the time of issuance, and without the charge of additional premium. Thus this privilege is almost invariably to be found printed or written in "the forms" of descriptions prepared and presented to the company by the brokers, whether of mercantile or dwelling-house risks, and in ordinary cases, such a form is accepted by the company as matter of course, the company remaining ignorant of the amount of other insurance until a fire loss occurs. Then it must have a disclosure on this point to enable it to compute its *pro rata* share of liability. When the special permit is granted it supersedes the prohibition, *Blake* v. *Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265. But a permit does not warrant excess above the permitted amount, *Union Nat. Bk.* v. *German Ins. Co.*, 71 Fed. 473, 18 C. C. A. 203; *Allen* v. *German-Am. Ins. Co.*, 123 N. Y. 6, 25 N. E. 309; *Benedict* v. *Ocean Ins. Co.*, 1 Daly (N. Y.), 8; *Strauss* v. *Phœnix Ins. Co.*, 9 Colo. App. 386, 48 Pac. 822; *Georgia Home Ins. Co.* v. *Campbell*, 102 Ga. 106, 29 S. E. 148. Prior insurance already subsisting is to be included in the estimate, *Palatine Ins. Co.* v. *Ewing*, 92 Fed. 111, 34 C. C. A. 236. Though the company knew and relied upon the amount of other contributing insurance subsisting at the time of the issuance of its policy, no obligation rests upon the assured by virtue of the permit, to maintain in force the original amount, but he may change the amount at will, *Hoffman* v. *Mfg. Ins. Co.*, 38 Fed. 487; *Indiana Ins. Co.* v. *Hoffman*, 128 Ind. 250, 27 N. E. 561; *Lattan* v. *Royal Ins. Co.*, 45 N. J. L. 453; *Hand* v. *Williamsburg City Ins. Co.*, 57 N. Y. 41. In the absence of a stipulation to the contrary, an unaccepted or rejected policy does not constitute other insurance, *N. J. Rubber Co.* v. *Commercial U. Assur. Co.*, 64 N. J. L. 580, 46 Atl. 777, *Ins. Co.* v. *Graham*, 181 Ill. 158, 54 N. E. 914; *Dalton* v. *Germania Fire Ins. Co.*, 126 Iowa, 377, 102 N. W. 127; *Price* v. *Home Ins. Co.*, 54 Mo. App. 119. Nor an arrangement for insurance not definitely closed until after the fire, *Taylor* v. *State Ins. Co.*, 107 Iowa, 275, 77 N. W. 1032. As where a policy had not yet attached because the premium was not paid, *Equitable F. & Acc. Office* v. *Ching* (1907), App. Cas. 96. Insurance taken out by a third party in the name of the assured but without his authority is not other insurance within the meaning of this clause, *Church of St. George* v. *Sun Fire Office*, 54 Minn. 162, 55 N. W. 909; *Nelson* v. *Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38. Unless it be subsequently ratified, *German Ins. Co.* v. *Emporia Mut. L. & A. Assoc.*, 9 Kan. App. 803, 59 Pac. 1092. Nor does the renewal of a permitted policy violate the terms of the policy, *Pitney* v. *Glens Falls Ins. Co.*, 65 N. Y. 6; *Stage* v. *Home Ins. Co.*, 76 App. Div. 509, 78 N. Y. Supp. 555.

[3] Formerly Minnesota had a standard policy prohibiting other insurance in excess of the insurable value of the

To constitute "other insurance" the interests insured by the policies must be the same. An important application of this doctrine is furnished by the construction put upon the full mortgagee clause. The Syracuse Screw Company insured its building with the defendant. To the policy was attached the standard mortgagee clause in favor of Everson who held a mortgage upon the building. This clause made the insurance first payable to the mortgagee as his interest might appear, and provided that as to his interest the insurance should not be invalidated by any act or neglect of the mortgagor. After the issuance of this policy, the insured took out another policy for its own exclusive benefit, without the defendant's consent and without a mortgagee clause. The court held that the mortgagee clause, attached to the first policy, created a distinct contract in favor of Everson. It further held that while the later policy was other insurance in relation to the mortgagor's interest it was not other insurance in relation to the mortgagee's interest, nor would it defeat or affect Everson's right of recovery under the prior policy.[1]

Hall, the plaintiff, procured a policy from the defendant for $1,000 on "stock of eggs in pickle," in which he had an undivided interest. Taylor, the owner of the remaining interest in the eggs, separately insured for his own benefit. It was held that the interests of the co-owners were not the same and that therefore Taylor's policy was not "other insurance." Judgment in favor of the plaintiff was affirmed.[2]

To constitute "other insurance," the subject-matter insured by the policies must be at least in part the same. The defendant issued a policy to Johnson on his "farm implements." This description was adequate to embrace certain mowing machines and binders which were subsequently bought by him and added to his "farm implements." After the purchase and without consent of the defendant Johnson insured his "mowing machines and binders" with another company. This was held to be "other insurance," which avoided the policy in suit.[3]

property insured, *Carpenter-Glass L. Co.* v. *Germania F. Ins. Co.*, 86 Minn. 371, 90 N. W. 766.

[1] *Eddy* v. *London Assur. Corp.*, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686.

[2] *Hall* v. *Concordia Fire Ins. Co.*, 90 Mich. 403, 51 N. W. 524. A policy by a mother as trustee for certain children on their interests in three houses will not vitiate a prior policy on the undivided interest in the same property of another child procured by the child, *Franklin M. & F. Ins. Co.* v. *Drake*, 2 B. Mon. (Ky.) 47. Insurance by one creditor on the goods of the debtor is not "other insurance" with a policy on the same goods in favor of another creditor, *Roos* v. *Merchants' Mut. Ins. Co.*, 27 La. Ann. 409.

[3] *Johnson* v *Farmers' Ins. Co.*, Iowa (1905), 102 N. W. 502. The

To constitute "other insurance" the risk also must be the same.[1] Thus in an English case, the plaintiff procured from the defendant a policy on wool in transit to Sydney by land or in warehouses or on wharf. Subsequently the plaintiff effected an insurance against marine perils, one of them being fire, and so worded that the marine policy might possibly cover the same risk of fire as the fire policy for some period of time during the transit, but not while the goods were in warehouses. The court held that the marine policy not being double insurance with the fire, the plaintiff was entitled to a recovery.[2]

It often happens that a policy in force is given to a broker or agent for cancellation with instructions to procure a policy from a different company in its place. Though the issuance of the new policy may antedate the actual cancellation of the old, it has been held, with good reason, that there is no breach of this warranty.[3] This warranty, like all enuring to his benefit, is to be construed strictly against the insurer,[4] and neither the policy of the law nor the contract of insurance forbids different policies on different interests, but, on the contrary, there may be as many insurances as there are separate interests,[5] but where warehousemen, common carriers, agents, trustees, or bailees generally, take out insurance for the benefit of themselves and others on property, "their own or held

policy in suit was on goods and fixtures. A subsequent policy on goods only avoided the policy in suit, *Kimball* v. *Howard F. Ins. Co.*, 8 Gray (Mass.), 33.

[1] *Harris* v. *Ohio Ins. Co.*, 5 Ohio, 467.

[2] *Australian Agricultural Co.* v. *Saunders*, L. R. (1875) 10 C. P. 668.

[3] *Knowles* v. *American Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50, aff'd on opinion below, 142 N. Y. 641, 37 N. E. 567; *Train* v. *Holland Purchase Ins. Co.*, 68 N. Y. 208; but an unauthorized cancellation, *Kooistra* v. *Rockford Ins. Co.*, 122 Mich. 626, 81 N. W. 568; *Johnson* v. *North Brit. & M. Ins. Co.*, 66 Ohio St. 6, 63 N. E. 610; or an incomplete cancellation, *Gardner* v. *Standard Ins. Co.*, 58 Mo. App. 611; *East Tex. F. Ins. Co.* v. *Flippin*, 4 Tex. Civ. App. 576, 23 S. W. 550, is unavailing to dispose of the subsisting policy which then stands as "other insurance."

[4] *Mead* v. *American Fire Ins. Co.*, 13 App. Div. 476, 77 N. Y. St. R. 334, 43 N. Y. Supp. 334.

[5] *De Witt* v. *Agricultural Ins. Co.*, 157 N. Y. 353, 51 N. E. 977. For example, a policy to a mortgagor and another to a mortgagee are not within the operation of this clause, because they do not constitute double insurance, *Cowart* v. *Capital City Ins. Co.*, 114 Ala. 356, 22 So. 574; *Home Ins. Co.* v. *Koob*, 24 Ky. L. R. 223, 68 S. W. 453, 58 L. R. A. 58; *Cannon* v. *Home Ins. Co.*, 49 La. Ann. 1367, 22 So. 387. So also the interests of different mortgagees are distinct, *Fox* v. *Phœnix Fire Ins. Co.*, 52 Me. 333, and the different interests of joint-owners, *Woodbury Sav. Bank* v. *Charter Oak F. & M. Ins. Co.*, 31 Conn. 518; *Pitney* v. *Glens Falls Ins. Co.*, 65 N. Y. 6. The same is also true of grantor and grantee, or vendor and vendee, *State Ins. Co.* v. *New Hampshire Tr. Co.*, 47 Neb. 62, 66 N. W. 9, 1106; *Sprague* v. *Holland Purchase Ins. Co.*, 69 N. Y. 128; landlord and tenant, *Clemson* v. *Trammell*, 34 Ill. App. 414; bailor and bailee, *West Branch L. Exchange* v. *American Cent. Ins. Co.*, 183 Pa. St. 366, 38 Atl. 1081; life tenant and remainderman, *Franklin M. & F. Ins. Co.* v. *Drake*, 2 B. Mon. (Ky.) 47.

by them in trust," and the other parties in interest take out insurance for themselves upon the same subject and against the same risk, this constitutes double insurance.[1] Such other insurance for another person, however, would not avoid the owner's policy, unless it appeared that it was taken out by his authority or consent, or was subsequently ratified by him, since otherwise it would not constitute his contract, inasmuch as the element of mutual assent would then be wanting, and the courts are very reluctant to vitiate a policy unless the intent on the part of the insured to procure double insurance is established.[2] If the insured is not aware of the existence of other insurance, the prime object of this clause is wanting. No temptation to commit arson can be inferred from a fact of which the insured is ignorant.[3] But the warranty in the policy being absolute, principle would seem to require, that, if the double insurance really exists by legal authority of the insured, the policy in suit must be held avoided, whether the existence of the double insurance is known to the insured or not.[4]

Gwathmey & Co., warehousemen, for the benefit of themselves and their customers, procured insurance from the defendant on cotton and merchandise, their own or held in trust. The loss payable was not to exceed the sum insured nor the interest of the assured in the property. A condition of the policy provided: "Goods held on storage must be separately and specifically insured." The owners of the merchandise on storage took out specific insurance of their own to the full value of their property. Construing in its entirety the language of the policy in suit, the court concluded that the insurance in suit was not double or contributing with the other policies.[5]

[1] *Home Ins. Co.* v. *Balt. Warehouse Co.*, 93 U. S. 527; *Sturm* v. *Atlantic Mut. Ins. Co.*, 63 N. Y. 77; *Mussey* v. *Atlas Mut. Ins. Co.*, 4 Kern. (N. Y.) 79.

[2] *Mead* v. *Am. F. Ins. Co.*, 13 App. Div. 476, 43 N. Y. Supp. 334; *Church of St. George* v. *Sun F. Office*, 54 Minn. 162, 55 N. W. 909 (mortgagee took out insurance on mortgagor's interest without knowledge of mortgagor).

[3] *London & L. Fire Ins. Co.* v. *Turnbull*, 86 Ky. 230; *Doran* v. *Franklin Fire Ins. Co.*, 86 N. Y. 635. In one case it was held that where the consignor effected an insurance with the warranty "no other insurance," and unknown to him the consignees also insured the same goods, the first policy was not avoided, *Williams* v. *Crescent Mut. Ins. Co.*, 15 La. Ann. 652.

[4] *Phœnix Ins. Co.* v. *Copeland*, 90 Ala. 386, 8 So. 48; *Phœnix Ins. Co.* v. *Lamar*, 106 Ind. 513, 7 N. E. 241; *London & L. Fire Ins. Co.* v. *Turnbull*, 86 Ky. 230; *Van Alstyne* v. *Ætna Ins. Co.*, 14 Hun (N. Y.), 360; *Arnold* v. *Ins. Co.*, 106 Tenn. 529, 61 S. W. 1032. Evidence that the insured believed there was no other insurance is not admissible, *Zinck* v. *Phœnix Ins. Co.*, 60 Iowa, 266.

[5] *Home Ins. Co.* v. *Gwathmey*, 82 Va. 923, 1 S. E. 209. Compare *Home Ins. Co.* v. *Railway Co.*, 71 Minn. 296, 74 N. W. 140 (policies held contributing, though one policy covered only liability of the carrier to the shippers while the other policies covered grain, its own or held in trust. If the case had involved a question not of contribu-

In a Maryland case the plaintiff, a towing company, took out marine insurance on a cargo of corn "on account of whom it may concern." The owner of the corn also had it insured in another company against the same perils, and did nothing either before or after loss towards adopting or ratifying the insurance procured by the plaintiff. The court held that the policy in suit did not inure to the benefit of the owner so as to result in double insurance.[1]

The permit for other insurance must be in writing.[2] It is not enough for the assured merely to give notice of other insurance,[3] or of an intention to procure it,[4] nor is it enough under the New York standard policy, for the agent of the company to promise to indorse the permit in future.[5]

The policy provides that the consent must be indorsed or attached; but if in writing, the assured can attach it at any time; and even a telegraphic consent is in practice considered binding upon the company.

§ 253. Effect of Words—Valid or Invalid.—Policies in which the clause against other insurance does not contain the additional words "valid or invalid," have given rise to much difficulty in cases where two or more policies constituting double insurance contain the same provision. Shall both policies be avoided, or only one, and if only one, which one? There is in each a condition by which the policy containing it ought to be avoided, and yet the moment that either policy is held void, the reason for vitiating the other has ceased to exist.

And substantially the same difficulty arises where the other insurance is voidable upon some other ground of forfeiture of which the insurers have elected to avail themselves.

The opinions of the courts upon these questions are varied and irreconcilable;[6] but the sounder view, perhaps, is to hold the earlier

tion between underwriters, but of forfeiture for other insurance the decision would probably have been otherwise).

[1] *Western Assur. Co.* v. *Chesapeake L. & Towing Co.* (Md., 1907), 65 Atl. 637. Though such insurance is taken out by a bailee without authority of the owner, it has been held that the owner may ratify even after loss, *Ferguson* v. *Pekin Plow Co.*, 141 Mo. 161, 42 S. W. 711.

[2] But such matters of detail need not be written on a binding slip, *Dayton Ins. Co.* v. *Kelly*, 24 Ohio St. 345.

[3] *Orient Ins. Co.* v. *Prather*, 25 Tex. Civ. App. 446, 62 S. W. 89.

[4] *Gray* v. *Germania F. Ins. Co.*, 155 N. Y. 180, 49 N. E. 675.

[5] *Perry* v. *Ins. Co.*, 103 App. Div. (N. Y.) 113, 93 N. Y. Supp. 50.

[6] *Lacken* v. *Ga. Home Ins. Co.*, 42 Ga. 456; *Hubbard* v. *Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125; *Thomas* v. *Builders Mut. F. Ins. Co.*, 119 Mass. 121, 20 Am. Rep. 317; *Fireman's Ins. Co.* v. *Holt*, 35 Ohio St. 189, 35 Am. Rep. 601. See May, Ins., ch. 18.

policy undisturbed, on the ground that the later has had no valid inception, or, at the time, has ceased to exist.[1]

Much doubt would seem to be removed by the insertion, as in the New York standard form, of the words "valid or invalid," to which force must be given; and when the policy in suit contains them, it should be held vitiated by other insurance, whether regarded as void or voidable, provided no written consent to the other insurance has been obtained.[2] In a suit on either policy with such a clause the insured is unable to establish his case by virtue of excuse that the other policy is invalid.[3] And insurance taken out simultaneously with the policy in suit is equally in violation of the warranty.[4]

Where, however, the other policy is upon its face absolutely null and void, so as to be no policy at all, but a piece of waste paper, or where the policy, though still existing as a document, has been canceled,[5] then, in either case, the conclusion seems to follow that there is within the meaning of this clause no other or double insurance.[6] And so also, in construing the effect of this warranty, property removed from the location described in a policy should be considered as no longer within the operation of that policy, though still named in its description; and likewise new stock added subsequent to the issuance of the policy should be treated as coming within the reach of its terms.[7]

The corresponding provision of the Massachusetts policy is as follows: "This policy shall be void if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company."[8] It will be observed that this warranty does not contain the words "valid or invalid," and in construing it the Massachusetts court holds that other policies

[1] *Sweeting* v. *Mut. Ins. Co.*, 83 Md. 63, 34 Atl. 826, 32 L. R. A. 570; *Gee* v. *Ins. Co.*, 55 N. H. 65; *Jersey Ins. Co.* v. *Nichol*, 35 N. J. Eq. 291.

[2] *Hughes* v. *Ins. Co. of North Am.*, 10 Neb. 626, 59 N. W. 112; *Gee* v. *Cheshire Co. Mut. F. Ins. Co.*, 55 N. H. 65, 20 Am. Rep. 171; *Allen* v. *Merchants' Mut. Co.*, 30 La. Ann. 1386, 31 Am. Rep. 243; *Donogh* v. *Farmers' Ins. Co.*, 104 Mich. 503, 62 N. W. 721.

[3] *Phenix Ins. Co.* v. *Lamar*, 106 Ind. 513, 7 N. E. 241; *Reed* v. *Equitable Ins. Co.*, 17 R. I. 785, 24 Atl. 833. But see *Phœnix Ins. Co.* v. *Copeland*, 90 Ala. 386, 8 So. 48; *Stevens* v. *Citizens' Ins. Co.*, 69 Iowa, 658, 29 N. W. 769; *Wolpert* v. *Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. 1024.

[4] *United Firemen's Ins. Co.* v. *Thomas*, 92 Fed. 127, 34 C. C. A. 240.

[5] *German Ins. Co.* v. *Hayden*, 21 Colo. 127, 40 Pac. 453.

[6] *Phenix Ins. Co.* v. *Lamar*, 106 Ind. 513, 7 N. E. 241; *Am. Ins. Co.* v. *Replogle*, 114 Ind. 1, 15 N. E. 810, 132 Ind. 360, 31 N. E. 947; *Landers* v. *Watertown Ins. Co.*, 86 N. Y. 414, 40 Am. Rep. 554.

[7] *Washington Ins. Co.* v. *Hayes*, 17 Ohio St. 432; *Stevens* v. *Citizens' Ins. Co.*, 69 Iowa, 658; *Johnson* v. *Farmers' Ins. Co.*, 126 Iowa, 565, 102 N. W. 502; *Whitwell* v. *Putnam Fire Ins. Co.*, 6 Lans. (N. Y.) 166.

[8] *Hayes* v. *Mil. Mut. Fire Ins. Co.*, 170 Mass. 492, 49 N. E. 754; *Wheeler* v. *Watertown Ins. Co.*, 131 Mass. 1.

issued by other companies either before or after the one in suit, without assent of the defendant offer no defense, where such other policies contain the same condition.[1]

Other standard policies provide for the company's assent or agreement, but do not require that it shall be in writing or in print.[2] Such more liberal form of policy, however, does not supersede the common-law rule of evidence, by virtue of which contemporaneous oral statements and understandings are merged in the written contract and cannot be shown by parol.[3]

§ 254. Effect of Coinsurance Clause and Other Limited Consent.—An eighty per cent or other coinsurance clause operates as a permit for other insurance, but only to an amount required to make good the stated percentage of value.[4]

§ 255. Factories.—*Or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days.*

This condition, which is akin to the vacancy clause, is said to be not technical but substantial,[5] and reasonable.[6] Its violation avoids the policy.[7]

[1] *Hayes* v. *Milford Mut. Fire Ins. Co.*, 170 Mass. 492, 49 N. E. 754.

[2] For example, Iowa, Minnesota, and South Dakota.

[3] *Calmenson* v. *Equitable Mut. Fire Ins. Co.*, 92 Minn. 390, 100 N. W. 88. After the inception of the contract the local countersigning agent may give a binding oral permit, *Cooper* v. *German-American Ins. Co.* (Minn., 1905), 104 N. W. 687.

[4] *Cutler* v. *Royal Ins. Co.*, 70 Conn. 566, 40 Atl. 529, 41 L. R. A. 159; *Nestler* v. *Germania Fire I. Co.*, 44 Misc. (N. Y.) 97, 89 N. Y. Supp. 782, aff'd 91 N. Y. Supp. 29; see *Dolan* v. *Missouri Town M. F. I. Co.*, 88 Mo. App. 666; *Pool* v. *Mil. Mech. Ins. Co.*, 91 Wis. 530, 65 N. W. 54. Permit was inferred where there was an average clause applicable to other insurance, *Agricultural Ins. Co.* v. *Bemiller*, 70 Md. 400, 17 Atl. 380. Permit is sometimes worded "privilege for other concurrent insurance." In the following case it is reasonably held that other insurance is concurrent though the properties insured by the different policies were only in part the same, *Gough* v. *Davis*, 24 Misc. 245, 52 N. Y. Supp. 947, aff'd 39 App. Div. 639. And see *N. J. Rubber Co.* v. *Commercial Union Assur. Co.*, 64 N. J. L. 580, 46 Atl. 777; *East Tex. F. Ins. Co.* v. *Blum*, 76 Tex. 653, 13 S. W. 572, 576. "Concurrent" is not to be construed in this connection as "identical," *Washburn-Halligan Coffee Co.* v. *Merchants' Ins. Co.*, 110 Iowa, 423, 81 N. W. 707; and see *L'Engle* v. *Scottish M. & N. Ins. Co.* (Fla.), 37 So. 462; *Senor* v. *Western Millers' Ins. Co.*, 181 Mo. 104, 79 S. W. 687; *Caraher* v. *Royal Ins. Co.*, 63 Hun (N. Y.), 82, 17 N. Y, Supp. 858, aff'd on opinion below, 136 N. Y. 645, 32 N. E. 1015; *American Cent. Ins. Co.* v. *Heath*, 29 Tex. Civ. App. 445, 69 S. W. 235. In following case a mere mistake in calculating amount was held not to avoid earlier insurance, otherwise valid *Phœnix Ins. Co.*, v. *Boulden* 96 Ala. 609, 11 So. 774.

[5] *Alspaugh* v. *Brit.-Am. Ins. Co.*, 121 N. C. 290, 28 S. E. 415.

[6] *Cronin* v. *Fire Assoc.*, 119 Mich. 74, 77 N. W. 648.

[7] *Cronin* v. *Fire Assoc.*, 123 Mich. 277, 82 N. W. 45, 119 Mich. 74, 77 N. W. 648; *Strause* v. *Palatine Ins. Co.*,

Running the factory at night after the hour named in the policy is fatal,[1] but such continuation of the furnace fires, or even of the running of machinery, as cannot from the nature of the business be temporarily suspended, is not to be considered prohibited. Thus the mere running of the main shaft at night after the hour named, without any further operation, is permissible.[2] Nor is it easy to define, by any general rule, what constitutes that condition of inactivity or cessation from the usual working of the mill or factory which the latter part of the warranty tolerates for a period of only ten days. Temporary and unavoidable cessation in the operations, without deliberate purpose to shut down, has been held to be no such cessation as is contemplated by this clause, though continued for more than ten days.[3]

If the premises are in the same condition at the time of loss as at the time when the risk is accepted and the policy issued, it has been held that the company has no just cause for complaint on the score of idleness or inactivity, and may not be permitted to invoke the aid of this clause to occasion forfeiture, unless it had reason to suppose that before the expiration of ten days, manufacturing operations were to be more actively resumed.[4] Any consent or special agreement will control.[5]

128 N. C. 64, 38 S. E. 256 (an express permit was given). The clause, however, is construed strictly against the insurer, *Queen Ins. Co.* v. *Excelsior Milling Co.*, 69 Kan. 114, 76 Pac. 423. As to what is a manufacturing establishment, see *Stone* v. *Howard Ins. Co.*, 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771; *Carlin* v. *Western Assur. Co.*, 57 Md. 515; *Phœnix Ins. Co.* v. *Holcombe*, 57 Neb. 622, 78 N. W. 300; *Halpin* v. *North Am. Ins. Co.*, 120 N. Y. 73, 23 N. E. 989 (machinery is not equivalent to a manufacturing establishment).

[1] *Reardon* v. *Faneuil Hall Ins. Co.*, 135 Mass. 121.

[2] *Whitehead* v. *Price*, 2 Cr. M. & R. 447, 5 Tyrwh. 825. The insurers are presumed to have some knowledge of the requirements of the business, *McKeesport Machine Co.* v. *Ben Franklin Ins. Co.*, 173 Pa. St. 53, 34 Atl. 16.

[3] *Waukan Milling Co.* v. *Citizens' Mut. F. Ins. Co.* (Wis., 1906), 109 N. W. 937 (agent knew mill was likely to cease operations); *Ladd* v. *Ætna Ins. Co.*, 147 N. Y. 478, 42 N. E. 197, 70 N. Y. St. R. 69. But see *Day* v. *Mill Owners' Mut. F. Ins. Co.*, 70 Iowa, 710. Stoppage as to only part of the factory operations is not within the ban of this provision, *Am. Ins. Co.* v. *Brighton Cotton Mfg. Co.*, 125 Ill. 131, 17 N. E. 771; *Cent. Montana Mines Co.* v. *Firemen's Fund Ins. Co.*, 92 Minn. 223, 99 N. W. 1120, and stopping the machinery altogether for more than the stated period, if other work is done on the premises and a man left in charge, has been held to be no cause for forfeiture, *Bole* v. *New Hampshire Ins. Co.*, 159 Pa. St. 53, 28 Atl. 205; but see *McKenzie* v. *Scottish Union & Nat. Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Dover Glass Works* v. *Am. Ins. Co.*, 1 Marv. (Del.) 32, 29 Atl. 1039; *Brehm Lumber Co.* v. *Svea Ins. Co.*, 36 Wash. 520, 79 Pac. 34. Where there is room for question, the prudent manufacturer instructs his broker to apply for a special permit, which probably can be arranged for without additional expense, if the underwriters are satisfied with the moral hazard.

[4] *Louck* v. *Orient Ins. Co.*, 176 Pa. St. 638, 35 Atl. 247, 33 L. R. A. 712; *Lebanon Ins. Co.* v. *Erb*, 112 Pa. St. 149, 4 Atl. 8; but see *Stone* v. *Howard Ins. Co.*, 153 Mass. 475, 27 N. E. 6.

[5] *El Paso Reduction Co.* v. *Hartford*

The Massachusetts policy contains a similar clause, naming nine o'clock P. M. instead of ten o'clock, and thirty days as the limit for cessation of operations.[1]

§ 256. **Watchman.**—It is sometimes provided that a watchman shall be kept. The object of such a clause is to secure personal supervision over the property.[2] The warranty must be observed.[3] But a reasonable compliance is sufficient. Accordingly, a mere temporary absence for a few minutes [4] or for a short time [5] or for two hours [6] is no violation, as matter of law.[7]

§ 257. **Increase of Risk.**—*Or if the hazard be increased by any means within the control or knowledge of the insured.*

So far as the conduct of the insured himself is concerned, an obligation is said to rest upon him by general principles of insurance law not to voluntarily enhance the risk.[8] This clause extends his responsibility to acts of others within his control or knowledge.[9] It refers exclusively to future changes. A continuation of use or con-

Fire Ins. Co., 121 Fed. 937; *Edwards* v. *Planters' Fire Assoc.*, 111 Ga. 449, 36 S. E. 755; *Barker* v. *Citizens' Mut. Fire Ins. Co.*, 136 Mich. 626, 99 N. W. 866. The doctrine of waiver and estoppel has been applied. Waiver allowed, *Thackery Mining Co.* v. *Am. Ins. Co.*, 62 Mo. App. 293; *Improved Match Co.* v. *Michigan Ins. Co.*, 122 Mich. 256, 80 N. W. 1088. Waiver not allowed, *Carlin* v. *Western Assur. Co.*, 57 Md. 515; *Stone* v. *Howard Ins. Co.*, 153 Mass. 475, 27 N. E. 6.

[1] *Reardon* v. *Faneuil Hall Ins. Co.*, 135 Mass. 121. The South Dakota standard policy names twenty days as the limit; the Iowa, ten days.

[2] *Au Sable Lumber Co.* v. *Detroit Mfrs. M. F. I. Co.*, 89 Mich. 407, 50 N. W. 870.

[3] *Bank of Ballston Spa* v. *Ins. Co.*, 50 N. Y. 45.

[4] *McGannon* v. *Michigan Millers' M. F. I. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739.

[5] *Hanover Fire Ins. Co.* v. *Gustin*, 40 Neb. 828, 59 N. W. 375.

[6] *McGannon* v. *Millers' Nat. Ins. Co.*, 171 Mo. 143, 71 S. W. 160; *Kansas Mill Owners' Ins. Co.* v. *Metcalf*, 59 Kan. 383, 53 Pac. 68; and see *King Brick Mfg. Co.* v. *Phœnix Ins. Co.*, 164 Mass. 291, 41 N. E. 277.

[7] *Waukau Milling Co.* v. *Citizens' Mut. F. Ins. Co.* (Wis., 1906), 109 N. W. 937; *Spies* v. *Greenwich Ins. Co.*, 97 Mich. 310, 56 N. W. 560 (foreman of adjoining mill was the watchman). Nor is it material that the watchman happens to be asleep when the fire breaks out, *McGannon* v. *Millers' Nat. Ins. Co.*, 171 Mo. 143, 71 S. W. 160. But in another case it was decided that where the clause of the policy required that a watchman must be kept day and night, the policy was voided because only one watchman was employed in the building, the court concluding that the intent of the instrument was that a watchman must be awake, and if there were only one, there would be some portion of the time, presumably, when he would be asleep, *Rankin* v. *Amazon Ins. Co.*, 89 Cal. 210, 26 Pac. 872.

[8] *Hoffecker* v. *Newcastle Co. Mut. Ins. Co.*, 5 Houst. (Del.) 101 (held to be an implied promise). The word "risk" sometimes refers rather loosely to the adventure or subject-matter, sometimes to the hazard or chance of loss, *Bradford* v. *Symondson* (1881), 7 Q. B. D. 456, 464.

[9] *Janvrin* v. *Rockingham Ins. Co.*, 70 N. H. 35, 46 Atl. 686; *North Brit. & Am. Ins. Co.* v. *Union Stockyard Co* (Ky.), 87 S. W. 285.

dition existing when the policy issues is no increase of risk, however hazardous it may be.[1]

Before the insurers can successfully claim forfeiture on the ground of increase of hazard, they must show either that the situation was within the control, or the facts within the knowledge, of the assured;[2] but if the insured had knowledge, the standard policy seems to make him as responsible as though the increase of risk had been deliberately brought about by himself or his agent.[3]

This important warranty, however, must receive a reasonable construction, with due regard to the main purpose of insurance as well as to the special circumstances of every case.[4] Most fires, perhaps, result from acts of carelessness which temporarily increase the hazard, but a principal object to be gained by the policy is indemnity for the consequences of just such casual acts of negligence, if committed without evil design by the assured or his agents.[5] Thus, though it may seem highly reckless to use kerosene to aid in lighting a fire, nevertheless, the use of it for that purpose has been

[1] *Hoffecker* v. *Ins. Co.*, 5 Houst. (Del.) 101; *Whitney* v. *Black River Ins. Co.*, 72 N. Y. 117; *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 77 N. W. 752. A future change which does not increase the risk is not forbidden by this clause, *Parker* v. *Arctic Fire Ins. Co.*, 59 N. Y. 1. And see *Phœnix Ins. Co.* v. *Coomes*, 13 Ky. L. Rep. 238 (repairs increased value). Evidence showing decrease of risk is competent, *Smith* v. *Ins. Co.*, 32 N. Y. 399.

[2] *Waggonick* v. *Westchester F. Ins. Co.*, 34 Ill. App. 629; *Northern Assur. Co.* v. *Crawford*, 24 Tex. Civ. App. 574, 59 S. W. 916. As to whether the assured must also know that the known facts amount to an increase of hazard, compare *Phœnix Ins. Co.* v. *Parsons*, 129 N. Y. 86, 29 N. E. 87, with *McGonigle* v. *Ins. Co.*, 168 Pa. St. 1, 13, 31 Atl. 868; *McKee* v. *Ins. Co.*, 135 Pa. St. 544, 19 Atl. 1067; *Rife* v. *Ins. Co.*, 115 Pa. St. 530, 6 Atl. 65. Thus the underwriter cannot rely for defense, under this particular clause, upon the acts of a tenant of the insured, unless the insured knew of them, *Merrill* v. *Ins. Co.*, 23 Fed. 245; *Neb. & I. Ins. Co.* v. *Christiensen*, 29 Neb. 572, 45 N. W. 924; *East Tex. Ins. Co.* v. *Kempner*, 12 Tex. Civ. App. 534, 34 S. W. 393 (tenant used gasoline stove without knowledge of assured). So, as to acts of landlord, where tenant was insured, *Mechanics' Ins. Co.* v. *Hodge*, 149 Ill. 298, 37 N. E. 51.

[3] *L. & L. & G. Ins. Co.* v. *Gunther*, 116 U. S 113, 6 S. Ct. 306, 29 L. Ed. 575; *id.*, 134 U. S. 110, 10 S. Ct. 448; *Allen* v. *Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; *Long* v. *Beeber*, 106 Pa. St. 466. For the acts of his duly authorized agent the insured is responsible, and so likewise the knowledge of his agent, acquired while acting within the scope of his authorized employment, is to be imputed to him, *Cole* v. *Germania Fire Ins. Co.*, 99 N. Y. 40, 1 N. E. 38.

[4] *Meyer* v. *Queen Ins. Co.*, 41 La. Ann. 1000, 6 So. 899. See many illustrative cases, 2 Clement, Ins. (1905), 310–317. Changes required by the ordinary use of the property are impliedly allowed, so far as this clause is concerned, *Washington F. Ins. Co.* v. *Davison*, 30 Md. 91. Thus, repairs to make building tenantable, *Jolly's* v. *Baltimore Eq. Soc.*, 1 Har. & G. (Md.) 295, 18 Am. Dec. 288; or removal of dangerous defect, *James* v. *Lycoming Ins. Co.*, 13 Fed. Cas. 309.

[5] *McKenzie* v. *Scottish U. & N. Ins. Co.*, 112 Cal. 548, 44 Pac. 922; *Adair* v. *Ins. Co.*, 107 Ga. 297, 33 S. E. 78; *Des Moines Ice Co.* v. *Niagara Fire Ins. Co.*, 99 Iowa, 193, 68 N. W. 600; *Karow* v. *Ins. Co.*, 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17 (assured burned his property when insane).

held to constitute no such increase of risk as that referred to in this clause of the policy.[1] Mere acts of negligence by the assured or his agents, though causing or contributing to the loss, are covered by the fire insurance policy, in the absence of fraud or bad faith on his part.[2]

Goodfriend owned a department store in Middleborough. He carried upon his stock of merchandise $18,100 of insurance, including a policy of $1,000 issued by the defendant. The store was lighted by a gasoline machine, which got out of order shortly before the fire and caused the loss. The defendant moved to amend its answer by alleging that the gasoline lighter was defective for many days prior to the fire which was known or by the exercise of ordinary care could have been known to the plaintiff before the fire. The court held that an insurer is responsible for a loss occasioned by a risk insured against, though caused by the negligence of the insured or his agent, and ruled that the amendment was immaterial.[3]

The defendant, the Niagara Fire Insurance Company, insured an ice house belonging to the Des Moines Ice Company and situated on the shore of Lost Island Lake. The ice house was destroyed by fire. The loss was caused by the spread of fire from a bonfire made by the president of the plaintiff company not far away from the ice house, for the purpose of burning up some rubbish, and left burning without anyone to watch it at the noon hour. The court held that though the plaintiff's conduct might have been careless, nevertheless the loss was covered by the policy, and that the temporary and incidental increase of risk amounted to no breach of warranty.[4]

Furthermore, it must not be forgotten that the hazard is of necessity a variable quantity. It changes constantly from day to day, and sometimes imperceptibly, from the operation of the laws of nature and from various circumstances beyond the control of the insured. Such influences, and also transactions of third parties limited to adjoining premises[5] must in general, unless unusual or extraordinary, be considered as a necessary part or incident of the risk which the insurer has undertaken to bear.[6] It is not to be sup-

[1] *Angier* v. *Western Assur. Co.*, 10 S. D. 82, 71 N. W. 761, 66 Am. St. R. 685. As to mere carelessness, the United States Supreme Court says: "The insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself." *Orient Ins. Co.* v. *Adams*, 123 N. S. 73.

[2] *German Ins. Co.* v. *Goodfriend* (Ky., Dec., 1906), 36 Ins. L. J. 217. See § 49, *supra*.

[3] *German Ins. Co.* v. *Goodfriend* (Ky., 1906), 97 S. W. 1098.

[4] *Des Moines Ice Co.* v. *The Niagara Fire Ins. Co.*, 99 Iowa, 193, 68 N. W. 600.

[5] *German Ins. Co.* v. *Wright*, 6 Kan. App. 611, 49 Pac. 704.

[6] *State Ins. Co.* v. *Taylor*, 14 Colo. 499, 24 Pac. 333 (acts of neighbors).

posed that the insured has guaranteed that no improvements or changes shall be made anywhere in the vicinity of the insured property during the life of his insurance,[1] but it is reasonable to exact an obligation from him that he shall not allow himself, or permit others in control of the insured property, with his consent, to change its structure, nature, or habitual use in such a way as to make the hazard materially different from that which the insurers have agreed to undertake. Therefore trivial or temporary variations in the risk incident to the ordinary use of the insured property are presupposed by the contracting parties to be likely to occur;[2] but not so with more radical or permanent changes.[3]

In a Georgia case the defendant insured "the estate of Mrs. Hudson" against fire loss to dwelling house and furniture. The husband of the decedent, in charge and occupancy of the premises, employed the owner of a movable threshing machine run by an engine to bring his machine to the premises temporarily, for the purpose of threshing some wheat. The engine, which had no spark arrester, was moved thither and located about eighty-five feet from the dwelling. The work of threshing all told required about two hours. When the job was half done a sudden and unexpected gust of wind came and carried sparks from the engine to the house, which was in consequence destroyed by fire. The plaintiff was nonsuited below. On appeal, however, the court reversed, holding that the question whether a breach of the warranty had been committed by such a temporary and incidental use of the machine was for the jury.[4]

This clause binds the assured to make no alteration or change in the structure[5] or use[6] of the property which will substantially increase the risk,[7] and it prohibits him from introducing any unusual practice or mode of conducting his business which would have

[1] *Schaeffer* v. *Farmers' Mut. F. Ins. Co.*, 80 Md. 563, 31 Atl. 317 (engine fifty feet away).

[2] *Kircher* v. *Mil. Mech. Mut. Ins. Co.*, 74 Wis. 470, 43 N. W. 487.

[3] *Adair* v. *So. Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. R. 122 (mere incidental temporary acts are not prohibited); *Eager* v. *Firemen's Fund Ins. Co.*, 71 Hun, 352, 55 N. Y. St. R. 29, 25 N. Y. Supp. 35, aff'd 148 N. Y. 726, 42 N. E. 722 (risk must not be increased beyond that existing or reasonably contemplated by the parties).

[4] *Adair* v. *Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. R. 122.

[5] *Hill* v. *Middlesex Mut. Assur. Co.*, 174 Mass. 542, 55 N. E. 319; *Calvert* v. *Hamilton M. Ins. Co.*, 1 Allen (Mass.), 308, 79 Am. Dec. 744.

[6] *Planters' Mut. Ins. Co.* v. *Rowland*, 66 Md. 236, 7 Atl. 257 (change in process of manufacture); *Williams* v. *Peoples' Fire Ins. Co.*, 57 N. Y. 274 (kerosene); *Collins* v. *London Assur. Co.*, 165 Pa. St. 305, 30 Atl. 924; *Pool* v. *Milwaukee Mech. Ins. Co.*, 91 Wis. 530, 65 N. W. 57.

[7] *Janvrin* v. *Ins. Co.*, 70 N. H. 35, 46 Atl. 686 (must be substantial change to avoid).

the same effect,[1] and also from discontinuing any precaution represented in his application to have been adopted and practiced with a view to diminish the risk.[2]

During the term of the policy issued by the defendant to Horan upon his two-story frame dwelling, he caused an adjoining dwelling house to be erected which in fact increased the risk of fire in the building insured; but by another alteration, namely, by the removal of a carpenter shop standing at the date of the policy in suit, the risk was diminished. The trial judge charged the jury, "it is a question of fact, under all the evidence in this case, as to whether there was any increase of risk by fire; and whether it was counterbalanced by the removal of the carpenter shop." On appeal the court held that the charge was erroneous and that there had been a fatal increase of risk. A set-off of risks was not allowed.[3]

Erection of new buildings upon the property insured,[4] or adjacent thereto,[5] or any change in the structure of the buildings which makes them more inflammable, or the introduction of new and more hazardous employment [6] or machinery [7] is likely to avoid the policy, unless a disclosure is made to the company, and its consent obtained by written permit.[8] Other insurance is not *per se* an increase of

[1] *Collins* v. *London Assur. Co.*, 165 Pa. St. 305, 30 Atl. 924.

[2] *Houghton* v. *Manufrs. Mut. F. Ins. Co.*, 8 Metc. (Mass.) 114, 41 Am. Dec. 489; *Diehl* v. *Adams Co. Mut. Ins. Co.*, 58 Pa. St. 443, 98 Am. Dec. 302. New machinery may be substituted for old, *James* v. *Lycoming Ins. Co.*, 13 Fed. Cas. 309. And a dwelling house, in the absence of a stipulation to the contrary, may be used for boarders, *Planters' Ins. Co.* v. *Sorrels*, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780; but not for a liquor store, *Western Assur. Co.* v. *McPike*, 62 Miss. 740. Nor may a blacksmith shop be added to a printing office, *Robinson* v. *Ins. Co.*, 27 N. J. L. 134. By the rules of the New York Fire Exchange, occupancy by more than two families converts a private dwelling into an apartment house, a more hazardous risk.

[3] *Pottsville Mut. Fire Ins. Co.* v. *Horan*, 89 Pa. St. 438.

[4] *Roberts* v. *Chenango Ins. Co.*, 3 Hill (N. Y.), 501; *Francis* v. *Somerville M. Ins. Co.*, 25 N. J. L. 78 (an addition for hazardous articles).

[5] *Franklin Brass Co.* v. *Phœnix Assur. Co.*, 65 Fed. 773, 13 C. C. A. 124; *Cole* v. *Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38; *Murdock* v. *Chenango Co. Mut. Ins. Co.*, 2 Comst. (N. Y.) 210; *Yentzer* v. *Farmers' Mut. Ins. Co.*, 200 Pa. St. 325, 49 Atl. 767 (erection of adjacent building for incubator).

[6] *Mack* v. *Rochester German Ins. Co.*, 106 N. Y. 560, 13 N. E. 343. For example, changing from private dwelling to hotel, *Guerin* v. *Manchester Assur. Co.*, 29 Can. S. C. 139; or to liquor saloon, *Lappin* v. *Charter Oak Ins. Co.*, 58 Barb. 325.

[7] *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339.

[8] *Stokes* v. *Cox*, 1 H. & N. 320. And see as to erection of neighboring buildings over which insured had no control, *Janvrin* v. *Ins. Co.*, 70 N. H. 35, 46 Atl. 686; *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 77 N. W. 752. Blacksmith shop ten or twelve feet away, *held*, an increase of risk, *Gardiner* v. *Piscataquis M. F. Ins. Co.*, 38 Me. 439. So also a small frame building, *Northwestern Nat. Ins. Co.* v. *Davis*, 10 Ky. L. Rep. 818. So also a new building in a lot represented to be vacant, *Pottsville M. F. Ins. Co.* v. *Horan*, 89 Pa. St. 438. The introduction of electric lighting, pending the term of insurance, should be disclosed to the

risk.[1] Nor is vacancy *per se* an increase of risk.[2] Indeed, some classes of buildings are much less hazardous when vacant than when occupied.[3] Nor is change of occupants an increase of risk, as matter of law.[4]

In Iowa it has been held that giving a chattel mortgage amounted to an increase of risk as matter of law;[5] but this decision is very questionable, and in general the creation of incumbrances, whether voluntary, as in the case of mortgages, or involuntary, as in the case of tax liens, is not to be considered as increasing the risk within the meaning of this clause, although they might result in increasing the inducement to the insured to destroy his property.[6] The conclusion is doubtless based in part upon the circumstance, that the fire policy deals specially with the matter of incumbrances, and expressly demands a disclosure of chattel mortgages only.

It must be noticed that the requirements of this clause impose upon the insured an obligation which in terms covers all changes of which he has knowledge in the surrounding or adjoining premises, provided they enhance the hazard; but inasmuch as nothing is specifically said about the adjoining premises, and the word "knowledge" is connected with the word "control," it is doubtful how far the courts will hold the insured responsible for not disclosing changes

company, *Hahn* v. *Guardian Assur. Co.*, 23 Oreg. 576, 581, 32 Pac. 683, but the making of ordinary and necessary repairs does not fall within the prohibition of this clause, *Lyman* v. *State Mut. Fire Ins. Co.*, 14 Allen (Mass.), 329; *Townsend* v. *Northwestern Ins. Co.*, 18 N. Y. 168; *Smith* v. *German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368 (temporary use of gasoline to burn off old paint, *held*, not to avoid). And see *Bentley* v. *Lumbermen's Fire Ins. Co.*, 191 Pa. St. 276, 43 Atl. 209, as to use of benzine, but policy was not standard. Extraordinary alterations and repairs, without special permit, will avoid, *First Cong. Church* v. *Holyoke Fire Ins. Co.*, 158 Mass. 475, 32 N. E. 572, 19 L. R. A. 587, 35 Am. St. R. 508 (long continued use of naphtha torches in connection with repairs, issue for jury); *Merriam* v. *Ins. Co.*, 21 Pick. (Mass.) 162, 32 Am. Dec. 252.

[1] *Lindley* v. *Ins. Co.*, 65 Me. 368, 20 Am. Rep. 701.

[2] *Becker* v. *Farmers' Mut. Ins. Co.*, 48 Mich. 610, 12 N. W. 874; *Luce* v. *Dorchester Mut. F. Ins. Co.*, 110 Mass. 361; *Cornish* v. *Farms Buildings Ins. Co.*, 74 N. Y. 295; *Eureka F. & M. Ins. Co.* v. *Baldwin*, 62 Ohio St. 368, 57 N. E. 57; *Boardman* v. *North Waterloo Ins. Co.*, 31 Ont. 525; but see, under statute, *Jones* v. *Granite State F. Ins. Co.*, 90 Me. 40, 37 Atl. 326; *Hanscom* v. *Home Ins. Co.*, 90 Me. 333, 38 Atl. 324.

[3] Removal of part of goods from insured premises is no increase of hazard, *Runkle* v. *Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. 712.

[4] *Georgia Home Ins. Co.* v. *Kinnier*, 28 Gratt. (Va.) 88; *Planters' Ins. Co.* v. *Sorrels*, 1 Baxt. (Tenn.) 352.

[5] *Lee* v. *Agricultural Ins. Co.*, 79 Iowa, 379, 44 N. W. 683.

[6] *Hosford* v. *Germania Fire Ins. Co.*, 127 U. S. 399; *Greenlee* v. *Ins. Co.*, 102 Iowa, 427, 71 N. W. 534; *Judge* v. *Conn. Fire Ins. Co.*, 132 Mass. 521; *Collins* v. *London Assur. Co.*, 165 Pa. St. 298, 30 Atl. 924; *Continental Fire Ins. Co.* v. *Whitaker* 112 Tenn. 151, 79 S. W. 119. The Wisconsin court, however, decided that the existence of a mortgage was a fact material to the risk, *Vankirk* v. *Citizens' Ins. Co.* 79 Wis. 627.

made by others upon adjacent premises [1] in the absence of a special warranty regarding "exposures." [2]

In a Colorado case the policy provided that it should be void if the hazard was increased without written consent of the company. The court decided that such a clause was aimed only at premises of the insured and property within his control, and that consequently the language could not be extended to the acts of contiguous owners.[3] But the phraseology of most of the statutory policies is broad enough to cover all such acts of neighbors done on their premises as increase the hazard of the insured property, with the knowledge of the insured, although the acts are not within the control of the insured. This ruling has been expressly made by the New Hampshire court under the standard policy of that state;[4] and a later provision in the New York standard form respecting proofs of loss, which requires the insured to describe "any changes in exposures since the issuing of the policy," not to be found in the Massachusetts and New Hampshire policies, may be mentioned as an added reason for giving the same construction to the New York policy. Therefore, whenever the insured learns that, by reason of some alteration in the surrounding exposures, the risk of loss to the insured property has been substantially enhanced, his safe method of procedure is to immediately notify the company by aid of his broker, who will secure prompt action by the company, and, if necessary as an additional precaution, obtain its "binder for survey" meanwhile.[5]

In a case in which the defense was that the risk was materially increased by the erection of adjoining buildings with the knowledge and consent of the insured, the Minnesota court held that such an issue, unless the facts were undisputed and the inference obvious, raised a question for the jury, and that the burden of alleging and proving the defense rested upon the insurer.[6]

If the change of risk is such as to fall within the ban of this provision of the contract, the question is immaterial whether or not it is the cause of the loss; since the risk becomes other than that which was contracted for, and the contract is void at the option of the

[1] *State Ins. Co.* v. *Taylor*, 14 Colo. 499, 24 Pac. 333.

[2] *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 77 N. W. 752 (where there was an express warranty of no exposure within 100 feet).

[3] *State Ins. Co.* v. *Taylor*, 14 Colo. 499, 24 Pac. 333.

[4] *Janvrin* v. *Rockingham F. Mut. Fire Ins. Co.*, 70 N. H. 35, 46 Atl. 686 (the increase of risk must be substantial).

[5] *Putnam* v. *Home Ins. Co.*, 123 Mass. 324, 25 Am. Rep. 93. But a binding until acceptance or rejection will not run after rejection, *Goodhue* v. *Hartford Fire Ins. Co.*, 184 Mass. 41, 67 N. E. 645.

[6] *Taylor* v. *Security Mut. F. Ins. Co.*, 88 Minn. 231, 92 N. W. 952.

insurers;[1] and according to the weight of authority a temporary increase of risk vitiates the policy, and does not simply suspend its operation;[2] but a contrary rule has been adopted in Illinois and elsewhere.[3] And, as already shown, statutes and statutory forms of policies in some states supersede these common-law doctrines.

This clause has no application to conditions expressly provided for by other clauses of the policy.[4] Thus it is obvious that the insured is entitled to the full benefit of all the written permits that may be regularly obtained and attached to the policy, for hazardous use or occupation, for change of interest or location, for rebuilding or repairing, for vacancy, for chattel mortgages, for anything agreed to by the company in writing, regardless of the effect upon the risk; provided only the insured keeps within the terms of his permit.[5]

Whether the change amounts to a material alteration in the risk is essentially a question of fact;[6] and must generally be a question for the jury.[7] Thus the Minnesota court declares, "it is rare that the

[1] *Daniels* v. *Equitable Fire Ins. Co.*, 48 Conn. 105. See § 107, *supra*.

[2] *Imperial Ins. Co.* v. *Coos Co.*, 151 U. S. 452, 14 S. Ct. 379; *Hill* v. *Middlesex Assur. Co.*, 174 Mass. 542, 55 N. E. 319; *Kyte* v. *Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361; *Jennings* v. *Chenango Co. Mut. Ins. Co.* 2 Den. (N. Y.) 75.

[3] For example, *Traders' Ins. Co.* v. *Catlin*, 163 Ill. 256, 45 N. E. 255; *Ohio Farmers' Ins. Co.* v. *Burget*, 65 Ohio St. 119, 61 N. E. 712. See fuller discussion of this subject, §§ 114, 247, *supra*. Burden is on the underwriter to prove increase of risk, *Taylor* v. *Security Mut. F. I. Co.*, 88 Minn. 231, 92 N. W. 952.

[4] *Daniels* v. *Equitable Ins. Co.*, 50 Conn. 551; *Herrman* v. *Merchants' Ins. Co.*, 81 N. Y. 184. Thus if there be an express privilege to make alterations and repairs, it is not material to inquire whether or not they increase the risk, *Townsend* v. *Northwestern Ins. Co.*, 18 N. Y. 168. Such inquiry is likewise immaterial, on the other hand, in the case of express prohibitions, for instance, against keeping gasoline or other explosive, *Norwaysz* v. *Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551; *Boyer* v. *Ins. Co.*, 124 Mich. 455, 83 N. W. 124, 83 Am. St. R. 338. Under sprinkler clause it is permissible to make repairs; therefore it is not a fatal increase of risk to discontinue for necessary repairs the use of the sprinkler service. So *held* in *Cummer Lumber Co.* v. *Associated Mfrs. M. F. I. Corp.*, 67 App. Div. 151, 73 N. Y. Supp. 668.

[5] *Betcher* v. *Capital F. Ins. Co.*, 78 Minn. 240, 80 N. W. 971; *Garrebrant* v. *Continental Ins. Co.* (N. J., 1907), 67 Atl. 90.

[6] *Firemen's Ins. Co.* v. *Appleton, etc., Co.*, 161 Ill. 9, 43 N. E. 713; *Runkle* v. *Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. 712.

[7] For example, *Taylor* v. *Security Ins. Co.*, 88 Minn. 231, 92 N. W. 952; *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 64 N. E. 339; *Greenwich Ins. Co.* v. *State*, 74 Ark. 72, 84 S. W. 1025; *Williams* v. *Peoples' Ins. Co.*, 57 N. Y. 274. The issue is not always for the jury, for example, *Cassimus* v. *Scot. Union & Nat. Ins. Co.*, 135 Ala. 256, 33 So. 163; *Betcher* v. *Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971; *Cole* v. *Germania Ins. Co.*, 99 N. Y. 36; *School Dist.* v. *German Ins. Co.*, 7 S. D. 458, 64 N. W. 527. Experts in general cannot testify as to the ultimate fact to be determined by the jury, namely, whether a given situation amounts to an increase of risk. If it be a matter of common knowledge the issue is for the jury, *Carroll* v. *Home Ins. Co.*, 51 App. Div. 149, 64 N. Y. Supp. 522; *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.) 72. But testimony regarding prevailing rates of premium is admissible as having some bearing, *Southern Mut. Ins. Co.* v. *Hudson*, 113 Ga. 434, 38 S. E. 964; *Taylor* v. *Security Ins. Co.*, 88 Minn. 231, 92 N. W.

question is ever one of law to be determined by the court." [1] Nevertheless sometimes the only permissible inference to be drawn from the facts is too clear to allow the issue to pass beyond the judge. Accordingly the same court felt compelled to take judicial notice of the fact that the storage of explosive fireworks in the insured building increased the risk.[2]

The clause in the Massachusetts policy is of similar purport: [3] *or if, without such assent* [in writing or in print] *the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risk.*

The Massachusetts court decided that on the erection by the assured of a factory on an adjoining lot, increasing the risk of the insured property, the policy at once became void, without any affirmative action or notice by the insurer.[4] On the other hand, the same court held that the careless use of an unsafe stove on the premises for a single night, by a visiting crew of sailors, would not avoid the policy.[5]

Under an Iowa statute whether the removal of the property insured to a new location, without the insurer's consent, increases the risk presents a question for the jury.[6]

§ 258. **Mechanics.**—*Or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time.*

952; *Planters' Mut. Ins. Co.* v. *Rowland*, 80 Md. 236, 7 Atl. 257. The rating by the companies is not conclusive upon this issue, *Montelcone* v. *Royal Ins. Co.*, 47 La. Ann. 1563, 18 So. 472; *Carroll* v. *Home Ins. Co.*, 51 App. Div. 149, 64 N. Y. Supp. 522. And when the issue involves a matter of expert knowledge, experts may testify, *Traders' Ins. Co.* v. *Catlin*, 163 Ill. 256, 45 N. E. 255; *Cornish* v. *Farm Bldg. Ins. Co.*, 74 N. Y. 295.

[1] *Taylor* v. *Security Mut. F. Ins. Co.*, 88 Minn. 231, 92 N. W. 952 (erection of adjoining buildings); *Adams* v. *Altas Mut. Ins. Co.* (Iowa, 1907), 112 N. W. 651.

[2] *Betcher* v. *Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971. The storage of dynamite is "material to the risk" as matter of law under the statutes providing that only matters material to the risk will avoid the policy, *Kenefick* v. *Norwich Union F. Ins. Co.* (Mo., 1907), 103 S. W. 957.

[3] South Dakota limits to act or agency of the insured. By the Iowa policy increase of hazard to be fatal must not only be known to the insured, but must also contribute to the loss. By the New Hampshire policy it must continue until the loss to avoid the policy.

[4] *Allen* v. *Massasoit Ins. Co.*, 99 Mass. 160. Material alterations in the insured premises increasing the risk avoid the policy, though not connected with the loss, *Hill* v. *Middlesex Mut. Fire Assur. Co.*, 174 Mass. 542, 55 N. E. 319; *Kyte* v. *Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508.

[5] *Loud* v. *Citizens' Mut. Ins. Co.*, 2 Gray (Mass.), 221. The policy was held suspended and not avoided where the owner of a bowling alley and pool table was illegally conducting his business for a short time without a license, *Hinckley* v. *Germania Fire Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445.

[6] *Adams* v. *Atlas Mut. Ins. Co.* (Ia., 1907), 112 N. W. 651.

Such a provision is reasonable and binding on the insured.[1] The limit of time, wisely inserted in this clause, tends to make it more free from ambiguity than formerly, and if the insured allows any building or repairing operations to go on without permit for more than the specified time, he will vitiate his policy, although in fact the risk may not have been increased.[2] The permission carries with it the right to do the work in a usual and proper manner, no matter what the effect on other clauses of the policy, for instance, those forbidding an increase of risk, or the shutting down of factory operations.[3]

In the Massachusetts policy this subject is not specifically covered, but repairs fall within the operation of the general clause in regard to an alteration in the situation or circumstances affecting the risk.

§ 259. Interest of Insured.—*Or if interest of the insured be other than unconditional and sole ownership.*

If each one of several persons having insurable interests in a property were allowed to take out a separate insurance to its full value, and had the right under his policy to a separate collection for the full loss, the moral hazard would be greatly enhanced. Insurance would at once be regarded as a matter of promising specula-

[1] *Imperial Fire I. Co.* v. *Coos County*, 151 U. S. 452, 38 L. Ed. 231, 14 S. Ct. 379.

[2] *Newport Imp. Co.* v. *Home Ins. Co.*, 163 N. Y. 237, 57 N. E. 475, aff'g 21 App. Div. 633, 47 N. Y. Supp. 1143; *Mack* v. *Rochester German Ins. Co.*, 106 N. Y. 560, 13 N. E. 343. It has been held that a privilege to alter and repair does not extend to a material enlargement of the building, *Frost Detroit L. & W. Works* v. *Millers', etc., Ins. Co.*, 37 Minn. 300, 34 N. W. 35. Often a special privilege without time limit to make "additions, alterations, and repairs," is obtained from the company. As to "additions," see § 233, *supra*. Sometimes the insurer, unless an extra premium is paid, will consent only to a more restricted form of privilege which does not include reconstructing, or enlargement of buildings or new buildings. For a proper premium a special clause known as a builder's risk is given, *Rann* v. *Home Ins. Co.*, 59 N. Y. 387; *Smith* v. *German Am. Ins. Co.*, 7 N. Y. Supp. 846.

[3] *Am. Ins. Co.* v. *Brighton Cotton Mfg. Co.*, 24 Ill. App. 149, aff'd 125 Ill. 131, 17 N. E. 771; *Au Sable Lumber Co.* v. *Detroit Ins. Co.*, 89 Mich. 407, 50 N. W. 870. And see *Firemen's Ins. Co.* v. *Appleton Paper Co.*, 161 Ill. 9, 43 N. E. 713 (in which sprinkler equipment was removed); *Burnham* v. *Royal Ins. Co.*, 75 Mo. App. 394; *Townsend* v. *Northwestern Ins. Co.*, 18 N. Y. 168. And the time limit controls, although a continuation of the work may be needful for the preservation of the property, *German Ins. Co.* v. *Hearne*, 117 Fed. 289, 54 C. C. A. 527, 59 L. R. A. 492. A breach of the clause by a tenant of the assured will avoid, *Diehl* v. *Adams Co. Mut. Ins. Co.*, 58 Pa. St. 443. The Michigan court has held that painters employed to paint the outside of the building insured are not "mechanics," but it would be unsafe to rely upon any such distinction in most jurisdictions, *Smith* v. *German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368. *Contra*, *German Ins. Co.* v. *Hearne*, 117 Fed 289.

tion, and any loss by fire, so far from being a misfortune, would be a source of gain to the assured. In the view of underwriters, therefore, it becomes vital to the proper conduct of the business to know whether a loss will fall exclusively upon the assured, or partly upon him and partly upon others.

This provision of the standard policy, inserted in the interest of the underwriters, is by high authority deemed reasonable and valid,[1] and a fulfillment of its terms is declared to be a condition precedent to any right of recovery by the assured.[2] It has reference, obviously, to the time when the contract is made;[3] and it means that his interest must at that time be of such a nature that the substantial burden of any fire loss will fall exclusively upon him, regardless of the technical character of his title.[4] Thus a vendee under an executory contract of purchase binding him absolutely to complete and to take the whole title, whether of real,[5] or personal property,[6] is held to be sole and unconditional owner, though the formal instrument of transfer be not yet delivered; and, by parity of reasoning, the vendor ceases to be sole and unconditional owner though still holding the legal title.[7] But where the agreement to purchase is

[1] *Barnard* v. *National Fire Ins. Co.*, 27 Mo. App. 26. In another connection the Ohio court says: "Considerations of public policy forbid that conflagrations should be made profitable," *Lake Erie & W. R. R. Co.* v. *Falk*, 62 Ohio St. 297.

[2] *Hunt* v. *Ins. Co.*, 196 U. S. 47, 25 S. Ct. 179; *Matthie* v. *Globe Fire Ins. Co.*, 68 App. Div. 239, 74 N. Y. Supp. 177, aff'd 174 N. Y. 489, 67 N. E. 57.

[3] *Collins* v. *London Assur. Co.*, 165 Pa. St. 298, 30 Atl. 924.

[4] *Hartford Fire Ins. Co.* v. *Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. R. 499 ("to be unconditional and sole, the interest must be completely vested in the insured, not conditional or contingent, nor for years, or for life only, nor in common, but of such a nature that the insured must sustain the entire loss if the property be destroyed; and this is so whether the title is legal or equitable"). *Yost* v. *Dwelling House Ins. Co.*, 179 Pa. St. 381, 36 Atl. 317; *Steinmeyer* v. *Steinmeyer*, 64 S. C. 413, 42 S. E. 184 ("ownership of the assured is sole, when no one else has any interest in the property as owner; and is unconditional, when the quality of the estate is not limited or affected by any condition"). Several parties insured together may be the sole and unconditional owner, *Rankin* v. *Andes Ins. Co.*, 47 Vt. 144. If the assured has only a conditional devise, his ownership does not meet the requirement, *Dwelling-house Ins. Co.* v. *Dowdall*, 49 Ill. App. 33. Nor have stockholders such an interest in the corporate property, *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 U. S. App. 564.

[5] *Loventhal* v. *Home Ins. Co.*, 112 Ala. 108, 20 So. 419, 33 L. R. A. 258, 57 Am. St. R. 17; *Hough* v. *City Fire Ins. Co.*, 29 Conn. 10; *Knop* v. *F. Ins. Co.*, 101 Mich. 359, 50 N. W. 653; *Hall* v. *Niagara Ins. Co.*, 93 Mich. 184, 53 N. W. 727; *Dupreau* v. *Hibernia Ins. Co.*, 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; *Pres., etc., of Ins. Co.* v. *Pitts*, 88 Miss. 587, 41 So. 5; *Grunauer* v. *Ins. Co.* 72 N. J. L. 289, 62 Atl. 418; *Stowell* v. *Clark*, 47 App. Div. (N. Y.) 626, 62 N. Y. Supp. 155, aff'd 171 N. Y. 673, 64 N. E. 1125; *Imperial F. Ins. Co.* v. *Dunham*, 117 Pa. St. 460, 12 Atl. 668; *Matthews* v. *Capital Fire I. Co.*, 115 Wis. 272, 91 N. W. 675; *Evans* v. *Ins. Co.*, 109 N. W. 952 (1906).

[6] *Phœnix Ins. Co.* v. *Kerr*, 129 Fed. 723, 64 C. C. A. 251; but see *Scottish Union & Nat. Ins. Co.* v. *Strain*, 24 Ky. L. R. 958, 70 S. W. 274.

[7] *Hamilton* v. *Dwelling House I. Co.*,

conditional or contingent, whether of real,[1] or of personal property,[2] so that a fire loss will not fall upon the vendee, then his interest is not sufficient to satisfy the requirement of this warranty.[3] The beneficial owner of the entire property is the real owner.[4]

If the assured has possession and use under claim of right, the court is not disposed to pass upon the validity of his title, or to apply to it any nice rules of conveyancing.[5]

98 Mich. 535, 57 N. W. 735, 22 L. R. A. 527; *Rosenstock* v. *Miss. Home Ins. Co.*, 82 Miss. 674, 35 So. 309; but see *Erb* v. *Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. 261. It does not follow, however, that the vendor's insurance, if valid when procured, is avoided by such an executory contract of sale. See § 265, *infra*.

[1] *Liberty Ins. Co.* v. *Boulden*, 96 Ala. 508, 11 So. 771; *Brooks* v. *Erie Fire Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748, aff'd 177 N. Y. 572, 69 N. E. 1120.

[2] *Phœnix Ins. Co.* v. *Public Park Amusement Co.*, 63 Ark. 187, 37 S. W. 959.

[3] Thus the owner of a mere option to purchase property is not a sole and unconditional owner, *Phœnix Ins. Co.* v. *Kerr*, 129 Fed. 723, 64 C. C. A. 251; see *Wunderlich* v. *Palatine Ins. Co.*, 104 Wis. 396, 80 N. W. 471. Or where purchaser, the assured, has made a binding agreement to resell to the vendor at a given price and time, *Farmers' & Mech. Ins. Co.* v. *Hahn* (Neb.), 96 N. W. 255. A person in possession of personal property, with a reservation of title in the seller until payment of the notes given for the purchase price, is not sole and unconditional owner, *Geiss* v. *Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99 (soda water fountain). But if it be equitably and substantially true that the insured is the unconditional and sole owner, as regards the risk of fire loss, the clause will not be held to have been violated, *Milwaukee Mech. Ins. Co.* v. *Rhea*, 129 Fed. 9, 60 C. C. A. 103, in which the jury was charged that it would be sufficient if vendee was in possession by a parol agreement to purchase and to pay. But held otherwise where there was no consideration for the parol promise to convey in *Miller* v. *Amazon Ins. Co.*, 46 Mich. 463, 9 N. W. 493; *Martin* v. *State Ins. Co.*, 44 N. J. L. 485, 43 Am. Rep. 397; *Lebanon Mut. Ins. Co.* v. *Erb*, 112 Pa. St. 149. But see *Westchester Fire Ins. Co.* v. *Weaver*, 70 Md. 536, 17 Atl. 401, 5 L. R. A. 478 (policy held void as to piano taken under conditional purchase though assured liable for fire loss).

[4] *Fire Assoc.* v. *Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153. So where two agree to carry on a cotton plantation, one to furnish stock, money, and supplies, the other to furnish the plantation and superintend the business, the former to be indemnified for his advances out of the proceeds of the cotton, and the stock and implements used to be equally divided at the end of the year, it was held, that, the cotton not being worth enough to pay the advances, the partner who had made them was the sole and unconditional owner of the cotton, but not of the stock and implements, *Noyes* v. *Hartford Fire Ins. Co.*, 54 N. Y. 668. And a purchaser at a sheriff's sale who has not paid the purchase money, there being an outstanding right to claim the premises, has not such an ownership, *Security Ins. Co.* v. *Bronger*, 6 Bush (Ky.), 146. So where the use of real estate was contributed as a partner's share of the capital, there being no deed directly or in trust, the firm cannot truly describe the property as belonging to them by an entire, unconditional, and sole ownership, *Citizens' Fire Ins. S. & L. Co.* v. *Doll*, 35 Md. 89, 6 Am. Rep. 360.

[5] Thus it was held that the insurance company could not take advantage of the fact that the building encroached two feet upon the adjoining property, *Haider* v. *St. Paul F. & M. Ins. Co.*, 67 Minn. 514, 70 N. W. 805; or that the title of the assured might be successfully assailed by his creditors, *German Ins. Co.* v. *Hyman*, 34 Neb. 704, 52 N. W. 401; *Burson* v. *Fire Assn.*, 136 Pa. St. 267, 20 Atl. 401; or by the interested corporation of which he was a trustee, *Caraher* v. *Royal Ins. Co.*, 63 Hun (N. Y.), 82, 44 N. Y. St. R. 141, 17 N. Y. Supp. 858; or that the as-

As a rule any incumbrances or liens, whether voluntary or involuntary, upon the property of the insured, need not be disclosed under this clause. The assured is none the less owner because of their existence.[1]

sured held by deed of gift, which, a few days after issuance of policy and before the fire, had actually been adjudged void as against creditors of the grantor, *Steinmeyer* v. *Steinmeyer*, 64 S. C. 413, 42 S. E. 184. The owner of an undivided part interest is not sole and unconditional owner, for this phrase calls for the fee simple, *Palatine Ins. Co.* v. *Dickenson*, 116 Ga. 794, 43 S. E. 52; *Hebner* v. *Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. 627; *L. & L. & G. Ins. Co.* v. *Cochran*, 77 Miss. 348, 26 So. 932, 78 Am. St. R. 524. Nor is one who holds jointly with others the sole and unconditional owner, *Schroedel* v. *Humboldt Ins. Co.*, 158 Pa. St. 459, 27 Atl. 1077; as, for example, a partner in the firm property, *McGrath* v. *Home Ins. Co.*, 88 App. Div. (N. Y.) 153, 84 N. Y. Supp. 374; *McFetridge* v. *Phœnix Ins. Co.*, 84 Wis. 200, 54 N. W. 326. But a transfer of his interest in the firm by one partner, before policy issues, has no effect on title of firm to firm real estate, *Wood* v. *Am. Ins. Co.*, 149 N. Y. 382, 44 N. E. 80. Nor is a surviving partner, who is also administrator of the deceased partner, the sole and unconditional owner, *Crescent Ins. Co.* v. *Camp*, 71 Tex. 503, 9 S. W. 473. Nor is a tenant for life, *Garver* v. *Hawkeye Ins. Co.*, 69 Iowa, 202; but see *Security Ins. Co.* v. *Kuhn*, 207 Ill. 166, 69 N. E. 822. Nor a tenant for a term, *Mt. Leonard Mills Co.* v. *L. & L. & G. Ins. Co.*, 25 Mo. App. 259, though tenant is responsible for fire loss. Nor is the trustee of a syndicate, holding the legal title for the benefit of himself and five others, such sole and unconditional owner, *Bradley* v. *German-Amer. I. Co.*, 90 Mo. App. 369. Nor is the owner of a small part of the furniture described, *Dow* v. *National Assur. Co.*, 26 R. I. 379, 58 Atl. 999 (1904). Nor is a husband when title is in him and his wife, *Schroedel* v. *Humboldt Fire Ins. Co.*, 158 Pa. St. 459, 27 Atl. 1077. Nor is a mortgagee prior to sale in foreclosure, *Ordway* v. *Chase*, 57 N. J. Eq. 478, 42 Atl. 149. But otherwise as to mortgagee of personal property in possession after debt is due, *Carey* v. *L. & L. & G. Ins. Co.*, 92 Wis. 538, 66 N. W. 693. One who holds title from a second mortgagee is not sole and unconditional owner, *Southwick* v. *Atlantic F. & M. Ins. Co.*, 133 Mass. 457. But as before shown descriptive phrases are often employed which override this warranty, and indicate that the insurable interest of the insured, whatever it may be, is covered, *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423, 22 S. Ct. 862 ("for whom it may concern"); *Cross* v. *N. F. Ins. Co.*, 132 N. Y. 133, 30 N. E. 390 ("as trustee"); *Sullivan* v. *Spring Garden Ins. Co.*, 34 App. Div. 128, 54 N. Y. Supp. 629. Thus a policy to "a receiver" shows upon its face other interests than that of owner, *L. & L. & G. Ins. Co.* v. *McNeill*, 89 Fed. 131, 59 U. S. App. 499. And it has been held that where one man does business under a partnership name, insurance in such partnership name is valid, *Phœnix Ins. Co.* v. *McKernan*, 20 Ky. L. R. 337, 46 S. W. 10 (in which another even loaned his name and credit without avoiding policy); *Delaware Ins. Co.* v. *Bonnet*, 20 Tex. Civ. App. 107, 48 S. W. 1104; *Matter of Pelican Ins. Co.*, 47 La. Ann. 935, 17 So. 427.

[1] *Hartford Ins. Co.* v. *Enoch*, 72 Ark. 47, 77 S. W. 899; *McClelland* v. *Greenwich Ins. Co.*, 107 La. 124, 31 So. 691; *Dolliver* v. *St. Joseph F. & M. Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378; *Caplis* v. *Am. Ins. Co.*, 60 Minn. 376, 62 N. W. 440; *Hare* v. *Headley*, 54 N. J. Eq. 545, 35 Atl. 445; *Huff* v. *Jewett*, 20 Misc. 35, 44 N. Y. Supp. 311; *Steinmeyer* v. *Steinmeyer*, 64 S. C. 413, 42 S. E. 184; *Union Assur. Soc.* v. *Nalls*, 101 Va. 613, 44 S. E. 896. A lease from the insured need not be mentioned, *Ins. Co.* v. *Haven*, 95 U. S. 242. So a mortgagor is a sole and unconditional owner prior to a foreclosure of the property, *Wolf* v. *Theresa Village M. F. I. Co.*, 115 Wis. 402, 91 N. W. 1014. Inasmuch as the moral hazard is increased where the property is heavily incumbered, sometimes the application or policy requires a disclosure of incumbrances, *Essex Sav. Bk.* v. *Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930; *Lockwood* v. *Middlesex Mut. Assur. Co.*, 47

Though no extraneous representation be asked for by the insurer or be made by the assured regarding his interest, he must, nevertheless, see to it that the express warranties of the policy in regard to sole and unconditional ownership are fulfilled. This is beyond peradventure the sound rule.[1] But, by an extraordinarily liberal construction, several courts have held that, if the company make no affirmative inquiries, a legal presumption will be indulged in to the effect that the company is content with any insurable interest belonging to the insured; and some judges have applied this rule to the standard policy, though it contains the further warranty that the interest must be truly stated in the policy.[2]

This clause is not in the Massachusetts policy.

Conn. 553; *Martin* v. *Fidelity Ins. Co.*, 119 Iowa, 570, 93 N. W. 562; *Fitchburg Savings Bank* v. *Amazon Ins. Co.*, 125 Mass. 431. A deed intended as a mortgage does not avoid, *Sun Fire Office* v. *Clark*, 53 Ohio St. 414, 42 N. E. 248.

[1] For example, *Hunt* v. *Ins. Co.*, 196 U. S. 47, 25 S. Ct. 179; *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 U. S. App. 564, 27 L. R. A. 614; *Pelican Ins. Co.* v. *Smith*, 107 Ala. 313, 18 So. 105, 92 Ala. 428; *Orient Ins. Co.* v. *Williamson*, 98 Ga. 464, 25 S. E. 560; *Parsons* v. *Lane*, 97 Minn. 98, 106 N. W. 485; *Rosenstock* v. *Mississippi Home Ins. Co.*, 82 Miss. 674, 35 So. 309; *Lasher* v. *St. Joseph F. & M. Ins. Co.*, 86 N. Y. 423. See § 141, *supra*.

[2] For example, *Manchester Assur. Co.* v. *Abrams*, 89 Fed. 932, 32 C. C. A. 426; *Sharp* v. *Scottish U. & M. Ins. Co.*, 136 Cal. 542, 69 Pac. 253 (Beatty, C. J., dissents in able opinion); *Glens Falls Ins. Co.* v. *Michael* (Ind., 1905), 74 N. E. 964 (life interest; Gillett, J., dissents in convincing opinion); *German Ins. Co.* v. *Davis*, 6 Kan. App. 268, 51 Pac. 60 (but value of insurable interest exceeded insurance); *Hartford Ins. Co.* v. *McClain* (Ky.), 85 So. W. 699; *Miotke* v. *Milwaukee, etc., Ins. Co.*, 113 Mich. 166, 71 N. W. 463 (standard policy; Ross, C. J., dissenting); *Farmers' & Merchants' Ins. Co.* v. *Mickel*, 72 Neb. 122, 100 N. W. 130; *Union Assur. Soc.* v. *Nalls*, 101 Va. 613, 44 S. E. 896 (standard policy); *Dooly* v. *Hanover Ins. Co.*, 16 Wash. 155, 47 Pac. 507 (standard policy). And see many other like cases recently collected and disapproved by the Minnesota court in *Parsons* v. *Lane*, 97 Minn. 108, 109, 106 N. W. 485. By precisely the same course of reasoning other standard warranties could be read out of the policy, and the common-law doctrines relating, not only to concealment but also to the force and effect of express warranties, would be substantially annulled. The courts that have introduced this innovation into the law of their respective states must have overlooked the usual method of closing insurance contracts in the large cities, § 75, *supra*. Under the customs there prevailing it would work havoc with public convenience if mercantile risks could not be bound until the old-fashioned application blanks, with answers in detail, had first been exacted from the insured, and passed upon by the insurance companies. The companies foregoing the advantage of such burdensome practices, are at least entitled to the benefit of unambiguous warranties, contained in the statutory form of their contracts, relating to so essential a matter as title. As the Minnesota court has recently declared, the clauses of the policy themselves amount to "pointed inquiries" upon the subject, and demand a true disclosure, *Parsons* v. *Lane*, 97 Minn. 98, 113, 106 N. W. 485. The doctrine of waiver and estoppel has been very frequently applied to this subject. For example, *Brooks* v. *Erie Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748, aff'd on opinion below, 177 N. Y. 572, 69 N. E. 1120; *Ayres* v. *Phœnix Ins. Co.*, 66 Mo. App. 288; *State Ins. Co.* v. *Latourette*, 71 Ark. 242, 74 S. W. 300; *Syndicate Ins. Co.* v. *Catchings*, 104 Ala. 176, 16 So. 46.

§ 260. Leased Ground.—*Or if the subject of insurance be a building on ground not owned by the insured in fee simple.*

This clause is similar to the last and must be similarly construed.[1] If the insured owns only part of the fee, it has been held that the clause would be violated, unless, as provided, an agreement giving necessary consent is indorsed upon the policy;[2] or if he has only a life estate;[3] but if he has the equitable right to a fee simple, it has been held that the clause would not be violated, though the special written permission had not been obtained.[4]

This clause is not in the Massachusetts policy.

§ 261. Chattel Mortgage.—*Or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage.*

Buildings are stationary, subject to survey, rating, and location upon insurance maps. Personal property is movable, subject to control of the owner alone, and on the average more hazardous than buildings. Real estate mortgages are very common. Chattel mortgages are suggestive of slender resources. Therefore the standard policy requires a disclosure of mortgages only when they cover personalty.[5]

Except for this provision it might not be necessary to state the existence of a chattel mortgage, since by the weight of authority it does not constitute a change of interest, title, or possession, or, as matter of law, an increase of risk.[6] But the express warranty must be observed.[7] Accordingly a chattel mortgage will avoid, though

[1] *Wyandotte B. Co.* v. *Hartford F. Ins. Co.* (Mich.), 108 N. W. 393; *Elliott* v. *Ins. Co.*, 117 Pa. St. 548, 12 Atl. 676, 2 Am. St. R. 703.

[2] *Scottish Un. & Nat. Ins. Co.* v. *Petty*, 21 Fla. 399. But compare *Kenton Ins. Co.* v. *Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81, and *Haider* v. *St. Paul F. & M. Ins. Co.*, 67 Minn. 514, 70 N. W. 805.

[3] *Garver* v. *Hawkeye Ins. Co.*, 69 Iowa, 202. But a lease or other incumbrance does not disturb the fee, *Dolliver* v. *Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378.

[4] *Swift* v. *Vt. Mut. Fire Ins. Co.*, 18 Vt. 305. Waiver allowed in *Berry* v. *Am. Cent. Ins. Co.*, 132 N. Y. 49, 30 N. E. 254; *Goss* v. *Agricultural Ins. Co.*, 92 Wis. 233, 65 N. W. 1036. Waiver not allowed in *Martin* v. *Ins. Co. of N. A.*, 57 N. J. L. 623, 31 Atl. 213; *Matthie* v. *Globe Fire Ins. Co.*, 174 N. Y. 489, 67 N. E. 57; *Sergent* v. *L. & L. & G. Ins. Co.*, 66 App. Div. (N. Y.) 48, 73 N. Y. Supp. 120 (knowledge acquired by agent long before, to work estoppel must be present in his mind at the time).

[5] *American Artistic G. S. Co.* v. *Glens Falls Ins. Co.*, 1 Misc. (N. Y.) 114 (citing cases); *Vankirk* v. *Citizens' Ins. Co.*, 79 Wis. 627.

[6] *Orrell* v. *Hampden Fire Ins. Co.*, 13 Gray (Mass.), 431; *Hennessey* v. *Manhattan Fire Ins. Co.*, 28 Hun (N. Y.), 98; *Wytheville Ins. Co.* v. *Stultz*, 87 Va. 629. *Contra*, *Lee* v. *Agricultural Ins. Co.*, 79 Iowa, 379.

[7] *Home Fire Ins. Co.* v. *Johansen*, 59 Neb. 349, 80 N. W. 1047; *Vucci* v. *North British & M. I. Co.*, 88 N. Y. Supp. 986 (*held* void, though only part of personalty was covered by mortgage). As to when the contract is severable see *Kiernan* v. *Agricultural Ins. Co.*, 81 Hun, 373, 30 N. Y. Supp. 892, and §§ 115, 246, *supra*. But the description in an open or floating policy may admit of the construction that the

set aside after loss as a fraud on the creditors of the mortgagor, since as between the latter and his mortgagee the mortgage would be valid.[1] And a real estate mortgage, describing certain articles as fixtures and covered by the mortgage, will avoid a policy on the personalty covering some of the articles, for, so far as it affects the personal property, the mortgage will be considered a chattel mortgage.[2]

This provision also is absent from the Massachusetts policy.

§ 262. **Foreclosure.**—*Or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale, by virtue of any mortgage or trust deed.*

This clause by implication indicates that the existence of a real

transfer of part by a chattel mortgage leaves the insurance undisturbed upon the rest of the goods, *Coleman* v. *Phœnix Ins. Co.*, 3 App. Div. 65, 38 N. Y. Supp. 986. The descriptive words, "held in trust, sold but not delivered," are said not to excuse a chattel mortgage, *First Nat. Bank* v. *Am. Cent. Ins. Co.*, 58 Minn. 492, 60 N. W. 345.

[1] *Secrest* v. *Hartford Fire I. Co.*, 68 S. C. 378, 47 S. E. 680.

[2] *Fitzgerald* v. *Atlanta Home Ins. Co.*, 61 App. Div. (N. Y.) 350, 70 N. Y. Supp. 552 (no particular form of words necessary to create a chattel mortgage). And see *Susman* v. *Whyard*, 149 N. Y. 127, 130, 43 N. E. 413. A policy on both fixtures and personalty, where issued for a gross sum, will be avoided, as to both subjects of insurance, by a mortgage upon the personal property, *Fitzgerald* v. *Atlanta Home Ins. Co.*, 61 App. Div. 350, *supra*. Compare *Taylor* v. *Anchor Mut. F. I. Co.*, 116 Iowa, 625, 88 N. W. 807. By an over liberal construction, it has been held that a mortgage upon part of the subject insured does not avoid, even as to that part, the contract being entire, *North Brit. & Mer. Ins. Co.* v. *Freeman* (Tex. Civ. App.), 33 S. W. 1091; *Phœnix Ins. Co.* v. *Lorenz*, 7 Ind. App. 266, 33 N. E. 444. See § 246, *supra*. But a chattel mortgage never delivered, will not avoid, *Neafie* v. *Woodcock*, 15 App. Div. (N. Y.) 618, 78 N. Y. St. R. 768, 44 N. Y. Supp. 768. And parol evidence is admissible to show a conditional delivery. So *held* in *Thorne* v. *Ætna Ins. Co.*, 102 Wis. 593, 78 N. W. 920. A chattel mortgage paid when the policy issues but unsatisfied of record, will not avoid, *Laird* v. *Littlefield*, 34 App. Div. (N. Y.) 43, 53 N. Y. Supp. 1082, aff'd 164 N. Y. 597, 58 N. E. 1089. Nor an inoperative mortgage, *Weigen* v. *Council Bluffs Ins. Co.*, 104 Iowa, 410, 73 N. W. 862. A chattel mortgage from one partner to another, upon firm property when both are the assured, will not avoid, *Moulton* v. *Ætna Fire I. Co.*, 25 App. Div. (N. Y.) 275, 49 N. Y. Supp. 570; *Alston* v. *Phœnix Ins. Co.*, 100 Ga. 287, 27 S. E. 981. Nor will an instrument creating a lien for rent be construed as a chattel mortgage, *Caplis* v. *Ins. Co.*, 60 Minn. 376, 62 N. W. 440, 51 Am. St. R. 535. But a deed of trust on personalty will be so construed, *Hunt* v. *Ins. Co.*, 196 U. S. 47, 25 S. Ct. 179. By the weight of authority a subsequent discharge does not restore the policy. For example, *German-Am. Ins. Co.* v. *Humphrey*, 62 Ark. 348, 35 S. W. 428; *Ins. Co. of N. A.* v. *Wicker*, 93 Tex. 390, 55 S. W. 740. *Contra*, for example, *Born* v. *Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676. And see § 247, *supra*. As heretofore shown certain courts have held that, if no inquiry is made as to title and incumbrances, the company cannot object to a chattel mortgage, *Phœnix Ins. Co.* v. *Fuller*, 53 Neb. 811, 74 N. W. 269; *Allesina* v. *L. & L. & G. Ins. Co.*, 45 Oreg. 441, 78 Pac. 392; *Lancashire Ins. Co.* v. *Monroe*, 101 Ky. 12, 39 S. W. 434; *Morotock Ins. Co.* v. *Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. R. 846. But this view is opposed to the current of authority, § 247, *supra*; *Crikelair* v. *Ins. Co.*, 168 Ill. 309, 48 N. E. 167, 61 Am. St. R. 119; *Shaffer* v. *Mil. Mech. Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557; *Fitchburg Sav. Bank* v. *Amazon Ins. Co.*, 125

estate mortgage need not be disclosed to the company until the commencement of a foreclosure suit or, in place of judicial proceedings where the mortgage or trust deed so provides, the receipt of a notice of sale.[1] But the commencement of foreclosure proceedings,[2] or the giving of such notice of sale [3] with the cognizance [4] of the assured owner will avoid his policy. If the assured gain knowledge of the foreclosure proceedings after their commencement and before loss, the result is fatal to the insurance, provided no written permit has been obtained from the company.[5]

This clause is not contained in the Massachusetts policy.

Mass. 431; *Skinner* v. *Norman*, 165 N. Y. 565, 59 N. E. 309; *Ætna Ins. Co.* v. *Holcomb*, 89 Tex. 404, 34 S. W. 915; *Wilcox* v. *Ins. Co.*, 85 Wis. 193, 55 N. W. 188. The doctrine of waiver applies where the facts warrant, *Robbins* v. *Springfield Ins. Co.*, 149 N. Y. 477, 44 N. E. 159; *Skinner* v. *Norman*, 165 N. Y. 565, 59 N. E. 309 (*held*, that company waived because agent, though having no knowledge, undertook to investigate); *Walker* v. *Phœnix Ins. Co.*, 156 N. Y. 628, 632, 51 N. E. 392; *Neafie* v. *Woodcock*, 15 App. Div. 618, 44 N. Y. Supp. 768; *South. Ins. Co.* v. *Stewart* (Miss.), 30 So. 755.

[1] *Stenzel* v. *Penn. Fire Ins. Co.*, 110 La. 1019, 35 So. 271.

[2] *Springfield St. Laundry Co.* v. *Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. 238; *Hayes* v. *United States Ins. Co.*, 132 N. C. 702, 44 S. E. 404; *Gibson Elec. Co.* v. *L. & L. & G. Ins. Co.*, 159 N. Y. 418, 54 N. E. 23; *Woodside Brewing Co.* v. *Pacific Ins. Co.*, 11 App. Div. 68, 42 N. Y. Supp. 620, aff'd on opinion below, 159 N. Y. 549; *Quinlan* v. *Prov. Wash. Ins. Co.*, 133 N. Y. 356, 31 N. E. 31.

[3] *Merchants' Ins. Co.* v. *Brown*, 77 Md. 79, 25 Atl. 992; *Medley* v. *German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. 101. Advertising for sale under trust deed is notice, *Hayes* v. *U. S. Fire Ins. Co.*, 132 N. C. 702, 44 S. E. 404.

[4] *London & Lan. Ins. Co.* v. *Davis* (Tex. Civ. App.), 84 S. W. 260.

[5] *Delaware Ins. Co.* v. *Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137; *Norris* v. *Hartford Fire Ins. Co.*, 55 S. C. 450, 33 S. E. 566. Foreclosure proceedings are commenced at time of the service upon him of the petition to foreclose, *Findlay* v. *Union Mut. F. I. Co.*, 74 Vt. 211, 52 Atl. 429; or service of summons, *Norris* v. *Hartford Ins. Co.*, 55 S. C. 450, 33 S. E. 566. But the mere service of citation may carry with it no such knowledge, *London & Lan. Ins. Co.* v. *Davis* (Tex. Civ. App.), 84 S. W. 260. And the forfeiture is complete, though the proceedings be shortly abandoned, *Springfield Steam Laundry Co.* v. *Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. 238. This condition of the policy has been held to be promissory or subsequent, and hence not to refer to pending foreclosure proceedings instituted before the issuance of the policy, *Orient Ins. Co.* v. *Burrus*, 23 Ky. L. R. 656, 63 S. W. 453; *Cooledge* v. *Continental Ins. Co.*, 67 Vt. 14, 30 Atl. 798; *Chamberlain* v. *Ins. Co. of N. A.*, 20 N. Y. St. R. 543, 3 N. Y. Supp. 701. And see *Benjamin* v. *Palatine Ins. Co.*, 80 App. Div. 260, 80 N. Y. Supp. 256, aff'd on opinion below, 177 N. Y. 588, 70 N. E. 1095. Nor does it refer to the foreclosure of a vendor's lien, *Ins. Co.* v. *Estes*, 106 Tenn. 472, 62 S. W. 149, 82 Am. St. R. 892, 52 L. R. A. 915; or mechanic's lien, *Colt* v. *Phœnix Ins. Co.*, 54 N. Y. 595; or statutory lien, *Speagle* v. *Dwelling House Ins. Co.*, 97 Ky. 646, 31 S. W. 282. Nor does it refer to a sale under a judgment, though given for the same debt and affecting the same land as is covered by the mortgage, *Collins* v. *London Assur. Corp.*, 165 Pa. St. 298, 30 Atl. 924. Waiver allowed by knowledge of countersigning agent, at time policy issued, *Benjamin* v. *Palatine Ins. Co.*, 80 App. Div. 260, 80 N. Y. Supp. 256, aff'd on opinion below, 177 N. Y. 588, 70 N. E. 1095. And in one case by knowledge of solicitor, *Farmers' & Merchants' Ins. Co.* v. *Wiard*, 59 Neb. 451, 81 N. W. 312. But a consent to the mortgage is not a consent to foreclosure, *Titus* v. *Glens Falls Ins. Co.*, 81 N. Y. 410.

CHAPTER XIII

The Standard Fire Policy—Continued

§ 263. Alienation Clause.—*Or if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise.*

This clause, known as the alienation clause, embraces a provision of highest importance to the insurer, but furnishes, at the same time, a frequent cause of stumbling to the ignorant or thoughtless assured.[1]

[1] In early forms of policies "a sale or alienation without written assent," avoided the policy. Under such a clause it was held in many cases that to effect forfeiture the entire interest must be transferred. "So long as the insured retains such an interest that he may be a sufferer by the loss, the policy remains valid to protect that interest," *Hitchcock* v. *Northwestern Ins. Co.*, 26 N. Y. 68. Such adjudications nullified the clause altogether since without it the burden was on the assured to show some insurable interest. To meet the effect of this ruling various new forms of the alienation clause were devised and employed by the different companies (see 1 May, Ins., Appendix to ch. XII), a large number in substance prohibiting any sale or change of title or possession, in whole or in part, without written consent. Under such form, it is held that while there cannot be a transfer of title, or possession in whole or in part, an incidental change, if it does not alter the character of the interest or ownership of the insured, will not avoid the policy, *Rhode Island Underwriters Assoc.* v. *Monarch*, 98 Ky. 305, 32 S. W. 959, *Georgia Home Ins. Co.* v. *Bartlett*, 91 Va. 305, 21 S. E. 476, 50 Am. St. R. 832. For instance, by the weight of authority giving a real estate mortgage, does not avoid the policy, *Commercial Ins. Co.* v. *Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Judge* v. *Conn. Fire Ins. Co.*, 132 Mass. 521; *Jackson* v. *Mass. Mut. F. Ins. Co.*, 23 Pick. 418, 34 Am. Dec. 69; *Phillips* v. *Merrimack Mut. Fire Ins. Co.*, 10 Cushing, 350; *Conover* v. *Mutual Ins. Co.*, 1 Comst. (N. Y.) 290; *Morotock Ins. Co.* v. *Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. R. 846. Nor does giving a chattel mortgage avoid such a policy, *Rice* v. *Tower*, 1 Gray (Mass.), 426; *Hennessey* v. *Manhattan Fire Ins. Co.*, 28 Hun (N. Y.), 98. Nor does the incurring of other liens upon the property avoid such a policy, *Hosford* v. *Hartford Fire Ins. Co.*, 127 U. S. 404; *Baley* v. *Homestead Fire Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570. Some courts also made a distinction between voluntary and involuntary changes of interest, *Baley* v. *Homestead Fire Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570, and see *Thompson* v. *Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408. As to whether the death of the assured avoided the policy, there was conflict in the decisions, *Hine* v. *Woolworth*, 93 N. Y. 75; *Planters' Mut. I. Co.* v. *Dewberry*, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. R. 195; *Forest City Ins. Co.* v. *Hardesty*, 182 Ill. 39, 55 N. E. 139. A devise by will was held to be a change of interest or title, *Sherwood* v. *Agricultural Ins. Co.*, 73 N. Y. 447, 29 Am. Rep. 180. But a sale in foreclosure before being consummated by the delivery of the deed did not

Insurers have a right to know with whom they are contracting. No new party can be introduced into the contract without their consent.[1] Nor, without like consent, may the insured deliberately alter the risk. If, after alienating to others a substantial part of his insurable interest, he could nevertheless recover the original amount of his policy, the aggregate insurance upon a property might many fold exceed its value; the moral hazard would obviously become an uncertain and shifting quantity;[2] and the inducements to those in interest to burn the property, or to omit vigilance in guarding it from fire, would be indefinitely multiplied. Applying these principles to this clause of the standard policy, the conclusion is easily reached that if any prohibited change of interest takes place, without written consent of the insurers, whether by voluntary act of the insured or otherwise, the party to whom an interest may be transferred acquires no rights in the insurance money, and the assured loses whatever rights he had.

This requirement, though rigorous, is held to be reasonable,[3] material, and enforceable.[4] It is a condition subsequent, applying only to circumstances which occur after the inception of the contract;[5] but it embraces within its scope real and personal property alike.[6]

avoid, *Haight* v. *Continental Ins. Co.*, 92 N. Y. 51. Some policies provided for forfeiture in case the property became encumbered in any way without the written consent of the insurer. This was held to be confined to such encumbrances as the insured voluntarily put upon his property, and not to tax liens or judgments, *Hosford* v. *Hartford Fire Ins. Co.*, 127 U. S. 404, 8 S. Ct. 1199; *Baley* v. *Homestead Fire Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570.

[1] *Cummins* v. *National Fire Ins. Co.*, 81 Mo. App. 291.

[2] *Rosenstein* v. *Traders Ins. Co.*, 79 App. Div. 481, 487, 79 N. Y. Supp. 736. The interest to guard the property would be diminished, *German Ins. Co.* v. *Gibe*, 59 Ill. App. 614; *Cottingham* v. *Ins. Co.*, 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627.

[3] *Farmers & Merc. Ins. Co.* v. *Jensen*, 56 Neb. 284, 76 N. W. 577, 44 L. R. A. 861.

[4] *Northam* v. *Dutchess Co. Mut. Ins. Co.*, 166 N. Y. 319, 59 N. E. 912; *Jaskulski* v. *Citizens Mut. F. I. Co.*, 131 Mich. 603, 92 N. W. 98 (no new party insured allowed, without consent of insurer).

[5] *Cowart* v. *Capital Ins. Co.*, 114 Ala. 356, 22 So. 574.

[6] *Walradt* v. *Phœnix Ins. Co.*, 136 N. Y. 375, 381, 32 N. E. 1063. Thus the condition is broken by a conveyance to a third person, if absolute upon its face, though the property be subsequently reconveyed, *Bemis* v. *Harbor Creek M. F. I. Co.*, 200 Pa. St. 340, 49 Atl. 769, and though at the time there be an agreement for reconveyance, *Tatham* v. *Commerce Ins. Co.*, 4 Hun, 136. Policy is forfeited by bill of sale delivered to a third party to be delivered by him to the proper party upon the payment of the balance of the consideration, *Excelsior Foundry Co.* v. *Western Assur. Co.*, 135 Mich. 467, 98 N. W. 9; or by conveyance by assured to his wife, *Melcher* v. *Ins. Co. of Pa.*, 97 Me. 512, 55 Atl. 411. And see *Walton* v. *Agricultural Ins. Co.*, 116 N. Y. 326, 22 N. E. 443, in which though both husband and wife were insured a transfer of the barn from former to latter through a mere conduit was held to avoid. The condition

The Home Insurance Co. had issued a policy to Verdier on his stock of hardware. During the term of the policy, without permit of the insurer, Verdier took in Brown as a copartner, giving him a three-tenths interest in the insured property of the concern, which was subsequently damaged by fire. The court held that the contract of insurance in its nature is strictly personal, and that the transfer of the copartnership interest from Verdier to Brown altogether avoided the policy.[1]

A subsequent decision in the same court, although it gained the approval of all the judges in the highest court, as well as in the courts below, is not so easily explained. The insured, the Buffalo Elevating Co., owned and operated a large grain elevator in Buffalo. Besides its insurance on the building and its insurance on all the contents of the building, it took out a third class of insurance in 46 policies, aggregating $73,250, to wit, $232.93 a day, and known as "use and occupancy" insurance,[2] the object of which, as already shown, is to indemnify an owner or occupier for the loss of commercial use during the period required for reconstructing a building destroyed or damaged by fire. Shortly after some of these policies were issued, and shortly before the rest of them were issued, the insured, without knowledge or consent of the insurers, joined for the whole active season a secret pool or trust composed of many elevators. This was done, as in former seasons, under a written pooling agreement providing, in substance, among other things, that, after payment of certain operating expenses, the balance, to wit, eighty per cent of the gross earnings of the Buffalo Elevating Co., should be turned over by it absolutely to the pool, to be divided up among the many members together with their earnings, and that, in spite of a fire destroying the elevator in question, the Buffalo Elevating Co. should nevertheless continue to receive its full percentage of the entire pool earnings from the pool. A fire destroyed the plaintiff's elevator, and the insured claimed from the insurers of use and occupancy $60,328.87,

is broken by conveyance and receipt back of purchase money mortgage, *Savage* v. *Howard Ins. Co.*, 52 N. Y. 502, 11 Am. Rep. 741. Also by execution and record of a deed to the son of the assured, though without consideration or change of possession, where given for the purpose of avoiding the enforcement of a judgment, *Rosenstein* v. *Traders Ins. Co.*, 79 App. Div. 481, 79 N. Y. Supp. 736, 102 App. Div. 147; or by execution of a voluntary assignment for the benefit of creditors, *Orr* v. *Hanover Ins. Co.*, 158 Ill. 149, 41 N. E. 854; *Northam* v. *Dutchess Co. Mut. Ins. Co.*, 166 N. Y. 319, 59 N. E. 912; *Ohio Farmers Ins. Co.* v. *Waters*, 65 Ohio St. 157, 61 N. E. 711; or by conveyance in partition between devisees where only one was the assured, *Robinson* v. *North Brit. & M. Ins. Co.* (Ky.), 53 S. W. 660.

[1] *Germania F. Ins. Co.* v. *Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591, 43 Am. St. R. 749.

[2] See § 20, *supra*, and Appendix of Forms, ch. II.

to wit, for an arbitrated period of 259 working days required for rebuilding. The insurance companies of this class, by the same counsel, all set up substantially the same defense, namely, that where the policy was issued before the transfer to the pool, the insured had violated the warranty against making any change of interest in the subject-matter insured, and that where the policy was issued after the transfer to the pool, the insured had violated the warranty of sole and unconditional ownership of the subject-matter. The case was submitted on an agreed statement of facts, and the plaintiff recovered in full. The court held that the insured under a use and occupancy policy is sole and unconditional owner, and has made no change of interest in the subject-matter insured thereby, although he transfer to another the total earnings. The court based its conclusion upon the proposition that "use and occupancy" and "earnings" or "profits" are not of necessity synonymous terms, a proposition which both sides admitted.[1]

[1] *Michael* v. *Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810. If the earning power and gross earnings of an elevator are no part of its commercial use, it is difficult to see what is. If an absolute transfer of the total earnings is no change of interest whatsoever in the subject-matter of "use and occupancy" insurance, it is difficult to conceive what can be. A sale of the building or contents would not avoid such a policy, since neither building nor contents is its subject-matter. The court inquires, why the insurer does not say so plainly, instead of using a vague phrase if he means to insure "earnings" or "profits." But the phrase "use and occupancy," while usually involving, to a considerable extent, the notion of earnings or profits is not intended to be and ought not to be synonymous with either. The policies are valued. If the insurance is taken in good faith, the insured expects to recover though it subsequently transpires that he is losing, and not making, money in his business. So also it is appropriate to take out this same class of insurance to indemnify for a continuance of unprofitable expenses during the period required for reinstatement, regardless of whether the business is profitable or unprofitable. But all this is far from saying that a sale of the entire gross earnings is not a most substantial change of interest in the subject-matter of this kind of insurance. If only an alienation of the whole interest were prohibited, as by some statutory policies, instead of any change in the interest, a transfer of the total profits or total gross earnings clearly would not avoid the policy, since, as the learned court argues, the insured conceivably might, even after such a transfer, make some other business use of the premises, while still holding the title to the land. He might at least "occupy his premises" and enjoy the prospect. But surely the gross earnings represent a most practical, tangible and substantial part of the use of a commercial establishment. Indeed, at page 35, in the opinion of the court, Mr. Justice Gray says, "Insurance on use and occupancy evidently relates to the business use which the property is capable of in its existing condition." To hold, then, that the total earnings are no part of this business use, it is respectfully submitted, is not within the letter or the spirit of the contract evidenced by the New York standard policy. Compare *Castellain* v. *Preston*, 11 Q. B. D. 308, 52 L. J. Q. B. 366; *Chi., etc., R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 11 S. Ct. 490 (quoting and approving the English doctrine). The gross earnings of the Buffalo Elevating Company might have been insured by the pool, the legal and equitable owner of eighty per cent of them, by the same kind of

It is appropriate to employ in this clause the word "interest" in place of the words "title," or "ownership," for the assured often has an insurable interest where he has no title or ownership; but in the phrase "change of interest" two words of very broad signification have been brought into conjunction.[1] And although expressions of judges may be found to the effect that the phrase embraces "every conceivable change of title or interest,"[2] "any material change of interest,"[3] "such a change as would enable someone else having the right and the title, to take out a new policy,"[4] nevertheless a rule of construction favorable to the assured must be preferred, and the main purpose of the contract must be kept in the foreground. Accordingly, it is rightly held that a policy will not be avoided by a mere paper transfer designated as a bill of sale, which is merely colorable, there being no consideration and no delivery of the possession of the property;[5] nor by a sale or transfer which is invalid and ineffectual as between the parties;[6] nor by sales, purchases and

policies, and the same amount collected a second time in its favor, and a third time by the next assignee, and so on *ad infinitum* all under the egis of an obscure but appropriate phrase for a long time in use, which probably means very much the same thing to all parties in interest in such cases, namely, the money earnings, or some part thereof, expected to accrue from the commercial use. The effect of the insurance in litigation, in conjunction with the pooling agreement, in the *Buffalo Elevating Co. case* was patent. If the plaintiff's building and contents were fully insured, he was a gainer by the fire before he had collected a dollar of his use and occupancy insurance. The fire put a stop for a season to his operating expenses, or certainly lessened them, while the pool continued to give him substantially all his income. On top of that, he collected $60,000 more for an alleged loss of use, no part of which was really sustained. And this was precisely the result which, at the time when he took out his insurance, he must have anticipated was likely to occur, if the elevator should be destroyed by fire. There was such a transfer of the commercial use as would enable the assignee to insure it, and, according to a test established by the Appellate Division this comes within the ban of the alienation clause, *Fuller* v. *Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 456.

[1] *Stenzel* v. *Penn. Fire Ins. Co.*, 110 La. 1019, 35 So. 271. A transfer of either legal or equitable interest avoids, *Southern Cotton Oil Co.* v. *Prudential F. Asso.*, 78 Hun, 373, 60 N. Y. St. R. 127.

[2] *Lappin* v. *Charter Oak F. & M. Ins. Co.*, 58 Barb. (N. Y.) 325.

[3] *Excelsior Foundry Co.* v. *Western Assur. Co.*, 135 Mich. 467, 98 N. W. 9.

[4] *Fuller* v. *Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 456, aff'd 184 N. Y. 605, 77 N. E. 1187; and see *Abbott* v. *Hampden Mut. Fire Ins. Co.*, 30 Maine, 414; *Edmands* v. *Mutual Safety Fire Ins. Co.*, 1 Allen (Mass.), 311; *Western Mass. Ins. Co.* v. *Riker*, 10 Mich. 279.

[5] *Forward* v. *Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. 615, 59 N. Y. St. R. 777.

[6] *Whitney* v. *American Ins. Co.*, 127 Cal. 464, 59 Pac. 897 (deed to avoid policy must be delivered and accepted as well as recorded); *Phœnix Ins. Co.* v. *Asbury*, 102 Ga. 565, 27 S. E. 667 (deed held void for usury); *Westchester Ins. Co.* v. *Jennings*, 70 Ill. App. 539 (deed ineffective without name of grantee); *Kitterlin* v. *Milwaukee Ins. Co.*, 134 Ill. 647, 25 N. E. 772 (deed void because wife did not join); *Schaeffer* v. *Anchor Ins. Co.*, 113 Iowa, 652, 85 N. W. 985 (deed delivered after grantors' death will not avoid policy); *Hartford Fire Ins. Co.* v. *Warbritton*, 66 Kan. 93, 71 Pac. 278 (no delivery of deed and no avoidance of policy because deed was fraudulently taken from escrow);

fluctuations in a stock of goods, or materials and equipment, in a store or factory.[1] And it is held that a change which increases the interest of the assured will not be permitted to defeat the insurance.[2]

The wording of the New York standard policy makes it clear that a devolution of interest, by the death of the insured, to heirs, devisees, executors or administrators effects no forfeiture.[3]

§ 264. **The Same—Incumbrances.**—The standard policy expressly provides that written consent must be obtained for chattel mortgages, and, if known to the assured, for proceedings in foreclosure. These provisions, by implication, make it clear that the giving of real estate mortgages and the incurring of other liens are not prohibited.[4]

§ 265. **The Same—Executory Contracts of Sale.**—Valuable buildings are usually insured by many policies.[5] Conveyancing for the most part follows a well-established practice. A preliminary or executory contract of sale is exchanged, with part payment by the

German Fire Ins. Co. v. *York*, 48 Kan. 488, 29 Pac. 586, 30 Am. St. R. 313 (deed to homestead held void because signed by husband only); *Pitney* v. *Glens Falls Ins. Co.*, 65 N. Y. 6 (transfer invalid under statute of fraud); *Gerling* v. *Ins. Co.*, 39 W. Va. 689, 20 S. E. 691 (grantor mentally incompetent, policy not avoided). Compare *Milwaukee Trust Co.* v. *Lancashire Ins. Co.*, 95 Wis. 192, 70 N. W. 81 (assignment for benefit of creditors, though void as to them, is good as between assignor and assignee and is therefore a change of title).

[1] *Wolfe* v. *Security Fire Ins. Co.*, 39 N. Y. 49; *Hoffman* v. *Ætna Fire Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337; *Coleman* v. *Phœnix Ins. Co.*, 3 App. Div. 65, 38 N. Y. Supp. 986; *Lane* v. *Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150. And descriptive phrases in the policy, for instance, "for account of whom it may concern," may imply a permit for transfer, *Hagan* v. *Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229. And a change of receivers is said to be allowed, *Thompson* v. *Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408.

[2] *Continental Ins. Co.* v. *Ward*, 50 Kan. 346, 31 Pac. 1079.

[3] *Planters' Mut. Ins. Assn.* v. *Dewberry*, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. R. 195; *Forest City Ins. Co.* v. *Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. R. 161; *Richardson's Adm'r* v. *German Ins. Co.*, 89 Ky. 571, 13 S. W. 1, 8 L. R. A. 800; *Georgia Home Ins. Co.* v. *Kinnier's Adm'x*, 28 Grat. (Va.) 88.

[4] *Wolf* v. *Theresa Village M. F. I. Co.*, 115 Wis. 402, 91 N. W. 1014; *Germania Ins. Co.* v. *Stewart*, 13 Ind. App. 627, 42 N. E. 286; *Bushnell* v. *Farmers Ins. Co.*, 110 Mo. App. 223, 85 S. W. 103; *Sun Fire Office* v. *Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *Lampasas Hotel Co.* v. *Phœnix Ins. Co.* (Tex Civ. App.), 38 S. W. 361; *Peck* v. *Ins. Co.*, 16 Utah, 121, 51 Pac. 255, 67 Am. St. R. 600. *Contra*, *Sossaman* v. *Pamlico Ins. Co.*, 78 N. C. 145. So where the conveyance was absolute in form but intended as collateral, held not to avoid the policy, *Henton* v. *Ins. Co.* (Neb.), 95 N. W. 670; *German Ins. Co.* v. *Gibe*, 162 Ill. 251, 44 N. E. 490; *Barry* v. *Hamberg-Bremen Fire Ins. Co.*, 110 N. Y. 1, 17 N. E. 405.

[5] From one hundred to two hundred insurance companies may be liable on a single risk if it be a large factory or mercantile establishment. The bulk of insurance handled by brokers and insurance agents in large cities is upon business and mercantile properties.

vendee, and an obligation on both sides to complete at a given date, but only provided, upon examination, the title is found as represented. Until that date the whole matter is purely tentative and uncertain.

Where the contract is silent upon the subject, courts differ as to whether the executory vendee must complete despite the intermediate destruction of the building by fire.[1] But, however that issue may be determined, it is obviously of great importance to the public to know at what precise stage of such a transaction numerous subsisting policies of the vendor ought in due course to be canceled, and new policies taken out, or indorsement made on the old, in favor of the vendee. Convenience seems to demand that whether or not the vendee takes out insurance to protect his interest, the subsisting policies of the vendor should continue in full force and effect until the deed of conveyance is delivered and the legal title transferred. Such is the understood practice, and fortunately many courts in construing the standard policy have harmonized their decisions upon this point with the exigencies of trade.[2]

But where the executory vendee has deviated from the usual practice and has, in addition to his executory contract, and pending its fulfillment, taken actual possession and control of the property, by the better authority the policy is held avoided, despite the phrase of the policy allowing a mere change of occupants without increase of hazard.[3]

Frequently furniture and other articles of personalty are sold by

[1] See cases § 54, p. 68 n., *supra*.

[2] *Jones* v. *Capital City Ins. Co.*, 122 Ala. 421, 25 So. 790; *National Fire Ins. Co.* v. *Three States Lumber Co.*, 217 Ill. 115, 75 N. E. 450; *Phœnix Ins. Co.* v. *Caldwell*, 187 Ill. 73, 58 N. E. 314; *Erb* v. *Ins. Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845; *Wyandotte Brewing Co.* v. *Hartford F. Ins. Co.*, 144 Mich. 440 (1906) ("a conditional sale in the law of fire insurance is not an alienation," real estate), *Brunswick, etc., Co.* v. *Northern Assur. Co.*, 142 Mich. 29, 105 N. W. 76 (*id.* personalty); *Wood* v. *Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. R. 733; *Tiemann* v. *Citizens Ins. Co.*, 76 App. Div. 5, 78 N. Y. Supp. 620 (overruling *Germond* v. *Home Ins. Co.*, 2 Hun, 540); *Home Ins. Co.* v. *Tompkies*, 30 Tex. Civ. App. 404, 71 S. W. 812. But see *Excelsior Foundry Co.* v. *Western Assur. Co.*, 135 Mich. 467, 98 N. W. 9; and compare *Hamilton* v. *Dwelling House Co.*, 98 Mich. 535, 57 N. W. 735; *Gibb* v. *Phil. Ins. Co.*, 59 Minn. 267; *Swank* v. *Farmers' Ins. Co.*, 126 Iowa (1905), 547, 102 N. W. 429 (a mere option to buy); *Magoun* v. *Firemen's Fund I. Co.*, 86 Minn. 486, 91 N. W. 5 (agreement to transfer to mortgagee is no change).

[3] *Skinner Ship Building Co.* v. *Houghton*, 92 Md. 68, 48 Atl. 85; *Gibb* v. *Phil. Ins. Co.*, 59 Minn. 267, 61 N. W. 137, 50 Am. St. R. 405; *Davidson* v. *Hawkeye Ins. Co.*, 71 Iowa, 532, 32 N. W. 514; *Cottingham* v. *Ins. Co.*, 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627; *Grunauer* v. *Westchester F. Ins. Co.*, 72 N. J. L. 289, 62 Atl. 418; *Brighton Beach Racing Assoc.* v. *Home Ins. Co.*, 113 App. Div. 728, 93 N. Y. Supp. 654 (aff'd by the New York Court of Appeals). And see *Fuller* v. *Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 546, aff'd 184 N. Y. 605, 77 N. E. 1187; and many cases, § 259, holding executory vendee in possession to be sole and unconditional owner.

the dealer on the installment plan, with immediate delivery to the purchaser, who, however, acquires title only after full payment of the purchase price. It should be observed that under the terms of the New York standard fire policy, in the absence of special permit, or of such description of interest and location as impliedly contemplates conditional sales and transfers, the dealer would forfeit his insurance upon property thus turned over to the possession of third parties.[1]

§ 266. The Same—Joint Owners—Partners—Joint Insured.—Where the insured are joint owners of the property, or jointly interested in it, as, for example, in the case of partners or trustees, a transfer from one to another without the introduction of any new person, is held, by the weight of authority, to be no violation of the alienation clause. This conclusion rests upon the ground that, the company having exhibited its willingness to grant insurance to all those named in the policy, a mere shifting of interest among them should not be regarded as objectionable by the company.[2] And the same indulgence also seems to be extended to those who are jointly insured, though not joint owners.[3]

[1] *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730; *Allemania F. Ins. Co.* v. *Peck*, 133 Ill. 220, 24 N. E. 538, 23 Am. Rep. 610; *Jones* v. *Phœnix Ins. Co.*, 97 Ia. 275, 66 N. W. 169; *Northern Assur. Co.* v. *City Savings Bk.*, 18 Tex. Civ. App. 721, 45 S. W. 737. But see *Brunswick-Balke Collender Co.* v. *Northern Assur. Co.*, 142 Mich. 29. As to whether the purchaser in possession, being obligated to pay the full purchase price would be an "unconditional and sole owner" under his own policy, see cases cited *pro* and *con*, § 259, *supra*.

[2] *German Ins. Co.* v. *Fox* (Neb.), 96 N. W. 652 (1903); *Phœnix Ins. Co.* v. *Holcombe*, 57 Neb. 622, 78 N. W. 300; *Georgia Home Ins. Co.* v. *Hall*, 94 Ga. 630, 21 S. E. 828; *Loeb* v. *Firemen's Ins. Co.*, 38 Misc. 107, 77 N. Y. Supp. 106; *Walradt* v. *Phœnix Ins. Co.*, 136 N. Y. 375, 32 N. E. 1063; *Pierce* v. *Nashua Ins. Co.*, 50 N. H. 297; *Burnett* v. *Eufaula Home I. Co.*, 46 Ala. 11, 7 Am. Rep. 581; *Allemania Fire Ins. Co.* v. *Peck*, 133 Ill. 220; *Dermani* v. *Home Mutual I. Co.*, 26 La. Ann. 69, 21 Am. Rep. 544; *Texas Bkg. & I. Co.* v. *Cohen*, 47 Tex. 406, 26 Am. Rep. 298; *Virginia F. & M. Ins. Co.* v. *Saunders*, 84 Va. 969, 11 S. E. 794; *Contra*, *Keith* v. *Royal Ins. Co.*, 117 Wis. 531, 94 N. W. 295; *Shuggart* v. *Ins. Co.*, 55 Cal. 408; *Oldham* v. *Anchor Ins. Co.*, 90 Iowa, 225, 57 N. W. 861; *Jones* v. *Phœnix Ins. Co.*, 97 Iowa, 275, 66 N. W. 169; *Finley* v. *Lycoming County M. I. Co.*, 30 Pa. St. 311, 72 Am. Dec. 705. Because of the peculiar character of ownership in firm property, the assignment by one of several partners to an outsider of an undivided interest will not transfer the right to the title or possession of any part, but simply carries to the assignee the right to call upon the firm for an accounting. Therefore such a transfer will not defeat the firm insurance, *Wood* v. *Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. R. 733; *Hanover Fire Ins. Co.* v. *Lewis*, 28 Fla. 209, 10 So. 297. But where the partner gives a chattel mortgage upon the firm property to a third party the policy is avoided, *Olney* v. *German Ins. Co.*, 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684, 26 Am. St. R. 281. But not so if the chattel mortgage is given to a copartner, *Moulton* v. *Ætna Fire Ins. Co.*, 25 App. Div. 275, 49 N. Y. Supp. 570.

[3] *Germania Fire Ins. Co.* v. *Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591 ("It is only where a stranger is to be brought into contractual relations with the insurance company that the consent of the latter

Whatever may be the sound rule in the case of different part owners, jointly insured but not joint owners, there is no doubt that the introduction of a new interest or person without permit avoids the policy under this clause at the option of the insurer.[1]

§ 267. The Same—Legal Process or Judgment.—The institution of legal proceedings does not avoid the policy under this clause; nor does a judicial sale have that effect until expiration of any period allowed for redemption;[2] and until confirmation by the court where that is required.[3] And such sale must be consummated by delivery

is essential," Court by E. Bartlett, J.), *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 405; *Lockwood* v. *Middlesex Ins. Co.*, 47 Conn. 553; *Royal Ins. Co.* v. *Sockman*, 15 Ohio C. C. 105; *West* v. *Citizens Ins. Co.*, 27 Ohio St. 1, 22 Am. Rep. 294. But see *Collings* v. *American Cent. Ins. Co.*, 70 Mo. App. 14; *Walton* v. *Agricultural Ins. Co.*, 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677, 4 judges to 3 (in this case both husband and wife were insured, but the policy was held avoided, because husband transferred to wife the barn which with other property was insured. Unfortunately only the dissenting opinion discusses these close and interesting questions involved, to wit, whether a transfer without introduction of a stranger is not permissible, and whether the employment of a third party as a mere conduit for passing title from husband to wife should have any effect in causing forfeiture).

[1] *Germania Fire Ins. Co.* v. *Home Ins. Co.*, 144 N. Y. 195, 39 N. E. 77, 63 N. Y. St. R. 91, 43 Am. St. R. 749, 26 L. R. A. 591; *Malley* v. *Atlantic F. & M. Ins. Co.*, 51 Conn. 222; *Biggs* v. *North Carolina Home Ins. Co.*, 88 N. C. 141. In the same way a transfer by the assured to a firm in which he is a silent partner defeats the insurance, *Royal Ins. Co.* v. *Martin*, 192 U. S. 149, 24 S. Ct. 247. It is so common an occurrence for a large business concern to advance a valued clerk and give him an interest in the firm property and profits in place of a salary that it is manifestly of pressing importance that they should be advised in what form to take out insurance, in order to avoid forfeiture in the event of any addition to the personnel of the copartnership. To meet this point, the prudent broker always insists upon an insertion in the policy, after the name of the assured firm, of the words "as now or hereafter may be constituted," or some such phrase, *Loeb* v. *Firemen's Ins. Co.*, 78 App. Div. 113, 77 N. Y. Supp. 106 (insurance with such a phrase held good, though word "Co." was used contrary to statute). A mere dissolution of a partnership does not avoid insurance on firm property, *Dresser* v. *United Firemen's I. Co.*, 45 Hun (N. Y.), 298, 12 N. Y. St. R. 434, aff'd 122 N. Y. 642, 25 N. E. 956. Nor giving a new partner an interest only in profits, *Hanover Ins. Co.* v. *Lewis*, 28 Fla. 209, 10 So. 297. Nor does an executory agreement to change firm into a corporation avoid the insurance, *Drennen* v. *London Assur. Co.*, 113 U. S. 51, 5 S. Ct. 341, 116 U. S. 461, 6 S. Ct. 442. But changing partnership into limited liability company without permit may avoid, *Peuchen Co.* v. *City Ins. Co.*, 18 Ont. App. 446. So also a reorganization of a corporation into a new corporation, *Cremo Light Co.* v. *Parker*, 118 App. Div. (N. Y.) 845.

[2] *Greenlee* v. *North Brit. Mer. Ins. Co.*, 102 Iowa, 427, 71 N. W. 534, 63 Am. St. R. 455 in which mechanic's lien was foreclosed, *Wood* v. *American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. R. 733; *Browne National Bank* v. *Southern Ins. Co.*, 22 Wash. 379, 60 Pac. 1123, judgment in forcible detainer, *Hammel* v. *Queens Ins. Co.*, 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1.

[3] *Hanover Fire Ins. Co.* v. *Brown*, 77 Md. 64, 25 Atl. 929; *Slobodisky* v. *Phœnix Ins. Co.*, 53 Neb. 816, 74 N. W. 270. When sale is complete it will avoid the standard policy, *Hartford Fire Ins. Co.* v. *Ransom* (Tex. Civ. App. 1901, 61 S. W. 144). But if order of confirmation is set aside, a judicial sale will not avoid, *Richland Co. Ins.*

of the instrument of conveyance pursuant to the statute.[1] Setting apart in partition to the widow for life, after the death of the assured, constitutes a change in interest and possession.[2]

A levy by the sheriff without actual taking possession does not avoid the policy;[3] nor does it, so it has been held, though he take actual possession; such change of possession, whether of real or of personal property, being expressly permitted by virtue of the words "except change of occupants without increase of hazard."[4]

The appointment of one of the partners as receiver of the firm property effects no change of interest or possession;[5] and if a receiver is insured as such a new appointment does not avoid.[6] An adjudication in bankruptcy effects no forfeiture until the estate of the bankrupt becomes vested in the trustee.[7] But a transfer or assignment in bankruptcy or insolvency, whether voluntary or involuntary, is a change of interest, and unless consented to by the insurer will vitiate the policy.[8]

The Massachusetts policy is simpler. It forbids a sale of the property without assent of the company, in writing or in print.[9] Under such a provision so long as the insured retains any insurable interest, the policy will protect it.[10] But a voluntary alienation is as much a breach of the condition as a sale for value received.[11]

Co. v. *Sampson*, 38 Ohio St. 672. Nor will it, if purchaser fails to complete, *Lodge* v. *Capital Ins. Co.*, 91 Iowa, 103, 58 N. W. 1089; *Marts* v. *Cumberland Ins. Co.*, 44 N. J. L. 478.

[1] *International Wood Co.* v. *National Assur. Co.*, 99 Me. 415, 59 Atl. 544.

[2] *Trabue* v. *Dwelling House Ins. Co.*, 121 Mo. 75, 25 S. W. 848.

[3] *McClelland* v. *Greenwich Ins. Co.*, 107 La. 124, 31 So. 691; *Caraher* v. *Royal Ins. Co.*, 63 Hun, 82, 17 N. Y. Supp. 858.

[4] *Walradt* v. *Phœnix Ins. Co.*, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. R. 752 (Court stood 4 to 3); *Herman* v. *Katz*, 101 Tenn. 118, 47 S. W. 86, and see *Collins* v. *London Assur. Corp.*, 165 Pa. St. 298, 30 Atl. 924; *Contra*, *Carey* v. *German-Am. Ins. Co.*, 84 Wis. 80, 54 N. W. 18 (writ of attachment). This and the *Walradt case* were both decided in January, 1893, and neither court had the benefit of the views of the other, *St. Paul F. & M. Ins. Co.* v. *Archibold* (Tex.), 16 Ins. L. J. 153.

[5] *Keeney* v. *Home Ins. Co.*, 71 N. Y. 396.

[6] *Thompson* v. *Phœnix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019.

[7] *Fuller* v. *New York Ins. Co.*, 184 Mass. 12, 67 N. E. 879; *Fuller* v. *Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 456.

[8] *Birdseye* v. *City Fire Ins. Co.*, 26 Conn. 165; *Young* v. *Eagle Fire Ins. Co.*, 14 Gray (Mass.), 150; *Hine* v. *Woolworth*, 93 N. Y. 75. So in Massachusetts it is decided that a conveyance by a wife, of the property insured, to a trustee in insolvency for her husband is a violation of the condition as to alienation, *Brown* v. *Cotton & W. M. M. I. Co.*, 156 Mass. 587, 31 N. E. 691.

[9] *Stuart* v. *Reliance Ins. Co.*, 179 Mass. 434, 60 N. E. 929; *Clinton* v. *Norfolk Ins. Co.*, 176 Mass. 486, 57 N. E. 998; *Bryan* v. *Traders Ins. Co.*, 145 Mass. 389, 14 N. E. 454; *Foote* v. *Hartford Ins. Co.*, 119 Mass. 259; *International Wood Co.* v. *Nat. Assur. Co.*, 99 Me. 415, 59 Atl. 544.

[10] *Clinton* v. *Norfolk Mut. F. Ins. Co.*, *Stuart* v. *Reliance Ins. Co.*, 179 Mass 434, 60 N. E. 929.

[11] *Brown* v. *Cotton, etc., Mut. Ins. Co.*, 156 Mass. 587, 31 N. E. 691. So also a temporary alienation will avoid,

§ 268. Assignment of Policy.—*Or if this policy be assigned before loss.*

Even without express prohibition in the policy, it has been held that a fire policy is not assignable except with the consent of the insurer, since it is peculiarly a personal contract, and no new party assured can be introduced into it without consent of the insurer.[1]

This warranty must not be disregarded, on pain of forfeiture,[2] and the consent of the company must be obtained in writing;[3] but there is no necessity that the assignment itself be evidenced by written instrument.[4] The company's indorsement consenting to the assignment of the policy carries with it an implied consent to the transfer of interest in the property.[5]

A pledge or deposit of the policy as collateral security is not prohibited by this clause.[6]

176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. R. 325; *Bryan* v. *Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. 454; *Hitchcock* v. *Northwestern Ins. Co.*, 26 N. Y. 68. Similarly the South Dakota policy provides that the policy shall be void "if without such assent [oral or written] the insured shall sell and dispose of all insurable interests in the insured property." An alienation of one of several estates insured by one policy avoids the policy only as to that estate, *Clark* v. *Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Rep. 44. Sale by one partner of his share to another partner and taking a mortgage are no breach of the condition, *Powers* v. *Ins. Co.*, 136 Mass. 108, 49 Am. Rep. 20.

[1] *New England Loan & Tr. Co.* v. *Kenneally*, 38 Neb. 895, 57 N. W. 759; *Lett* v. *Guardian Fire Ins. Co.*, 125 N. Y. 82, 25 N. E. 1088; *Rayner* v. *Preston*, 18 Ch. Div. 1. In a dissenting opinion in the last case, James, L. J., was of opinion that the contract should be held to run with the title to the land to the extent of inuring to the benefit of the vendee under an executory contract of sale. Marine policies at common law were considered assignable without express consent of the insurers, because of custom and commercial convenience, which made it important that interests in vessels and cargoes should pass freely without consultation with distant insurance companies, *Pellas* v. *Neptune Marine Ins. Co.*, 5 C. P. D. 34. See cases §§ 60, 63, *supra*.

[2] *Hall* v. *Continental Ins. Co.* (Ky., 1905), 84 S. W. 519; *Lyford* v. *Connecticut Fire Ins. Co.*, 99 (Me., 273), 58 Atl. 916; *Miles Lamp Chimney Co.* v. *Erie Fire Ins. Co.*, 164 Ind. 181, 73 N. E. 107 (the property and a standard policy were transferred without consent of insurer to new corporation with same stockholders).

[3] *New* v. *German Ins. Co.*, 5 Ind. App. 82, 31 N. E. 475 (1892).

[4] *Western Assur. Co.* v. *McCarty*, 18 Ind. App. 449, 48 N. E. 265; *Cannon* v. *Farmers' Mut. Ins. Co.*, 58 N. J. Eq. 102, 43 Atl. 281. If statute requires it, assignment also must be written, *St. Paul F. & M. Ins. Co.* v. *Brunswick Grocery Co.*, 113 Ga. 786, 39 S. E. 483. No particular form of words either by the assured, *Pierce* v. *Nashua Fire Ins. Co.*, 50 N. H. 297; *Bentley* v. *Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; or by the company, *Queen Ins. Co.* v. *Block* (Ky., 1900), 58 S. W. 471; is requisite to constitute an assignment.

[5] *Benninghoff* v. *Agricultural Ins. Co.*, 93 N. Y. 495; *Gould* v. *Dwelling House Ins. Co.*, 134 Pa. St. 570, 590, 19 Atl. 793.

[6] *Griffey* v. *N. Y. Central Ins. Co.*, 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; *Key* v. *Continental Ins. Co.*, 101 Mo. App. 344, 74 S. W. 162. An assignment by the mortgagee of his mortgage and interest in a policy, if payable to him "as his interest may appear," does not fall within the ban, *Whiting* v. *Burkhardt*, 178 Mass. 535, 60 N. E. 1, 86 Am. St. R. 503, 52

Where the policy has been transferred as collateral security either with or without the consent of the insurer, the assignee may be merely an appointee or payee to receive any insurance money to the extent of the debt. In such a case it is not necessary that he should show any title or insurable interest in the property itself. An equitable assignee of the proceeds of insurance, if any, need have no interest in the property itself.[1]

The assured does not violate the terms of the standard policy by accepting from a common carrier a bill of lading containing as one of its provisions that the carrier is to have full benefit of any insurance upon the property.[2]

Where the property or subject of the fire insurance, as well as the policy, are transferred to the assignee with the assent of the company, a new contract is thus formed between the company and the assignee which will not be disturbed by any subsequent breach of condition by the assignor;[3] or by any agreement between him and the company.[4] As to whether the insurers can avail themselves of prior breaches of contract unknown to them at the time of the assignment, or whether the contract, though evidenced by the same policy and without further consideration, is to be regarded as a wholly independent contract, there is lack of harmony in the decisions. By the weight of authority the assignee seems to be given a fresh start, precisely as though a new policy were issued to him; and he is held to be relieved from the consequences of past forfeitures incurred by the assignor.[5]

L. R. A. 788; *Breeyear* v. *Rockingham Farmers' Mut. F. I. Co.*, 71 N. H. 445, 52 Atl. 860. An assignment of a policy, though on its face absolute, may be shown to have been intended as collateral security only, *Matthews* v. *Capital Ins. Co.*, 115 Wis. 272, 91 N. W. 675, and, on the other hand, if the policy is delivered with the intent that it shall serve as collateral security, the character of the transaction may be shown by parol, though there be no written assignment, *Dickey* v. *Pocomoke City Bank*, 89 Md. 280, 43 Atl. 33.

[1] *Merrill* v. *Colonial Fire Ins. Co.*, 169 Mass. 10, 47 N. E. 439; *Baughman* v. *Camden Mfg. Co.*, 65 N. J. Eq. 546, 56 Atl. 376; *Bibend* v. *L. & L. & G. Ins. Co.*, 30 Cal. 78. He has simply an equitable lien on any proceeds of the policy to the amount of the indebtedness due him, *Key* v. *Continental Ins. Co.*, 101 Mo. App. 344, 71 S. W. 162.

[2] *Jackson* v. *Boylston Mut. Ins. Co.*, 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728. But compare under the doctrine of concealment the following cases, *Pelzer Mfg. Co.* v. *St. Paul F. & M. Ins. Co.*, 41 Fed. 271; *Pelzar* v. *Sun Fire Office*, 36 S. C. 213, 15 S. E. 562 (non-disclosure of provision in lease depriving insurer of right of subrogation presents issue for jury, policy not avoided); *Tate* v. *Hyslop* (1885), 15 Q. B. D. 368 (non-disclosure of release of common-law liability of lighterman avoided policy). And see *Mercantile S. Co.* v. *Tyser* (1881), 7 Q. B. D. 73 (non-disclosure of canceling clause).

[3] *Pollard* v. *Somerset Mut. Fire Ins. Co.*, 42 Me. 221; *Fogg* v. *Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337.

[4] *Georgia Co-operative Fire Assoc.* v. *Borchardt*, 123 Ga. 181, 51 S. E. 429; *Am. Cent. Ins. Co.* v. *Sweetser*, 116 Ind. 370, 19 N. E. 159.

[5] For example, *Virginia-Carolina Chem. Co.* v. *Ins. Co.*, 108 Fed. 451;

This conclusion is defended by the argument that the company would presumably, if requested, cancel the old and issue a new policy, but only at greater inconvenience to itself and that, therefore, the method adopted is for the benefit of the company exclusively. The weakness in this line of reasoning comes from the fact that the assured can cancel only at short rates, which means that the insurer in that event retains more than the proportionate amount of premium. Accordingly, other decisions enforce the more logical but harsher rule that the assignee will take only such rights as belong to the assignor at the time of the assignment.[1] If, however, with the knowledge of past forfeiture, the company gives written consent to change of interest or to assignment, then a clear ground of estoppel is established in favor of the assignee.[2]

No one except the company can make objection to the assignment from the original insured to the assignee, on the ground that the company's consent was not obtained.[3]

After a loss by fire has occurred, the claim of the assured for damages is a *chose in action*, which he has a right to assign, in spite of this clause, without asking permission of the company,[4] and the assignee then takes, subject to all defenses available to the insurer as against the assignor.[5] But any excess of insurance over and above the fire loss still belongs to the assured assignor, and he can no more assign the policy as to that without consent than he could do so before the fire.

Continental Ins. Co. v. *Munns*, 120 Ind. 30, 22 N. E. 78; *Ellis* v. *Council Bluffs Ins. Co.*, 64 Iowa, 507; *Bullman* v. *North Brit. Mer. Ins. Co.*, 159 Mass. 118, 34 N. E. 169; *Rines* v. *German Ins. Co.*, 78 Minn. 46, 80 N. W. 839; *Hall* v. *Niagara Ins. Co.*, 93 Mich. 184, 53 N. W. 727; *Steen* v. *Niagara Ins. Co.*, 89 N. Y. 315, 327; *Bayless* v. *Merchants' Ins. Co.*, 106 Mo. App. 684, 80 S. W. 289; *Home Ins. Co.* v. *Nichols* (Tex. Civ. App.), 72 S. W. 440 (1903).

[1] *Wilson* v. *Hakes*, 36 Ill. App. 539; *McCluskey* v. *Prov. Wash. Ins. Co.*, 126 Mass. 306; *Commonwealth* v. *National Ins. Co.*, 113 Mass. 514; *Citizens' Ins. Co.* v. *Doll*, 35 Md. 89; *Waters* v. *Allen*, 5 Hill (N. Y.), 421; *Wilson* v. *Mutual Ins. Co.*, 174 Pa. St. 554, 34 Atl. 122; *Reed* v. *Windsor Mut. Ins. Co.*, 54 Vt. 413. And see *Sun Ins. Co.* v. *Greenville Bldg. & L. Assoc.*, 58 N. J. L. 367, 33 Atl. 962.

[2] *Hayes* v. *Saratoga Ins. Co.*, 81 App. Div. 287, 80 N. Y. Supp. 888, aff'd 179 N. Y. 535, 71 N. E. 1131; *Shearman* v. *Niagara Ins. Co.*, 46 N. Y. 526.

[3] *Leinkauf* v. *Calman*, 110 N. Y. 50, 17 N. E. 389.

[4] *Frels* v. *Little Black Farmers' Ins. Co.*, 120 Wis. 590, 98 N. W. 522; *Westchester Fire Ins. Co.* v. *Blackford*, 2 Indian Terr. 370, 51 S. W. 978; *Hall* v. *Dorchester Mut. Fire Ins. Co.*, 111 Mass. 53 (company with notice of assignment is liable to assignee); *Mellen* v. *Hamilton Fire Ins. Co.*, 17 N. Y. 609; *Imperial F. Ins. Co.* v. *Dunham*, 117 Pa. St. 460, 12 Atl. 668. Insurers cannot by their contract restrain this right to dispose of this chose in action, *Aikan* v. *New Hampshire Ins. Co.*, 53 Wis. 136, 10 N. W. 91; *Carroll* v. *Charter Oak Ins. Co.*, 38 Barb. 402, 40 Barb. 292; *Greene* v. *Republic Ins. Co.*, 84 N. Y. 572.

[5] *Johnston* v. *Phœnix Ins. Co.*, 39 Md. 233. Also takes all rights, for instance, right of reformation, *Benesh* v. *Mill Owners' Ins. Co.*, 103 Iowa, 465, 72 N. W. 674.

The Massachusetts policy forbids an assignment without assent of the company in writing or in print.

§ 269. **Memorandum Clause.**—*Or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or, if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed benzine, benzole, dynamite, ether, fireworks, gasoline, etc.*

This clause contains memorandum articles, that is, a list of inflammable substances,[1] peculiarly liable to destruction by fire, and of a nature likely to cause a spread of the fire. The restrictions are proper and must not be infringed, except as provided in the contract, by written agreement indorsed upon the policy. It is immaterial that the breach may not increase the risk or contribute to the loss.[2]

The word "premises" as used in this clause is to be construed to mean the buildings mentioned. It does not include an adjoining lot.[3] It will be applied to so much of a building designated as is used and controlled by the insured.[4]

But the warranty is absolute, hence if the insured, though unwittingly, allow his tenants, or other persons lawfully in possession of the premises, to violate the provisions of the memorandum clause, the policy will be avoided.[5]

Where, however, it comes to any question of interpretation, such sweeping provisions must receive reasonable construction. It is not to be readily presumed that the underwriters intended by the phraseology of the standard policy to interfere with the orderly and natural use of the property insured. If a groceryman or artisan should pass through the kitchen of the insured building with pro-

[1] See policy, in Appendix, ch. II, for full list and description.

[2] *Bastian* v. *Brit.-Am. Assur. Co.*, 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255 (dynamite was kept); *Ins. Co.* v. *Commissioners*, 54 Kan. 732 (gasoline was used for several days); *Hutton* v. *Patrons' Mut. Ins. Co.*, 191 Pa. St. 369, 43 Atl. 219 (gasoline was kept and sold); *Williams* v. *People's Fire Ins. Co.*, 57 N. Y. 274 (petroleum used in small quantities); *Gunther* v. *L. & L. & G. Ins. Co.*, 134 U. S. 110, 10 S. Ct. 448 (kerosene used contrary to special provisions of policy).

[3] *Rau* v. *Westchester F. I. Co.*, 36 App. Div. 179, 55 N. Y. Supp. 459, 50 App. Div. 428, 64 N. Y. Supp. 290, aff'd 168 N. Y. 665, 61 N. E. 1134; *Allemania Ins. Co.* v. *Pittsburg Exp. Soc.* (Pa.), 11 Atl. 572; but see case cited p. 144, *supra*.

[4] *Kohlmann* v. *Selvage*, 34 App. Div. 380, 54 N. Y. Supp. 230. See *Boyer* v. *Grand Rapids F. I. Co.*, 124 Mich. 455, 83 N. W. 124.

[5] *Gunther* v. *Liverpool & L. & G. I. Co.*, 134 U. S. 110, 10 S. Ct. 448, 33 L. Ed. 857, 116 U. S. 113, 29 L. Ed. 575 (kerosene); *Norwaysz* v. *Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551; *Badger* v. *Platts*, 68 N. H. 222, 44 Atl. 296, 73 Am. St. R. 572 (naphtha used by tenant); *Kohlmann* v. *Selvage*, 34 App. Div. 380, 54 N. Y. Supp. 230; *Westchester F. Ins. Co.* v. *Ocean View Pleasure Pier Co.*, 106 Va. 633, 56 S. E. 584 (fireworks for the Fourth of July, unknown to insured; policy void).

hibited articles in his pocket, or if a physician in case of necessity should administer ether on the floor above, it is hardly supposable that the insurance on house or contents is to be held forfeited in consequence.

As matter of interpretation certain important modifications are read into this clause with general approval.[1] Thus, its prohibition does not extend to such insignificant quantities of the articles enumerated as one would use for medicine or for cleaning clothes or machinery,[2] or for any similar use which must be presumed to be allowed by the contract of insurance in view of the character of the property insured.[3] And it is said that the word "used" means something more than an isolated occasion;[4] but it was held otherwise where fireworks were brought into the house the day before the Fourth of July, causing a conflagration the same night.[5]

Another modification of great practical consequence read into the clause by interpretation will be considered in the next section.

§ 270. The Same—As Affected by the Subject and the Written Description.—It has been remarked that the written description controls the general printed clauses of the policy if there is any inconsistency between them.[6] With the aid of this rule many courts have held that wherever the prohibited article naturally or usually belongs to the stock of goods or other subject-matter insured, the written description of the subject will by implication be regarded as a permit to use the article, in spite of the repugnant provision of the printed clause.[7]

[1] The prudent broker, however, gets special permit to use benzine, gasoline, etc., in small quantities, for cleaning or similar purposes, for which there should be no charge.

[2] *Mears* v. *Ins. Co.*, 92 Pa. St. 15.

[3] *Norwaysz* v. *Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551; *Carlin* v. *Western Assur. Co.*, 57 Md. 515, 40 Am. Rep. 440; *First Cong. Church* v. *Holyoke Ins. Co.*, 158 Mass. 475, 32 N. E. 572; *Smith* v. *German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; *Wood* v. *Northwestern Ins. Co.*, 46 N. Y. 421; *Williams* v. *People's Fire Ins. Co.*, 57 N. Y. 274; *Fraim* v. *National Fire Ins. Co.*, 170 Pa. St. 151, 32 Atl. 613 (gasoline kept outside but brought into the factory, *held*, no breach because a necessary incident of the business).

[4] *Springfield F. & M. Ins. Co.* v. *Wade*, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. R. 870. And see *Hinckley* v. *Ins. Co.*, 140 Mass. 38. Even the word "having" has been construed to mean an habitual use as applied to benzine, *Bentley* v. *Lumbermen's Ins. Co.*, 191 Pa. St. 276, 43 Atl. 209.

[5] *Heron* v. *Phœnix Mut. Fire Ins. Co.*, 180 Pa. St. 257, 36 Atl. 740. So also *Westchester F. Ins. Co.* v. *Ocean View Pleasure Pier Co.* (Va., 1907), 56 S. E. 584. The word "allowed" in this clause means allowed to be kept or used. So there is held to be no violation of the provision where gasoline is taken from a shed in the rear and carried through the store for immediate delivery to a customer, *London & L. F. I. Co.* v. *Fischer*, 92 Fed. 500, 34 C. C. A. 503.

[6] See § 87, *supra*.

[7] *Tubb* v. *L. & L. & G. Ins. Co.*, 106 Ala. 651, 17 So. 615 ("stock usually

Thus where a stock of fancy goods was insured with privilege to keep firecrackers on sale, it was held by the New York court that keeping fireworks would not avoid the policy, although by the printed memorandum clause fireworks were prohibited.[1] But the Federal Supreme Court came to the opposite conclusion on the same facts.[2]

And where privilege was given to use the property for a printing office, the keeping of camphene was held to appertain naturally to the permitted business, although camphene appeared in the printed memorandum of prohibited articles.[3] Hence there was no forfeiture.

Despite the attempt in the standard form to limit this rule of construction, the rule still prevails,[4] and the only effect of the clause, "any usage or custom of trade to the contrary," is, perhaps, to impose upon the insured the burden of showing with greater clearness that the written description fairly covers the prohibited articles in question.

A group of cases will give sharper definition to the views of the courts upon this important subject. A policy in the Michigan standard form was procured on the Eaton county courthouse. Like the New York policy it provided against increase of hazard, also against the keeping, using, or allowing of gasoline or other explosives on the premises; but permitted repairing by mechanics for fifteen days at any one time. A committee appointed by the board of supervisors took charge of the repainting of the building; and, in connection with the work, a five-gallon can of gasoline was kept in the building by the painters for at least twenty-four days. From

kept in a country store" permits use of benzine and fireworks); *Yoch* v. *Ins. Co.*, 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; *Phœnix Ins. Co.* v. *Walters*, 24 Ind. App. 87 ("retail hardware store" covers dynamite); *Ackley* v. *Ins. Co.*, 25 Mont. 272, 64 Pac. 665 (description in a policy amounts to a written permit, and "stock of drugs," etc., covers gasoline, benzine, and ether); *Hall* v. *Ins. Co.*, 58 N. Y. 292, 17 Am. Rep. 255 (all stock and materials ordinarily used in photographer's business are protected and the insurer is presumed to know what belongs to the business insured); *Mascott* v. *Granite State Fire Ins. Co.*, 68 Vt. 253, 35 Atl. 75.

[1] *Steinbach* v. *Lafayette Fire Ins. Co.*, 54 N. Y. 90.

[2] *Steinbach* v. *R. F. Ins. Co.*, 13 Wall. (U. S.) 183.

[3] *Harper* v. *N. Y. City Ins. Co.*, 22 N. Y. 444. Insurance upon stock "such as is usually kept for sale in a drug store" will not be avoided, where benzine is kept in a manner customary with druggists, *Phœnix Ins. Co.* v. *Flemming*, 65 Ark. 54, 44 S. W. 464, 67 Am. St. R. 900, 39 L. R. A. 789. It is permissible to show by parol evidence what articles naturally appertain to the property which is the subject of insurance, *Pindar* v. *Kings Co. Fire Ins. Co.*, 36 N. Y. 648, 93 Am. Dec. 544; *Northern Assur. Co.* v. *Crawford*, 24 Tex. Civ. App. 574, 59 S. W. 916; *Carrigan* v. *Lycoming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687.

[4] *Phœnix Ins. Co.* v. *Walters*, 24 Ind. App. 87, 56 N. E. 257, 79 Am. St. R. 257; *Mascott* v. *Granite State Fire Ins. Co.*, 68 Vt. 253, 35 Atl. 75.

this can torches were filled with gasoline and were then used to burn off or blister the old paint on the outside of the building. The court allowed the verdict of the jury in favor of the insured to stand, Justice Grant, writing a strong dissenting opinion. The majority of the court decided that painters are not "mechanics," that "keeping, using, or allowing" explosives refers only to an habitual keeping or storage, and that repairs by painters, deemed by the jury to be a reasonable and necessary incident to the use of the property, though continued for more than fifteen days, would not avoid the policy.[1]

The New Jersey Court of Errors and Appeals, with the Michigan case before it, was unable to construe the same clause of the standard policy with like liberality to the insured; but left a verdict for the plaintiff undisturbed, based on a different state of facts. The court, in an opinion by Justice Swayze, concludes that painters *are* "mechanics", within the meaning of the policy; but holds that mechanics are impliedly allowed by the express privilege for repairs to make repairs in "a reasonable, proper, and usual way," although the hazard may thereby be temporarily increased, and although the use of the generally prohibited article, gasoline, may be necessitated, but all within the limits of the specified period of fifteen days.[2]

The case last cited is more in harmony with an earlier Massachusetts case, involving a policy which prohibited the "keeping" of naphtha and the increasing of the risk, but contained no express provision regarding repairs. The right to make ordinary repairs, the court concluded, must be implied as an incident to the use of the property. Though naphtha was used by workmen for nearly four weeks in burning off the outside paint, preparatory to repainting the church insured, it was for the jury to say, under that policy, whether the repairs were reasonable and reasonably conducted.[3]

A manufacturing concern in Pennsylvania was engaged in the business of gold, silver and nickel plating. A policy covered their tools, machinery, and fixtures. Gasoline, though prohibited by the general printed clause of the policy, and though not specifically permitted, was used in their plating process and for cleaning purposes. It was thus allowed and used in the building described in the policy, but was stored elsewhere. The jury having found that the use of gasoline was a necessary incident to the conduct of their business, the judgment for the plaintiffs was affirmed.[4]

[1] *Smith* v. *German Ins. Co*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368.

[2] *Garrebrant* v. *Continental Ins. Co.* (N. J., 1907), 67 Atl. 90.

[3] *First Cong. Church* v. *Holyoke Ins Co.*, 158 Mass. 475, 32 N. E. 572.

[4] *Fraim* v. *National Fire Ins. Co.* 170 Pa. St. 151, 32 Atl. 613.

The North Carolina court, on the other hand, in construing the later memorandum clause of the New York standard policy, concluded that there was no necessary inconsistency between the language of the printed exception and the language of the written description of the plaintiff's policy. The written description covered "stock of cloth, cassimeres, clothing, trimmings, and all other articles usual in a merchant tailor's establishment." "Patterns" are named in the printed memorandum clause, and excepted, unless liability is specifically assumed thereon. A witness for the plaintiff testified, "all tailors usually keep patterns; can't well get along without them." The court, however, held that effect might be given both to the written and printed parts of the policy, and excluded from the plaintiff's recovery the value of the patterns.[1]

The constant aim of the courts is to carry out the apparent intent of the parties. Beyond this no indulgence can be extended to the assured. Thus an implied permit to sell flashlight powder as a part of photographers' supplies does not warrant its manufacture.[2]

The memorandum clause of the Massachusetts policy is as follows: *or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law—or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil, may be used for lighting, and in dwelling houses kerosene oil stoves may be used for domestic purposes—to be filled when cold, by daylight, and with oil of lawful fire test only.*[3]

§ 271. **Vacancy Clause.**—*Or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.*

[1] *Johnston* v. *Niagara Fire Ins. Co.*, 118 N. C. 643, 24 S. E. 424. Compare *Lovewell* v. *Westchester Fire Ins. Co.*, 124 Mass. 418, 26 Am. Rep. 671 ("patterns," though excepted by the printed memorandum clause, were held covered under the word "tools" in the description).

[2] *Lutz* v. *Royal Ins. Co.*, 205 Pa. St. 159, 54 Atl. 721; *Kennefick-Hammond Co.* v. *Norwich Union F. Ins. Co.* (Mo. App.), 80 S. W. 694 (stock of railroad contractors was not construed to cover dynamite). And see *First Cong. Church* v. *Holyoke Ins. Co.*, 158 Mass. 475, 32 N. E. 572 (naphtha was used to burn off paint); *Boyer* v. *Grand Rapids Fire Ins. Co.*, 124 Mich. 455, 83 N. W. 124 (use of gasoline in a stove avoided the policy); *Vandervolgen* v. *Manchester F. Assur. Co.*, 123 Mich. 291, 82 N. W. 46 (improper use of kerosene). But compare following two cases, in which policy was not of standard form, *Snyder* v. *Dwelling House Ins. Co.*, 59 N. J. L. 544, 34 Atl. 931; *Bentley* v. *Lumbermen's Ins. Co.*, 191 Pa. St. 276, 43 Atl. 209 (benzine). The elaborate classification of risks which was formerly indorsed upon many of the policies has been omitted in the standard form.

[3] *First Congregational Church* v. *Holyoke Mut. F. Ins. Co.*, 158 Mass.

The addition of a definite length of time, "ten days," is an improvement upon the old form. The provision of the standard policy is reasonable and must be observed, inasmuch as the insurers have a right to know whether the subject of insurance is receiving ordinary supervision or is being neglected.[1] Before the time limit was added to this clause considerable uncertainty existed as to the length of disuse which would constitute a vacancy, and it was held, among other things, that a temporary absence from a dwelling-house without deliberate purpose to stay away, and especially where the occupants left the furniture and household goods, would not avoid the policy or require a written consent;[2] but under the standard policy the period of unoccupancy of any building described must not exceed ten days as expressly permitted.[3] And though the insured premises are leased by the insured to another, the breach of this condition, committed by the tenant, will be equally fatal.[4]

The word "unoccupied" has been added to the word "vacant," to give the restriction a broader effect in favor of the insurance company. By a technical construction, "vacant" had been held to mean empty of everything but air.[5]

475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. R. 508 (naphtha avoided); *Whitmarsh* v. *Charter Oak F. Ins. Co.*, 2 Allen (Mass.), 581 (keeping oil, etc., avoided).

[1] *Baldwin* v. *German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326; *Names* v. *House Ins. Co.*, 95 Iowa, 642, 650, 64 N. W. 628 (purpose of the clause is "an added safety or security to the building"); *Hackett* v. *Phila. Underwriters*, 79 Mo. App. 16; *Hill* v. *Equitable M. F. Ins. Co.*, 58 N. H. 82; *Bartlett* v. *Brit.-Am. Assur. Co.*, 35 Wash. 525, 77 Pac. 812.

[2] *Union Ins. Co.* v. *McCullough* (Neb.), 96 N. W. 79; *Ætna Ins. Co.* v. *Meyers*, 63 Ind. 238; *Worley* v. *State Ins. Co.*, 91 Iowa, 150, 59 N. W. 16; *Woodruff* v. *Imperial Ins. Co.*, 83 N. Y. 133; *Cummins* v. *Agricultural Ins. Co.*, 67 N. Y. 260, 23 Am. Rep. 111; *East Tex. Ins. Co.* v. *Kempner*, 87 Tex. 229, 27 S. W. 122.

[3] *Huber* v. *Manchester Fire Ins. Co.*, 92 Hun, 223, 72 N. Y. St. R. 396, 36 N. Y. Supp. 873; *Roe* v. *Dwelling House Ins. Co.*, 149 Pa. St. 94, 23 Atl. 718; *Ohio Farmers' Ins. Co.* v. *Vogel* (Ind. App.), 73 N. E. 612. Some cases, however, seem to intimate that the specified period does not begin to run until there is a deliberate purpose to vacate or stay away for some definite period, *Burlington Ins. Co.* v. *Lowery*, 61 Ark. 168, 32 S. W. 383; *McMurray* v. *Capital Ins. Co.*, 87 Iowa, 453, 54 N. W. 354; *Home Ins. Co.* v. *Peyson*, 54 Neb. 495, 74 N. W. 960; *Laselle* v. *Hoboken F. Ins. Co.*, 43 N. J. L. 468; *Cummins* v. *Agricultural Ins. Co.*, 67 N. Y. 260, 23 Am. Rep. 111.

[4] *Knowlton* v. *Patrons', etc., Ins. Co.*, 100 Me. 481, 62 Atl. 289; *Hill* v. *Ohio Ins. Co.*, 99 Mich. 466, 58 N. W. 359; *Johnson* v. *Norwalk F. I. Co.*, 175 Mass. 529, 56 N. E. 569 (which turned on peculiar phraseology); *Johnson* v. *N. Y. Bowery Fire Ins. Co.*, 39 Hun (N. Y.), 410; *Raymond* v. *Farmers' Mut. F. I. Co.*, 114 Mich. 386, 72 N. W. 254 (tenant left to remove sick wife on approach of forest fire, *held*, no unoccupancy); *Phœnix Ins. Co.* v. *Burton* (Tex. Civ. App.), 39 S. W. 319.

[5] *Herrman* v. *Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644; *Herrman* v. *Merchants' Ins. Co.*, 44 N. Y. Super. Ct. 444, 81 N. Y. 184, 37 Am. Rep. 488. "Vacant" means deprived of contents, *Limburg* v. *German F. Ins. Co.*, 90 Iowa, 709, 57 N. W. 626; *Pabst Brewing Co.* v. *Union Ins. Co.*, 63 Mo. App. 663. The building is not vacant if furniture is left, *Shackelton* v. *Sun*

This provision is to be construed with special reference to the character of the building and its contemplated use.[1]

F. Office, 55 Mich. 288, 21 N. W. 343; *German-Am. Ins. Co.* v. *Evants*, 94 Tex. 490, 62 S. W. 417, or articles stored, though no person is occupying the house, *Norman* v. *Ins. Co.*, 74 Mo. App. 456. "Unoccupied" means "uninhabited," *Dohlantry* v. *Ins. Co.*, 83 Wis. 181, 53 N. W. 448. Vacancy or unoccupancy is not *per se* an increase of risk, see § 257. Compare *Farmers' & M. Ins. Co.* v. *Bodge* (Neb., 1907), 110 N. W. 1018. And where there is no suspicion as to the moral hazard it is a common thing for the insurers, without extra charge, to grant privilege "to be unoccupied during a part of the year." It has been held that except for the vacancy clause, the fact of vacancy need not be disclosed without special inquiry, *Browning* v. *Home Ins. Co.*, 71 N. Y. 508, 27 Am. Rep. 86. The burden of alleging and proving a breach is upon the defendant, *Moody* v. *Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313 (which also defines what plaintiff must allege and prove under a policy).

[1] *Hampton* v. *Hartford Ins. Co.*, 65 N. J. L. 265, 47 Atl. 433, 52 L. R. A. 344 (the words "occupied" and "unoccupied" in a policy of insurance will be given force with reference to the nature and character of the building, the purpose for which it is designated and the uses contemplated by the parties as expressed in the contract. The construction given to these words as applied to a dwelling will not of course cover a barn, a mill, a sawmill, a factory, music halls, theaters, or churches); *Fritz* v. *Home Ins. Co.*, 78 Mich. 565, 44 N. W. 139 (outbuildings need not be inhabited, but only used as intended); *Central Montana Mines Co.* v. *Firemen's Fund Ins. Co.*, 92 Minn. 223, 99 N. W. 1120; *Halpin* v. *Phœnix Ins. Co.*, 118 N. Y. 165, 23 N. E. 482 (under standard form the condition operates against personal property also); *Whitney* v. *Black River I. Co.*, 72 N. Y. 117, 28 Am. Rep. 116; *Caraher* v. *Royal Ins. Co.*, 63 Hun (N. Y.), 82, 44 N. Y. St. R. 141, 17 N. Y. Supp. 858, aff'd 136 N. Y. 645, 32 N. E. 1015; *Hoover* v. *Mercantile Town I. Co.*, 93 Mo. App. 111, 69 S. W. 42 (the intended use of the premises must in all cases be considered); *East Tex. Ins. Co.* v. *Kempner*, 12 Tex. Civ. App. 534, 34 S. W. 393, 35 S. W. 1069. Whether the nature of the business reasonably calls for continuous or occasional use is a pertinent fact to be regarded, *Des Moines Ice Co.* v. *Niagara F. Ins. Co.*, 99 Iowa, 193, 68 N. W. 600 (ice house); *Morotock Ins. Co.* v. *Pankey*, 91 Va. 259, 21 S. E. 487. The word "premises" if used in this connection should be applied to the dwelling house and not to the other buildings insured, *Thomas* v. *Hartford F. Ins. Co.*, 21 Ky. L. Rep. 914, 53 S. W. 297, 56 S. W. 264. That the land is occupied is no excuse for vacancy of the dwelling house, *Sexton* v. *Hawkeye Ins. Co.*, 69 Iowa, 99, 28 N. W. 462. Vacancy clause was applied to a scow, *Enos* v. *Sun Ins. Co.*, 67 Cal. 621, 8 Pac. 379; to a vessel, *Reid* v. *Lancaster F. Ins. Co.*, 90 N. Y. 382. A building, if known to be in course of construction, though described in the policy as a dwelling house, is not to be regarded as "unoccupied" because no one is living in it while unfinished, *Harris* v. *North Am. Ins. Co.*, 190 Mass. 361 ("the clause . . . as no change appears to have taken place must be construed in connection with these conditions under which the parties entered into their contracts"). And see *German Ins. Co.* v. *Penrod*, 35 Neb. 273, 53 N. W. 74 (building in process of erection). Rules and rates of underwriters and their associations do not control the question of forfeiture for alleged unoccupancy, *Quinsigamond S. Co.* v. *Phœnix Ins. Co.*, 172 Mass. 367, 52 N. E. 531, 177 Mass. 10, 58 N. E. 174; *Stone* v. *Granite State Ins. Co.*, 69 N. H. 438, 45 Atl. 235. Nor does any rule of the particular company as to granting or withholding permits control the question, *Rogers* v. *Phœnix Ins. Co.*, 121 Ind. 570, 23 N. E. 498. Nor, on the other hand, does the breach depend upon knowledge by the assured of the unoccupancy, *Schuermann* v. *Dwelling House Ins. Co.*, 161 Ill. 437, 43 N. E. 1093; or upon his control of the situation, *Moriarty* v. *Home Ins. Co.*, 53 Minn. 549, 55 N. W. 740; or upon his intent or good faith, *Watertown Ins. Co.* v. *Cherry*, 84 Va. 72, 3 S. E. 876.

If vacancy of a separable part of the insured premises affects the risk of that part only, in some jurisdictions the contract is held divisible.[1] For example, in a Virginia case a policy for $3,000, covered sixteen tenement houses, $187.50 being apportioned to each house. During the life of the policy eight of the buildings became unoccupied, and so remained for more than ten days. The court held that the insurance was valid as to the occupied houses and void as to those unoccupied.[2]

But where the vacancy affects the risk on the item of property destroyed a different rule applies. For a single premium Johnson took out a policy against fire, lightning, and windstorm, apportioned, $125 on dwelling house; $95 on corncrib with stable addition; $80 on hay and grain. At the date of the policy a tenant was in occupancy. Subsequently, the tenant moved away, and the owner of the land farmed it from his residence on an adjoining tract, leaving in the corncrib certain unused farming implements. A windstorm wrecked the corncrib. The judgment below in favor of the plaintiff was reversed on appeal.[3]

In case of doubt, however, the question whether the premises insured were unoccupied must go to the jury; and in the Michigan reports we find a good illustration. The plaintiff's house insured was on a farm, and situated about ten miles from the city of Menominee. Although the plaintiff was engaged in cultivating this farm, yet she spent more than half her time in her city home; but she or members of her family were on the insured premises, so a witness testified, "a few days in every week." They slept and ate in the farmhouse while so staying on the farm, and the plaintiff's husband was in the insured building when the fire occurred. From this testimony the jury was allowed to infer that both city and farmhouse were occupied as dwelling houses; and the judgment in favor of the plaintiff was affirmed on appeal.[4]

Where a ten tenement frame block, insured as an entirety, had

[1] *Republic Mut. F. Ins. Co.* v. *Johnson*, 69 Kan. 146, 76 Pac. 419. And see §§ 115, 246, *supra*.

[2] *Connecticut Fire Ins. Co.* v. *Tilley*, 88 Va. 1024, 14 S. E. 851, 29 Am. St. R. 770.

[3] *Republic Co. Mut. F. Ins. Co.* v. *Johnson*, 69 Kan. 146, 76 Pac. 419 ("there is nothing to indicate that the company would have entertained an application for the insurance of an isolated, unfrequented corncrib and stable, the prey of the elements, devoted merely to the shelter of unused implements and machinery and subject to be made the rendezvous of tramps. . . . Any ordinary individual in charge of the premises would exercise a preservative superintendence over them—would secure loosened boards about the crib, close widening apertures, brace racked timbers, and otherwise fortify the rigidity of the structure against storms").

[4] *Maas* v. *Anchor Fire Ins. Co* (Mich., 1907), 111 N. W. 1044.

two of its tenements occupied, the court was of the opinion that it was not vacant or unoccupied.[1] But if buildings are separate, the condition of the policy is to be applied distributively to them, and the occupancy of one of the buildings named in the policy will not excuse a vacancy in the others.[2]

If a violation of this clause occurs, by the better opinion the policy is absolutely avoided, and not merely suspended until reoccupancy;[3] the phrase of the standard policy "this entire contract shall be void if," etc., cannot well be construed in any other sense.[4] A New York case under the standard fire policy is apposite. The insured had a policy on her dwelling house and household furniture. About Thanksgiving time she went off with her daughter to make a visit in New York and Philadelphia, remaining away until April 22d. During that time no one either occupied the house or went into it. The insured intended to return about the middle of January, but was prevented from doing so by sickness. The fire occurred April 24, two days subsequent to her reoccupancy of the house. There was no proof that the unoccupancy had increased the risk or contributed to the loss. The court by Judge Hirschberg held that the insurance was avoided.[5]

[1] *Harrington* v. *Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 126. So also as to house and barn, *Worley* v. *State Ins. Co.*, 91 Iowa, 150, 59 N. W. 16. And as to a mining plant with several buildings, *Central, etc., Mines Co.*, 92 Minn. 223, 99 N. W. 1120. And see *Bryan* v. *Peabody Ins. Co.*, 8 W. Va. 605.

[2] *Hartshorne* v. *Agricultural Ins. Co.*, 50 N. J. L. 427, 14 Atl. 615; *Herrman* v. *Adriatic Fire Ins. Co.*, 85 N. Y. 163, 39 Am. Rep. 644; *Herrman* v. *Merchants Ins. Co.*, 81 N. Y. 184. But non-occupancy of an outbuilding is in itself no breach, *Kimball* v. *Monarch Ins. Co.*, 70 Iowa, 513, 30 N. W. 862. Privilege given by the standard policy to employ mechanics fifteen days does not impliedly allow unoccupancy during the same extended period, *Limburg* v. *German F. Ins. Co.*, 90 Iowa, 709, 57 N. W. 626. But a partial fire loss excuses an incidental unoccupancy ensuing, *Lancashire Ins. Co.* v. *Bush*, 60 Neb. 116, 82 N. W. 313.

[3] *German Ins. Co.* v. *Russell*, 65 Kan. 373, 69 Pac. 345; *Wainer* v. *Milford Mut. Fire Ins. Co.*, 153 Mass. 335; *Hoover* v. *Mercantile Town M. I. Co.*, 93 Mo. App. 111, 69 S. W. 42; *Moore* v. *Phœnix Ins. Co.*, 62 N. H. 240, 13 Am. St. R. 556; *Couch* v. *Farmers Ins. Co.*, 64 App. Div. 367, 72 N. Y. Supp. 95; *Hardiman* v. *Fire Assn.*, 212 Pa. St. 383, 61 Atl. 990; *East Tex. F. Ins. Co.* v. *Kemptner*, 87 Tex. 229, 27 S. W. 122. The effect of a violation of this clause is often controlled by statute, *McGannon* v. *Michigan Millers' M. F. I. Co.*, 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739. See *Cronin* v. *Fire Assn. of Phila.*, 123 Mich. 277, 82 N. W. 45.

[4] Other courts, however, take the opposite view, *Stephens* v. *Phœnix Assur. Co.*, 85 Ill. App. 671; *Ring* v. *Phœnix Assur. Co.*, 145 Mass. 426, 14 N. E. 525; *Pres., etc., of Ins. Co.* v. *Pitts* (Miss., 1906), 41 So. 5 ("insurance is revived by occupancy though suspended during vacancy"). And see cases *pro* and *con*, §§ 114, 247.

[5] *Couch* v. *Farmers' Fire Ins. Co.*, 64 App. Div. 367, 72 N. Y. Supp. 95 ("the stipulation in regard to occupancy was an express warranty, and, unless it was either performed or waived, the policy became void"), *contra*, *President, etc.*, v. *Pitts* (Miss., 1906), 41 So. 5. But by several standard policies a temporary breach in effect suspends and does not avoid the policy, for example, Iowa, Michigan, New Hampshire, Wisconsin.

It is not permissible to call experts and ask them whether it increases the risk to leave a house unoccupied;[1] and the unambiguous time limit contained in this clause cannot be disturbed by evidence of custom to the contrary in the case of the same or similar property.[2] As different classes of property naturally require different kinds of occupancy, the question whether the building is occupied or not may, however, be a question for the jury;[3] but what is meant by "vacant" or "unoccupied" is in general a question of law.[4]

§ 272. **Vacancy Clause—Dwellings.**—If the property insured is described in the policy as a dwelling house, to meet the requirements of the vacancy clause, it may be said in general, someone must be living in it as a place of abode.[5] A house is not vacant or unoccupied so long as someone is habitually living and sleeping there, for instance, several days a week.[6] On the other hand, many cases

[1] *Luce* v. *Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522.

[2] *Stone* v. *Howard Ins. Co.*, 153 Mass. 475. Permit for vacancy for a specified number of days will be strictly limited to that period, *Ranspach* v. *Teutonia F. Ins. Co.*, 109 Mich. 699, 67 N. W. 967; *Maness* v. *Sun Ins. Co.* (Tex. Civ. App.), 32 S. W. 326.

[3] *Hunt* v. *State Ins. Co.*, 66 Neb. 121, 92 N. W. 921; *Home Ins. Co.* v. *Mendenhall*, 164 Ill. 458, 45 N. E. 1078; *Rockford Ins. Co.* v. *Storig*, 31 Ill. App. 486; *Maas* v. *Anchor Fire Ins. Co.* (Mich., 1907), 36 Ins. L. J. 600; *Woodruff* v. *Imperial Ins. Co.*, 83 N. Y. 133.

[4] *Schuermann* v. *Dwelling House Ins. Co.*, 161 Ill. 437, 43 N. E. 1093; *Hartshorne* v. *Agricultural Ins. Co.*, 50 N. J. L. 427, 14 Atl. 615. Cancellation of policy after loss and return of unearned premium is no waiver of a known forfeiture, *Farmers & M. Ins. Co.* v. *Bodge* (Neb., 1907), 110 N. W. 1018.

[5] *McMurray* v. *Capital Ins. Co.*, 87 Iowa, 453, 54 N. W. 354; *Thomas* v. *Hartford Fire Ins. Co.*, 21 Ky. L. Rep. 914, 53 S. W. 297, 56 S. W. 264; *Agricultural Ins. Co.* v. *Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633; *Bonefant* v. *American F. I. Co.*, 76 Mich. 653, 43 N. W. 682; *Hoover* v. *Mercantile Town M. F. I. Co.*, 93 Mo. App. 111, 69 S. W. 42 (mere supervision without someone sleeping in dwelling is not enough); *Herrman* v. *Adriatic Fire Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644 (there must be a regular sleeper). Leaving furniture in a house is not occupancy, *Hanscom* v. *Home Ins. Co.*, 90 Me. 333, 38 Atl. 324; *Home Ins. Co.* v. *Boyd*, 19 Ind. App. 173, 49 N. E. 285; though the presence of furniture prevents the house from being vacant, *Norman* v. *Missouri Town Ins. Co.*, 74 Mo. App. 456; *Omaha Ins. Co.* v. *Sinnott*, 54 Neb. 522, 74 N. W. 955. Control and use by a tenant are no adequate substitutes for living and sleeping in a dwelling house, *Stoltenberg* v. *Continental Ins. Co.*, 106 Iowa, 565, 76 N. W. 835. Supervision by a third party living within the same inclosure may not save from forfeiture of the policy, *Burner* v. *German-Am. Ins. Co.*, 103 Ky. 370, 45 S. W. 109. Frequent visits are not enough, *Hanscom* v. *Home Ins. Co.*, 90 Me. 333, 38 Atl. 324; *Lester* v. *Ins. Co.* (Miss.), 19 So. 99; *Stapleton* v. *Greenwich Ins. Co.*, 16 Misc. 483, 38 N. Y. Supp. 973. Son of owner slept in house in daytime but not at night, policy was avoided, *Eureka, etc., Ins. Co.* v. *Baldwin*, 62 Ohio St. 368, 57 N. E. 57. In one case, it was held that occupancy by one conspiring to burn the house did not fulfill a special warranty of the policy regarding occupancy, *Names* v. *Dwelling House Ins. Co.*, 95 Iowa, 642, 64 N. W. 628.

[6] *Thieme* v. *Niagara Fire I. Co.*, 100 App. Div. 278, 91 N. Y. Supp. 499. And see *N. Y. Mut. S. & Loan Assn.* v. *Westchester Fire Ins. Co.*, 110 App. Div. 760, aff'd N. Y. Ct. App. 1907.

convincingly hold, that to constitute an "occupied dwelling house" the presence of someone sleeping in the house is not in all cases essential.[1]

A permit by the company to leave the house vacant for the summer will be liberally construed as meaning the season broadly rather than the summer months.[2]

By the Massachusetts form, "this policy shall be void if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent," that is, assent of the company in writing or in print. Under this clause, which says nothing about unoccupancy, the court concluded that a mere temporary absence on a visit would not even set the time running.[3]

[1] When house was furnished and frequently visited the Ohio court without dissent said: "Nor does it follow, as a matter of law, that a dwelling house is to be considered as unoccupied merely because it has ceased to be used as a family residence, when the household goods remain ready for use, and it continues to be occupied by one or more members of the family, who have access to the entire building for the purpose of caring for it, and who do care for it, and make some use of it as a place of abode," *Moody* v. *Ins. Co.*, 52 Ohio St. 12, 22, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. R. 699. To similar effect, *Home Ins. Co.* v. *Wood*, 47 Kan. 521, 28 Pac. 167; *Rockford Ins. Co.* v. *Storig*, 31 Ill. App. 486; *Dwelling House Ins. Co.* v. *Osborn*, 1 Kan. App. 197, 40 Pac. 1099; *Hill* v. *Ohio Ins. Co.*, 99 Mich. 466, 58 N. W. 359; *Omaha F. Ins. Co.* v. *Sinnott*, 54 Neb. 522, 74 N. W. 955. So also the Massachusetts court has held that a building, though warranted to be a dwelling house, is not to be regarded as unoccupied, because uninhabited, if when the policy issued both parties knew that it could not be inhabited until completed, *Harris* v. *North Am. Ins. Co.*, 190 Mass. 361, 77 N. E. 493. The many separate structures making up a modern Adirondack camp may fairly be described as a dwelling, but in many instances only a fraction of them are ever occupied by sleepers. There is no hard and fast rule of law. It is enough if only one person sleeps there, and it is not essential that he should have access to all the rooms. *Ins. Co.* v. *Hancock*, 106 Tenn. 513, 62 S. W. 145. Where the building was described as "a store and dwelling," ceasing to use it as a dwelling does not make it unoccupied, *Burlington Ins. Co.* v. *Brockway*, 138 Ill. 644, 28 N. E. 799. Holding the keys of a house, however, is not occupancy, and this is true though some of the furniture remains in the house, *Litch* v. *North Brit. & Mer. Ins.*, 136 Mass. 491; *Corrigan* v. *Conn. Fire Ins. Co.*, 122 Mass. 298. Nor is the placing of farm utensils in a house an occupancy, *Martin* v. *Rochester German I. Co.*, 86 Hun, 35, 67 N. Y. St. R. 237, 33 N. Y. Supp. 404. Where a house is only used for taking meals, and a barn only for storing hay, both are unoccupied, *Ashworth* v. *Builders Ins. Co.*, 112 Mass. 422. If a lessee of rented premises has not entered, the premises are unoccupied, *Stoltenberg* v. *Continental Ins. Co.*, 106 Iowa, 565, 76 N. W. 835.

[2] *Vanderhoef* v. *Agricultural Ins. Co.*, 46 Hun (N. Y.), 328; *Barker* v. *Citizens Mut. Fire Ins. Co.*, 136 Mich. 626, 99 N. W. 866 (permit for winter season construed). A house insured as a summer residence need only be occupied as such, *Western Assur. Co.* v. *Mason*, 5 Ill. App. 141 ("the plaintiff was only bound to maintain such occupancy as pertained to the ordinary use of the building in the manner and for the purposes for which it was designed to be used," *held*, question of fact).

[3] *Johnson* v. *Norwalk Fire Ins. Co.*, 175 Mass. 529, 56 N. E. 569. The South Dakota policy prohibits vacancy

The plaintiff had a policy in the New Hampshire standard form which contains a vacancy clause like the Massachusetts. The occupant of the house insured, on account of the state of her health, left the house unoccupied for three months, and until the fire, taking with her, however, only her clothing. When she left she intended to be absent for three or four months, but a man in charge of the premises visited them in the daytime at least twice a week. The court was of opinion that there is a difference in meaning between "absence" and "removal," and held that it was for the jury to determine under all the facts of the case whether the dwelling house was "vacant by removal."[1]

§ 273. Vacancy Clause—Buildings Other than Dwellings.—Buildings or premises insured, other than dwelling houses, must have that kind of use and occupancy which naturally belong to the character of the property described in the policy.[2] Thus a factory or mill need have no one sleeping in it at night; but must be put to some practical and actual use, and not treated simply as a storehouse.[3] And where a sawmill was insured, the court held that it could not be the intention to occupy such a building like a domicile. The conclusion was arrived at that a vacancy clause must be construed in view of the situation and character of the property insured, and the contingencies affecting its use, to which property of like character to that insured and similarly situated is ordinarily subject; and that interruptions of business and discontinuance of active use were in such a case to be anticipated, and would no more avoid the policy than would the omission to use a church building during week days;[4] but where a trip-hammer shop was not in operation,

and unoccupancy for more than thirty days without the assent of the company—written assent is not specified. A permit for vacancy does not impliedly include a permit for repairs, *Hill* v. *Commercial Union Ins. Co.*, 164 Mass. 406, 41 N. E. 657.

[1] *Stone* v. *Granite State F. Ins. Co.*, 69 N. H. 438, 45 Atl. 235.

[2] *Rockford Ins. Co.* v. *Wright*, 39 Ill. App. 574; *Poor* v. *Humboldt Ins. Co.*, 125 Mass. 274, 28 Am. Rep. 228; *Halpin* v. *Phœnix Ins. Co.*, 118 N. Y. 172, 23 N. E. 482; *Morotock Ins. Co.* v. *Pankey*, 91 Va. 259, 21 S. E. 487.

[3] *Halpin* v. *Ætna Fire Ins. Co.*, 120 N. Y. 70. A temporary cessation of operation of machinery because of sickness, breakdown, low water, or other unavoidable cause does not violate the condition, *Bellevue Roller Mill Co.* v. *London & L. F. Ins. Co.*, 4 Idaho, 307, 39 Pac. 196; *Ladd* v. *Ætna Ins. Co.*, 147 N. Y. 478, 42 N. E. 197; *Wankau Milling Co.* v. *Citizens, etc., Ins. Co.* (Wis., 1906), 109 N. W. 937 So where a mill shuts down for repairs, *Am. Ins. Co.* v. *Brighton Cotton Mfg. Co.*, 125 Ill. 131, 17 N. E. 771. A manufacturing plant, insured as an entirety, is not unoccupied so long as a part is in use, *Cent. Montana Mines Co.* v. *Firemen's Fund Ins. Co.*, 92 Minn. 223, 99 N. W. 1120.

[4] *Whitney* v. *Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116; *Lockwood* v. *Middlesex Mut. Assur. Co.*, 47 Conn. 553. A flouring mill, though shut down, was held to be not unoccupied, *Bellevue Roller Mill Co.* v. *London*

though a man visited it almost every day to inspect it, it was held that the policy was avoided, and that such visits did not constitute an occupancy.[1] On the other hand, where a schoolhouse was left vacant during the time of the ordinary vacations, and the furniture was not removed, it was held that the provisions of the vacancy clause were not violated.[2] And likewise a church is not unoccupied because services are discontinued in the absence of the pastor where the edifice is left in charge of the sexton.[3]

§ 274. **Certain Causes of Loss Excepted.**—*This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority; or by theft, or by neglect of the insured to use all reasonable means to save the property at and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning, but liability for direct damage by lightning may be assumed by specific agreement hereon.*

Some of these exceptions to the liability of the insurers may not be at all likely to happen, but if they should happen their results might be so disastrous as to remove them from the operation of any general rule of average. "Invasion" means the entrance of an armed force from abroad with hostile intent.[4]

& Lan. Ins. Co., 4 Idaho, 307, 39 Pac. 196. So of a tannery occupied in part, *Lebanon Ins. Co.* v. *Erb*, 112 Pa. St. 149, 4 Atl. 8. As to when a vessel is unoccupied, see *Reid* v. *Lancaster Ins. Co.*, 19 Hun (N. Y.), 284. As to a storehouse see *Rockford Ins. Co.* v. *Wright*, 39 Ill. App. 574; *Home Ins. Co.* v. *Scales*, 71 Miss. 975, 15 So. 134. As to a store, see *Limburg* v. *German Fire Ins. Co.*, 90 Iowa, 709, 57 N. W. 626. As to an ice factory, *Morotock Ins. Co.* v. *Pankey*, 91 Va. 259, 21 S. E. 487. As to an ice house, see *Des Moines Ice Co.* v. *Niagara Ins. Co.*, 99 Iowa, 193, 68 N. W. 600. Elevators held to be occupied, *Williams* v. *North German Ins. Co.*, 24 Fed. 625; *Clifton Coal Co.* v. *Scottish Union & Nat. Ins. Co.*, 102 Iowa, 300, 71 N. W. 433 (though not operating for more than ten days.

[1] *Keith* v. *Quincy Mut. Fire Ins. Co.*, 10 Allen (Mass.), 228.

[2] *Am. Ins. Co.* v. *Foster*, 92 Ill. 334, 34 Am. Rep. 134.

[3] *Hampton* v. *Hartford Fire I. Co.*, 65 N. J. L. 265, 47 Atl. 433, 52 L. R. A. 344; *Caraher* v. *Royal Ins. Co.*, 63 Hun, 82, 44 N. Y. St. R. 141, 17 N. Y. Supp. 858, aff'd 136 N. Y. 645, 32 N. E. 1015. In the case of a saloon, it is enough if a clerk lives in the building and sleeps there, *Stensgaard* v. *Natl. Fire Ins. Co.*, 36 Minn. 181.

[4] *Portsmouth Ins. Co.* v. *Reynolds*, 32 Grat. (Va.) 613; *Harris* v. *York Mut. Ins. Co.*, 50 Pa. St. 341 (riot); *Lycoming Fire Ins. Co.* v. *Schwenk*, 95 Pa. St. 89, 40 Am. Rep. 629 (riot); *Spruill* v. *Ins. Co.*, 46 N. C. 126 (insurrection); *Ætna Fire Ins. Co.* v. *Boon*, 95 U. S. 117, 24 L. Ed. 395 (military or usurped power held to be proximate cause of loss though the fire thereby caused extended through three intermediate buildings). And as to this clause see *Royal Ins. Co.* v. *Martin*, 192 U. S. 149, 24 S. Ct. 247, 48 L. Ed. 385; *Mich. F. & M. Ins. Co.* v. *Whitelaw*, 25 Ohio C. C. 197. It has been held under the Wisconsin statute that it is unlawful for the parties by agreement to add to the list of exemptions as enumerated in the standard policy an additional and

§ 275. Loss by Order of Civil Authority Excepted.—To destroy insects, the town supervisors started a fire which, getting beyond control, destroyed grain belonging to the insured; the loss thereby occasioned was held to be within this exception of the policy.[1] But where a building already doomed to destruction by approaching conflagration is intentionally destroyed with explosives to check the fire it is held to be loss by fire exclusively, as the proximate cause, and not a loss by explosion, or by order of civil authority.[2]

§ 276. Loss by Theft Excepted.—Loss by theft, otherwise proximate,[3] is now within this express exception to the insurer's liability.[4]

§ 277. Neglect of Insured After Fire.—From liability for loss caused directly or indirectly by the neglect of the assured himself to use reasonable precautions after the fire, as described in the standard policy, the company is exonerated. The burden, however, is upon the insurer to plead any such neglect on the part of the insured;[5] and also to establish it on the trial to the satisfaction of a jury.[6]

§ 278. Loss by Explosion Excepted Unless, etc.—The exception of loss by explosion was inserted in the policy because of a line of decisions holding that an explosion of gunpowder was in its nature fire, though occasioned without hostile fire or antecedent conflagration.[7] Therefore where the loss is caused by explosion and explosion is the proximate, that is, the primary, fault or catastrophe, the underwriter is relieved from liability under this exception[8] unless fire ensue, and then is liable for the fire loss only.[9]

inconsistent exemption, in that case, loss by fire caused by an electric current, *Wausau Telephone Co.* v. *United Firemen's Ins. Co.*, 123 Wis. 535, 101 N. W. 1100.

[1] *Conner* v. *Manchester Assur. Co.*, 130 Fed. 743. So also where a fire was started to check bubonic plague, *Hawaii Land Co.* v. *Ins. Co.*, 13 Hawaii, 164.

[2] *Greenwald* v. *Ins. Co.*, 3 Phila. (Pa.) 323. Same rule is declared in other cases, *Foster* v. *Fidelity F. Ins. Co.*, 24 Pa. Sup. Ct. 585 (1904); *Cohn* v. *Ins. Co.*, 96 Mo. App. 315 (1902); *Heuer* v. *Westchester F. Ins. Co.*, 44 Ill. App. 429; *Stanley* v. *Ins. Co.*, L. R. 3 Exch. 71, 74.

[3] See § 231, *supra*.

[4] *L. & L. & G. Ins. Co.* v. *Creighton*, 51 Ga. 95. But, it is said, the exception applies only to theft happening during the fire, not during necessary removal, *Sklencher* v. *Fire Assoc.*, 72 N. J. L. 48, 60 Atl. 232.

[5] *Fletcher* v. *German-Amer. I. Co.*, 79 Minn. 337, 82 N. W. 647.

[6] *Ellsworth* v. *Ætna Ins. Co.*, 89 N. Y. 186; *Briggs* v. *North Amer. & M. Ins. Co.*, 53 N. Y. 446.

[7] See § 231, *supra*.

[8] *Mitchell* v. *Potomac Ins. Co.*, 183

[9] *Orient Ins. Co.* v. *Leonard*, 120 Fed. 808; *Leonard* v. *Orient Ins. Co.*, 109 Fed. 286, 48 C. C. A. 369; *Dows* v. *Faneuil Hall Ins. Co.*, 127 Mass. 346, 34 Am. Rep. 384; *John Davis* v. *Ins. Co.*, 115 Mich. 382, 73 N. W. 393.

Mitchell had a policy for $5,000 on his stock of stoves and tinware in Georgetown, D. C. His clerk went down into the cellar of the store, and lighted a match there, because it was dark. The lighted match came in contact with the vapor of gasoline kept in the cellar, and a violent explosion at once followed, causing a collapse of the building. The damage to the insured stock was due to the falling of the building and the crushing of the stock. The jury having found these facts, the court held that the loss was by explosion and that the insured could not recover under his policy.[1]

If, however, the explosion, no matter how violent, is but a resulting incident of an already existing conflagration,[2] then the explosion is not accounted a cause at all, but only an inevitable physical effect of the predominant, still operating, and all-embracing peril insured against, and the results, if not unreasonably remote, are included as fire loss exclusively. Notwithstanding two or three decisions to the contrary, this rule, many times reiterated by the United States Supreme Court, and other tribunals, must be considered clear and well established.[3] Nor in such a case should it be

U. S. 42, 22 S. Ct. 22, 46 L. Ed. 74; *Ins. Co.* v. *Tweed*, 7 Wall. (U. S.) 44; *Tanneret* v. *Ins. Co.*, 34 La. Ann. 249; *United L. F. & M. Ins. Co.* v. *Foote*, 22 Ohio St. 340; *Home Lodge Assn.* v. *Queen Ins. Co.* (So. Dak., 1907), 110 N. W. 778 (explosion from gas jet). And even without any exception, if the cause of explosion is sufficiently remote, the underwriter will not be liable under a fire policy, *Everett* v. *London Assur. Co.*, 19 C. B. N. S. 126, 11 Jur. N. S. 546, 34 L. J. C. P. 299 (loss by concussion only from a gunpowder explosion nearly a mile distant).

[1] *Mitchell* v. *Potomac Ins. Co.*, 183 U. S. 42, 22 S. Ct. 22, 46 L. Ed. 74 ("a loss occurring solely from an explosion not resulting from a preceding fire is covered by the exception in the policy").

[2] The natural and ordinary combustion of gunpowder and other high explosives is accompanied by violent concussion.

[3] *Mitchell* v. *Potomac Ins. Co.*, 183 U. S. 42, 22 S. Ct. 22 (loss by explosion of gasoline not covered); *The G. R. Booth*, 171 U. S. 450, 19 S. Ct. 9, 43 L. Ed. 234 (carrier was liable where explosion was insured against and sea peril was excepted, though only sea water came in contact and did the damage to the cargo); *Washburn* v. *Ins. Co.*, 2 Fed. 304 (loss by explosion covered, because of antecedent fire); *Washburn* v. *Ins. Co.*, 29 Fed. Cas. 308, 329, 330; *Heuer* v. *Northwestern Ins. Co.*, 144 Ill. 393, 33 N. E. 411; *Trans. Fire Ins. Co.* v. *Dorsey*, 56 Md. 70, 40 Am. Rep. 403 (loss by explosion of sulphuric acid caused by preceding fire is covered); *Davis* v. *Ins. Co. of North Am.*, 115 Mich. 382, 73 N. W. 393; *La Force* v. *Ins. Co.*, 43 Mo. App. 518 (loss by explosion of gasoline vapor caused by preceding fire is covered); *Cohn* v. *Nat. Ins. Co.*, 96 Mo. App. 315, 319, 70 S. W. 259; *Renshaw* v. *Missouri State Ins. Co.*, 103 Mo. 606, 15 S. W. 945; *Briggs* v. *Ins. Co.*, 53 N. Y. 446 (loss by explosion *held* not covered because no antecedent fire); *Brown* v. *St. Nicholas Ins. Co.*, 61 N. Y. 332 (underwriter liable where stranding was insured against and ice detention excepted, yet the latter did the damage); *Hall* v. *Nat. F. Ins. Co.*, 115 Tenn. 530 (1906), 92 S. W. 402 (criticising *Hustace* v. *Phœnix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592). Same doctrine is applied in accident insurance. And see *Hartford Steam B., etc., Ins. Co.* v. *Sonneborn*, 96 Md. 616, 54 Atl. 610; see also § 231, *supra*. *Contra*, *Hustace* v. *Phœnix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651 (one judge dissenting and reversing five judges below). Here an explosion purely in-

regarded as at all material that the conflagration originates outside the premises insured,[1] since the laws of nature in their operation pay no respect to intangible boundaries of ownership or limits of insurance.[2] Nor should the circumstance that the effects of the incidental explosion alone, without accompanying ignition or combustion, reach the particular property insured, be considered as necessarily decisive in determining the issue of proximate cause;[3] though upon this point the authorities seem not to be in accord.

The better rule in such cases is the one approved by the Federal Supreme and other courts, that where the question, what is the proximate cause, comes to the border line of uncertainty, it should be disposed of as a question of fact.[4] In the treatment of this difficult subject an important circumstance has been too often over-

cidental to a raging conflagration in a neighboring building did the damage, the fire subsequently swept the plaintiff's premises also; and what is known as explosion insurance would not have met the loss. The last case has introduced uncertainty in rules of adjustment long considered settled in New York. In spite of the *Hustace case*, recovery was allowed on somewhat similar facts in actions of other neighboring owners growing out of same catastrophe, *Eppens, etc., Co.* v. *Hartford F. Ins. Co.*, 99 App. Div. 221, 90 N. Y. Supp. 1035; *Mattlage* v. *German-Am. Ins. Co.*, 139 Fed. 704. The New York court, in another case, has stated the general rule concisely as follows: "The proximate cause of an event must be held to be that which in a natural sequence unbroken by any new cause, produces that event, and without which that event would not have occurred," *Rider* v. *Syracuse Ry. Co.*, 171 N. Y. 139, 147, 63 N. E. 836.

[1] *Heuer* v. *Northeastern Ins. Co.*, 144 Ill. 393, 33 N. E. 411.

[2] Effects which follow by mere physical necessity must be attributed to the predominant cause, see Bailey's definition, McArthur, Ins. (2d ed.), 108 n. A half interest in an entire block may be owned and insured by one man, the other half interest in each house may be separately owned and separately insured, but the fire burns and the explosion occurs unaffected by such lines of demarkation. On the other hand, underwriters take into account neighboring exposures, as well as intrinsic hazards, *Capital City Ins. Co.* v. *Caldwell*, 95 Ala. 77, 85, 10 So. 355.

[3] *Russell* v. *German F. Ins. Co.*, 100 Minn. 528, 111 N. W. 400; *Ermentrout* v. *Girard F. & M. Ins. Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346; *Johnston* v. *West., etc., Ins. Co.*, 7 Shaw & D. Scot. Ct. Sess. 52. And see *Lynn Gas & Elec. Co.* v. *Meriden F. Ins. Co.*, 158 Mass. 570, 33 N. E. 690 (resulting loss was far from fire); *Transatlantic F. Ins. Co.* v. *Dorsey*, 56 Md. 70, 79, 40 Am. Rep. 403 (disapproving *Stanley* v. *Western Ins. Co.*, L. R. 3 Exch. 71, 17 L. T. N. S. 513). *Contra*, *Hustace* v. *Phœnix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592. And see *Miller* v. *London & L. Ins. Co.*, 41 Ill. App. 395; *Caballero* v. *Home Ins. Co.*, 15 La. Ann. 217; *Ins. Co.* v. *Roost*, 55 Ohio St. 581, 588, 36 L. R. A. 236; *Hall* v. *Nat. F. Ins. Co.*, 115 Tenn. 530, 92 S. W. 402. In an unreported case (*Aitken* v. *Midland, etc., Ins. Co.*) the condition was, "This company shall not be responsible for loss arising from explosion of gunpowder or in consequence thereof." A fire arose in a fireproof compartment on the ground floor not comprised in the policy. This compartment was used for storing inflammable oils, and with them were stored about sixty-five pounds of blasting powder. Except for the explosion of powder the fire would have been confined to the fireproof compartment, and the court of session held that the damage came within the exception and that the insurer therefore was not liable, Bunyon (5th ed.), 86.

[4] *Kellogg* v. *Mil. & St. Paul R. Co.*, 94 U. S. 469; *Russell* v. *German Fire Ins. Co.* (Minn., 1907), 111 N. W. 40.

looked. In most instances, at the time when risks are rated by insurers, the insurers have no knowledge of the scope of the policies to which the rates will be applied, or of the extent of the ownership of the various persons to whom the policies are to be issued. One man may own, and insure by one policy or by fifty specific policies a block of fifty houses, or every house in the block may be separately owned and separately insured. It matters not to the insurance companies which situation is to exist. To hold, then, as matter of law, that the same natural, physical results, produced by the one cause and in the one casualty, happening within the one block, are proximate as to the blanket policy, but not as to all the specific policies, is an unreasonable and needless distinction. No conflagration of ordinary buildings can long continue without numberless incidental explosions, some of greater and some of lesser violence. In general, the only indemnity offered to the public by underwriters for the loss occasioned by such incidental explosions is under the usual fire policy. The value and utility of this instrument should not be unreasonably curtailed.

La Force had a policy on his dwelling, which like the standard policy excepted loss caused by explosion of any kind unless fire ensued, and then included the loss by fire only. His housekeeper for the purpose of driving away cockroaches poured some gasoline on different parts of the kitchen floor. Some of the gasoline dripped through the cracks and evaporated, the vapor being confined between the floor and the ground underneath. There was no vapor in the kitchen, though on the kitchen floor there was liquid gasoline, which is not explosive. About half an hour later the housekeeper dropped a lighted match on the floor, which caused a fire but no immediate explosion. After the fire had extended entirely around the room and had burned the gasoline for from three to five minutes, and after the wainscoting around the wall had been ignited, the flames came in contact with the vapor beneath the floor and it exploded, blowing the floor up and shaking the walls down. The court held that the damage done to the building, both by reason of the actual burning and by reason of the concussion, was occasioned by fire within the meaning of the policy, and that the exception in favor of the insurer was not applicable.[1]

[1] *La Force* v. *The Williams City Ins. Co.*, 43 Mo. App. 518 ("it is no sufficient answer to say that some of the phenomena produced were in the form of an explosion. All the effects, whatever they may be in form, are the natural results of the combustion of combustible substances; and as the combustion is the action of fire, this must be held to be the proximate and legal cause of all damages done the premises of the plaintiff. There was a

In another case the plaintiff had insurance, with the same explosion clause, covering his stock of furniture and housefurnishing goods kept for sale. In a neighboring warehouse, the second building to the south, a raging fire, in progress for the space of an hour, extended to powder and dynamite stored in the warehouse, and occasioned a terrific explosion, the concussion from which did all the damage to the plaintiff's goods. No fire reached the plaintiff's store. The court while admitting that abstractly the contention of the plaintiff seemed sound, considered itself concluded by certain authorities cited, and *held*, reversing the court below, that on the facts as stated the plaintiff could not recover unless there was fire on the insured premises.[1]

The sound distinction is illustrated by a New York case in which lightning was the peril assumed and windstorm the exception. The damage in question was caused by windstorm following the stroke by lightning. The windstorm, however, was an altogether independent agency, in nowise caused by lightning, and therefore the judgment in favor of the insured was reversed.[2] But where a whirlwind, itself caused by a raging conflagration, presently topples a wall over, the damage is by fire alone. The wind is accounted an effect and not a cause. And this rule has been extended to the case where a wind, arising several days after the fire, precipitated upon the adjoining premises of the plaintiff, the insured, a wall previously weakened by a fire which never reached the plaintiff's premises at all in the shape of combustion.[3] The peril of fire insured against, though the primary cause in point of time may, however, be too remotely connected with the damage in question to be accepted as the responsible cause. For instance, where fire starting in a vessel which was lying temporarily in the River Mersey resulted in a violent gunpowder explosion aboard, which in turn shattered the windows of buildings on the banks, it was conceded that the explosion must be deemed the responsible cause of the damage to the

fire within the policy which preceded the explosion, and it logically results that the insurer is liable to the assured for the damages done by both fire and explosion," by Smith, P. J.).

[1] *Hall & Hawkins* v. *National Fire Ins. Co.* (Tenn., 1906), 92 S. W. 402. According to the rule laid down in the last case, if Messrs. Hall & Hawkins had been owners of the whole block of buildings, insured by a policy covering all the buildings, in blanket form, while recovering nothing for loss by concussion on their stock, they could have recovered for loss by concussion on the building in which the stock was located.

[2] *Beakes* v. *Phœnix Ins. Co.*, 143 N. Y. 402, 38 N. E. 453, 26 L. R. A. 267 (by Bartlett, J., who also dissented in the *Hustace case*, 175 N. Y. 292, 67 N. E. 592).

[3] *Russell* v. *German F. Ins. Co.* 100 Minn. 528, 111 N. W. 400. "For full discussion of proximate cause, see ch. XX."

windows.[1] Here was a casual exposure which the underwriters, perhaps, could hardly have been expected to take into their calculations, and which certainly was not to be found scheduled upon their insurance maps and surveys. It must be observed, however, that the issue in the case arose between stockholders of the insurers, and the insurers, who, it was claimed, had made payment *ultra vires* to the insured on account of the loss. The court rendered judgment adverse to the contention of the stockholders.

§ 279. **Falling Building.** *—Or if a building or any part thereof fall, except as the result of fire, all insurance on such building or its contents shall immediately cease.*

If any substantial portion of the structure falls, except as the result of antecedent fire, the insurance forthwith terminates;[2] but the rule is otherwise, if only a trifling portion falls.[3] If, however, the fall is caused by an explosion and fire ensues, then, as is manifest, the company is liable for the fire loss, by virtue of the clause considered in the preceding section.[4]

[1] The *Lottie Sleigh case*, *Taunton* v. *Royal Ins. Co.*, 2 H. & M. 135, 10 Jur. N. S. 291, 33 L. J. Ch. 406, 10 L. T. N. S. 156. Even in that case the underwriters saw fit to settle, Bunyon, Ins. (5th ed., 1906), 79. Upon this ground alone, if at all, it would have seemed possible to justify a decision in favor of the insurer in the *Hustace case*, in which two buildings and a street intervened between the Tarrant and Hustace buildings, 175 N. Y. 292, 67 N. E. 592. Explosion and not fire is the proximate cause, within the meaning of the exception, if the only fire causing the explosion is from a match, *Mitchell* v. *Ins. Co.*, 183 U. S. 42, 22 S. Ct. 22; *Heuer* v. *Ins. Co.*, 144 Ill. 393, 33 N. E. 411; or a fuse, *Phœnix Ins. Co.* v. *Greer*, 61 Ark. 509, 33 S. W. 840; or a lamp, *Briggs* v. *Ins. Co.*, 53 N. Y. 446; or lightning, *German Ins. Co.* v. *Roost*, 55 Ohio St. 581, 45 N. E. 1097; or a gas jet, *United L. F. & M. Ins. Co.* v. *Foote*, 22 Ohio St. 340; *Home Lodge Assn.* v. *Queen Ins. Co.* (So. Dak., 1907), 110 N. W. 778. But see *Heffron* v. *Kittanning Ins. Co.*, 132 Pa. St. 580, 20 Atl. 698 (fire caused by explosion of a lamp; underwriters held liable). A lightning clause should be obtained by the assured. It usually costs nothing. Lightning clause construed, *Beakes* v. *Phœnix Ins. Co.*, 143 N. Y. 402, 38 N. E. 453; *Kettelmann* v. *Fire Asso.*, 79 Mo. App. 447; *Warmcastle* v. *Scot. Union & Nat. Ins. Co.*, 201 Pa. St. 302, 50 Atl. 941, 59 Atl. 1105; *Clark* v. *Franklin*, 111 Wis. 65, 86 N. W. 549.

[2] *Kiesel* v. *Sun Ins. Office*, 88 Fed. 243, 31 C. C. A. 515; *Foster* v. *Home Ins. Co.*, 74 C. C. A. 445, 143 Fed. 307; *Nelson* v. *Traders' Ins. Co.*, 181 N. Y. 472, 74 N. E. 421.

[3] *London & L. Ins. Co.* v. *Crunk*, 91 Tenn. 376, 23 S. W. 140; *Home Mut. Ins. Co.* v. *Tomkies*, 96 Tex. 187, 71 S. W. 814. And see *Breuner* v. *L. & L. & G. Ins. Co.*, 51 Cal. 101. But it is said that if the building is simply blown off of blocks and turns over, the company is still liable, *Teutonia Ins. Co.* v. *Bonner*, 81 Ill. App. 231. Without this clause the company would be liable for loss of a building by fire unless before the fire started the building had lost its character as such and had become a mere congeries of materials in consequence of a collapse, *Nave* v. *Home Mut. Ins. Co.*, 37 Mo. 430, 90 Am. Dec. 394; *Farrell* v. *Ins. Co.*, 66 Mo. App. 153; *L. & L. & G. Ins. Co.* v. *Ende*, 65 Tex. 118.

[4] *Leonard* v. *Orient Ins. Co.*, 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706; *Friedman* v. *Atlas Assur. Co.*, 133 Mich. 212, 94 N. W. 757; *Davis* v. *Ins. Co.*, 115 Mich. 382, 73 N. W. 393; *Dow* v. *Faneuil Hall Ins. Co.*, 127 Mass. 346.

The Massachusetts standard policy contains no similar provision.

§ 280. **Earthquake and Volcano Clause.**—In California and in other localities an earthquake clause is sometimes employed.[1] Its purpose is to relieve the company from loss caused by a convulsion of nature. A defense under this exception usually presents an issue of fact for the jury as to whether the fire in question may not have been proximately due to some other cause than the earthquake. The burden is on the insurer.[2]

§ 281. **Memorandum Articles.**—*This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.*

If the property enumerated in this memorandum clause were covered by the policy, the insurers would be subjected to claims of uncertain amount and sometimes difficult of verification. For ex-

And a building may be shattered without falling, *Eppens* v. *Hartford Ins. Co.*, 99 App. Div. 221, 90 N. Y. Supp. 1035. The collapse of a building with fires in active operation in furnaces, stoves, or other appliances is apt to be immediately followed by a conflagration, therefore in such cases the vital inquiry arises whether the fall or the conflagration started first. In the one case the company is exonerated. In the other it is liable. The testimony is apt to be sharply conflicting. The issue is one for the jury, and the burden of proof rests on the insurance company, *Phenix Ins. Co.* v. *Luce*, 123 Fed. 257, 60 C. C. A. 655; *Western Assur. Co.* v. *Mohlman*, 83 Fed. 811, 51 U. S. App. 577, 28 C. C. A. 157; *Kiesel* v. *Sun Ins. Co.*, 88 Fed. 243; *Friedman* v. *Atlas Assur. Co.*, 133 Mich. 212, 94 N. W. 757; *Nichols* v. *Sun Mut. Ins. Co.*, 71 Miss. 326. And see *Russell* v. *German F. Ins. Co.*, 100 Minn. 528, 111 N. W. 400; *Ermentrout* v. *Girard Fire & M. I. Co.*, 63 Minn. 305, 65 N. W. 635, 56 Am. St. R. 485, 30 L. R. A. 346. In both of the last two cases a wall of the adjoining building fell over on the insured premises as the result of a fire confined to the adjoining building. But where seven days elapsed between the fire and the fall of the building it was held that the loss by the latter was not the proximate result of fire, *Gaskarth* v. *Law Union Ins. Co.*, 6 Ins. L. J. 159 [Manchester (Eng.) Civil Court]; *Cuesta* v. *Royal Ins. Co.*, 98 Ga. 720, 27 S. E. 172 (fall of walls occurred twenty-five days after fire). Compare *Russell* v. *Ins. Co.*, 100 Minn. 528, 111 N. W. 400.

[1] See Appendix of forms, ch. II.

[2] Recent cases in lower California courts.

ample, patterns in factories may be of great value when new, but worthless when out of date.

"Storage" means keeping for safe custody to be delivered again in the same condition substantially as when received, and, as employed in this clause of the policy, the prohibition is applicable only when the storing or safe-keeping is the sole or principal object of the deposit. If the goods are merely kept for consumption or sale, the prohibition of this clause does not apply.[1] For example, wine kept in a cellar either to be sold or consumed is not on storage;[2] nor is raw material, when kept in a factory to be manufactured;[3] nor is furniture, when kept in a hotel awaiting use;[4] nor are materials, when casually or temporarily left in a room.[5]

The Massachusetts policy contains a list of memorandum articles, "bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specially mentioned."

[1] If there is any doubt, it is the part of prudence to get written privilege, which usually costs nothing.

[2] *N. Y. Equitable Ins. Co.* v. *Langdon*, 6 Wend. (N. Y.) 623; *O'Neil* v. *Buffalo Fire Ins. Co.*, 3 Comst. (N. Y.) 122. Insurance on property "its own . . . or in storage, or for repairs" implies property belonging to others, *Johnston* v. *Chas. Abresch Co.*, 123 Wisc. 130, 101 N. W. 395.

[3] *Vogel* v. *People's Mut. Fire Ins. Co.*, 9 Gray (Mass.), 23.

[4] *Continental Ins. Co.* v. *Pruitt*, 65 Tex. 125.

[5] *Hynds* v. *Schenectady Co. Mut. Ins. Co.*, 11 N. Y. 554. The phrase "store or office fixtures" in this clause will not be extended to embrace fixtures in a factory, *Thurston* v. *Union Ins. Co.*, 17 Fed. 127. Movable counters and shelving are not permanent fixtures, *Banyer* v. *Albany Ins. Co.*, 85 App. Div. 122, 83 N. Y. Supp. 65, aff'd 179 N. Y. 554, 71 N. E. 1140. One court has held that the exception of "patterns" in this general clause will relieve the company, though they are usually kept as part of a tailor's stock which was insured as such, *Johnston* v. *Niagara Fire Ins. Co.*, 118 N. C. 643, 24 S. E. 424. But see §§ 87, 270, *supra*. As to exemption of all property on which there was specific insurance, see *Peabody* v. *L. & L. & G. Ins. Co.*, 171 Mass. 114, 50 N. E. 526; *London Assur.* v. *Paterson*, 106 Ga. 538, 32 S. E. 650.

CHAPTER XIV

The Standard Fire Policy—Continued

§ 282. Survey, etc., When a Warranty.—*If an application, survey, plan or description of property be referred to in this policy it shall be a part of this contract and a warranty.*

Before the introduction of this provision in favor of the insurance company, there was much difficulty in determining what sort of a reference to extraneous papers was sufficient (1) to make them a part of the contract, and (2) to incorporate their contents into the contract as warranties rather than as mere representations.[1]

This clause refers to papers outside the policy, and not to what is written or printed in it.[2] Occasionally the insurers require the execution of a detailed application by the insured and by express reference make it a part of the contract, in which event its statements, by virtue of this clause, become warranties;[3] and when warranties, as already shown, they must be literally true, or exactly fulfilled, or the contract will be avoided.[4]

For example, if an owner insures his building as "a dwelling-house" when in reality it is in part dwelling-house and in part stores.[5] Or if he insures it as "a dwelling-house," when in reality it is a hotel, the insurance is avoided.[6] But a building described in

[1] See §§ 106, 110.

[2] *King Brick Mfg Co.* v. *Phœnix I. Co.*, 164 Mass. 291, 41 N. E. 277.

[3] *Cerys* v. *State Ins. Co.*, 71 Minn. 338, 73 N. W. 849; *King* v. *Tioga Co. Patrons' R. Ins. Co.*, 35 App. Div. (N. Y.) 58, 54 N. Y. Supp. 1057; *Phœnix Ins. Co.* v. *Benton*, 87 Ind. 132; *Am. Credit Indem. Co.* v. *Carrollton Furniture Co.*, 95 Fed. 111; but see *Throop* v. *North Am. F. Ins. Co.*, 19 Mich. 423. Unless expressly incorporated the statements in the application are mere representations, *Vilas* v. *N. Y. Cent. Ins. Co.*, 72 N. Y. 590, 28 Am. Rep. 186; *Burritt* v. *Saratoga Co. Mut. F. Ins. Co.*, 5 Hill (N. Y.), 188, 40 Am Dec. 345; and see § 106, *supra*. The court will, if possible, construe as representation rather than warranty, *Houghton* v. *Mfrs., etc., Ins. Co.*, 8 Metc. (Mass.) 114; § 110, note 1. As to expressions of opinion, expectation or belief see §§ 98, 111. The phraseology of the application, where it is made a part of the contract, may itself limit the conditions of the policy in favor of the insured, *Washington Life Ins. Co.* v. *Haney*, 10 Kan. 525.

[4] See § 107, *supra*.

[5] *Bowditch* v. *Norwich Union F. Ins. Co.* (Mass., 1907), 79 N. E. 788.

[6] *Thomas* v. *Commercial Union Assur. Co.*, 162 Mass. 29; *Dougherty* v. *Greenwich Ins. Co.*, 64 N. J. L. 716.

the application as "woodhouse" was held covered, though only two-thirds of it was used for that purpose.[1]

Any statements in the application, however, which have nothing to do with the subject of the contract, or with the risk, will be held to be immaterial, and will be regarded as having been gratuitously volunteered. For an innocent error in making them the policy will not be avoided.[2]

[1] *White* v. *Mut. F. Assur. Co.*, 8 Gray (Mass.), 566. Description in application "occupied as hotel by a tenant;" in fact the building was used as a house of ill-fame; *held*, no forfeiture, *Hall* v. *People's Mut. F. Ins. Co.*, 6 Gray (Mass.), 185. It is said in general that a false description of the material of which a building is constructed avoids the policy, *Parrish* v. *Rosebud M. & M. Co.*, 140 Cal. 635, 74 Pac. 312. But see *Landes* v. *Safety Mut. F. Ins. Co.*, 190 Pa. St. 536, 42 Atl. 961; *Farmers' Ins. & L. Co.* v. *Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118. Misdescription as to division walls was held fatal, *Northrup* v. *Piza*, 43 App. Div. 284, 60 N. Y. Supp. 363, aff'd 167 N. Y. 578; *Northrup* v. *Porter*, 17 App. Div. 80, 44 N. Y. Supp. 814. Erroneous statements as to the distance of other buildings or exposures in the vicinity will avoid, *Burritt* v. *Saratoga Co. Mut. F. Ins. Co.*, 5 Hill (N. Y.), 188, 40 Am. Dec. 345; *Jennings* v. *Chenango Co. Mut. Ins. Co.*, 2 Denio (N. Y.), 75; *Keller* v. *L. & L. & G. Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. 695. So also under Massachusetts statute, the risk being increased by the existence of the other buildings, *Ring* v. *Phœnix Assur. Co.*, 145 Mass. 426, 14 N. E. 525. But see *Dennison* v. *Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42. Misstatement as to age of building was held fatal, *Lama* v. *Dwelling House Ins. Co.*, 51 Mo. App. 447. Otherwise, *Rogers* v. *Phœnix Ins. Co.*, 121 Ind. 570, 23 N. E. 498 (matter of opinion); *Eddy* v. *Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808; *Manufacturers' & M. Ins. Co.* v. *Zeilinger*, 168 Ill. 286, 48 N. E. 179, 61 Am. St. R. 105. But see *Phœnix Ins. Co.* v. *Pickel*, 3 Ind. App. 332, 29 N. E. 432. When the application calls for a disclosure of incumbrances, to mention only one of two mortgages avoids the policy, *Towne* v. *Fitchburg Mut. F. Ins. Co.*, 7 Allen (Mass.), 51. An estimate of value of the insured property in the application is generally regarded as matter of opinion rather than fact which, if given in good faith, does not avoid the policy, *Wheaton* v. *Ins. Co.*, 76 Cal. 415; *Helbing* v. *Svea Ins. Co.*, 54 Cal. 156, 35 Am. Rep. 72; *Susquehanna Mut. F. Ins. Co.* v. *Staats*, 102 Pa. St. 529. And see § 111, *supra*. Especially is this the rule where the policy is open and not valued, *Ins. Co.* v. *Phœnix Ins. Co.*, 26 Ind. App. 88, 59 N. E. 181. Construction under statutes making warranties representations, *Rosser* v. *Georgia Home Ins. Co.*, 101 Ga. 716, 29 S. E. 286. False and fraudulent statements regarding the character and origin of an insured painting alleged to be by Leonardo da Vinci avoided the policy, *Wood* v. *Firemen's Ins. Co.*, 126 Mass. 316.

[2] *Hartford Protection Ins. Co.* v. *Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484. In the case of a promissory warranty, circumstances may so change that the warranty will be held to be inapplicable; for example, if a loss occurs before the time for the fulfillment of the warranty has arrived, the loss will, nevertheless, be covered by the policy, *Gloucester Mfg. Co.* v. *Howard Fire Ins. Co.*, 5 Gray (Mass.), 497, 66 Am. Dec. 376. A warranty of the existence of a force pump on the insured premises, at all times ready for use, implies that there is sufficient power to work the pump, *Sayles* v. *N. W. Ins. Co.*, 2 Curtis (C. C.), 610. And see *Mechanics' & Traders' Ins. Co.* v. *Thompson*, 57 Ark. 279, 21 S. W. 468. Where the insured, in answer to the question whether his title to the property was absolute, said "his deceased wife held the deed," it was held that there was a breach of warranty, because the answer was not full and true; the fact being that his wife, in whose employ he had been prior to marriage, had executed in his favor, after marriage, an instrument acknowledging an indebtedness, and stating

So also it is highly important to observe that a warranty as to the description of the premises by reference to a plan, survey or other paper of a certain date, expressed or implied, is not necessarily a warranty that such description will be accurate in all its details as of a later date; and particularly where the policy contains a privilege to make additions.[1] And if a map is referred to in the policy apparently for the purpose of showing the relative situation of buildings, descriptive words upon it as to use or contents should not be held to prevent a rearrangement of the contents.[2]

Sometimes in the "forms" or description in the policies as employed from year to year in renewing insurance on a certain property, the phrase "as per plan on file," or "as per survey on file" is used, whereas in fact such a plan or survey, though correct at the time when it was made, may be quite incorrect in particulars at date of renewal. Where both parties know that such a plan is out of date, the court implies an intent to refer to it for purposes of identification or description rather than as a warranty.[3]

A written application means one signed by the assured or by his authority. An application blank, if neither signed nor authorized by the assured, but filled out, signed and turned in to the company by its agent, does not bind the assured, though the company may have relied upon it.[4] Likewise a policy though expressly referring

that it should be a lien upon her property, *Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451. Where the insured described his building as "two stories high," the main part of the building in fact being two stories, but a small rear addition being only one story, the inaccuracy was held to be no breach of warranty, *Wilkins* v. *Germania Fire Ins. Co.*, 57 Iowa, 529. A warranty that a room is warmed by a stove, and that the pipe is well secured, means that the room is so warmed, and the pipe so secured, when the stove is in use; but not at other times, *Loud* v. *Citizens' Mut. Ins. Co.*, 2 Gray (Mass.), 221.

[1] *Arlington Mfg. Co.* v. *Colonial Assur. Co.*, 180 N. Y. 337 (plan on file with broker referred to in policy). And see *Butterworth* v. *Western Assur. Co.*, 132 Mass. 489. A warranty of present use is not of necessity a warranty of continuance, § 112, *supra*.

[2] *Fair* v. *Manhattan Ins. Co.*, 112 Mass. 320.

[3] *Clinton* v. *Hope Ins. Co.*, 45 N. Y. 454, aff'g 51 Barb. 647. The Supreme Court said: "the survey is referred to in that portion of the policy which is written in and is plainly and simply the means used to identify and describe the property to be insured. This is the more apparent since the reference by its terms refers to no particular survey, though three, made at different times, of the same property, were on file at the agent's office," *Vilas* v. *N. Y. Central Ins. Co.*, 9 Hun (N. Y.), 121 ("if the application was evidence for any purpose it informed the defendant of the nature of plaintiff's title at its date").

[4] *Blass* v. *Agricultural Ins. Co.*, 18 App. Div. 484, 46 N. Y. Supp. 392, aff'd 162 N. Y. 639, 57 N. E. 1104; *Benninghoff* v. *Agricultural Ins. Co.*, 93 N. Y. 495; *Mowry* v. *Agricultural Ins. Co.*, 64 Hun, 137, 18 N. Y. Supp. 834, aff'd 138 N. Y. 642, 34 N. E. 512. A false description of the property may prevent a meeting of the minds and so defeat the contract, *Sanders* v. *Cooper*, 115 N. Y. 279, 22 N. E. 212. An application signed by the president of another insurance company was held

to an application "whereon it is issued" is not void simply because there is no application.[1] And it is recognized generally that unanswered questions in an application constitute no part of the insurance contract.[2]

This clause is not in the Massachusetts form of policy.[3]

§ 283. Who are Agents of the Company.—*In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.*

This clause has already been discussed in a previous chapter, under the subject of waiver and estoppel.[4] If the company makes it true, they can have the benefit of it; otherwise not.[5] The clause is tantamount to a notice in respect to the method the company adopts to give authority to its agents; and if not true, or if in fact

not to be binding upon the insured, though referred to in the policy, *Denny* v. *Conway, etc., Ins. Co.*, 13 Gray (Mass.), 492.

[1] *Blake* v. *Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265. But if the policy expressly refer to an application the insured cannot repudiate the application on the ground that the agent making it had no authority to act for him, *Draper* v. *Charter Oak F. Ins. Co.*, 2 Allen (Mass.), 569.

[2] *Brown* v. *Greenfield Life Assn.*, 172 Mass. 498, 53 N. E. 129. And see p. 128, note 2; and § 113, *supra*.

[3] Statutes in some states provide in substance that misrepresentations only if material shall avoid the policy; others provide that application or by-laws of the company to become part of the policy must be set forth therein or attached thereto. See Appendix, ch. I. In Massachusetts an application to be treated as part of the contract must be incorporated into the policy accurately and in full, *Wheeler* v. *Watertown F. Ins. Co.*, 131 Mass. 1; *Taylor* v. *Ætna Ins. Co.*, 120 Mass. 254. And see *Nugent* v. *Greenfield L. Assn.*, 172 Mass. 278, 52 N. E. 440 (incorrect copy of application attached to policy was rejected); *Wainer* v. *Milford Mut. F. Ins. Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. Massachusetts, like other states, has statutory provision: "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss," Rev. L. Ins. (1907) § 21. This provision is held to refer to the application or preliminary negotiation and not to a condition contained in the policy itself, *Barker* v. *Met. Life Ins. Co.*, 188 Mass. 542, 74 N. E. 945 (cases cited from other states). The Iowa standard policy provides: "X. Any application, survey, plan, or description of property signed by the insured and referred to in this policy shall, when a copy is attached hereto, be a part of this contract, and shall be held to be a representation and not a warranty." The corresponding clause of the Michigan standard policy is as follows: "If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract, and a warranty by the insured as to material facts." The South Dakota standard policy is worded: "Neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract of insurance." Such phraseology usually, but not always, relegates the issue of materiality to the jury, §§ 93, 101, 109, *supra*.

[4] See ch. VIII, *supra*.

[5] *Knights of Pythias* v. *Withers*, 177 U. S. 260; *Bernard* v. *M. Life Ins. Assoc.*, 12 Misc. (N. Y.) 10.

the agent has an authority broad enough to waive it, the fact may be shown.[1]

Agency involves a relation existing between the company and the agent, independent of the policy, which is *res inter alios acta*, and hence the relation may be shown by evidence outside the policy.[2] Logically speaking, therefore, this stipulation should have been omitted from the conditions of the New York policy, as it is from the Massachusetts and other policies.[3]

A mere broker as such is agent for the insured who employs him, though he is paid by a percentage out of the premiums.[4] His knowledge and acts in connection with the procuring of insurance, therefore, are to be imputed to the insured as principal and not to the insurance company;[5] and payment of the premium to him is not payment to the company unless made so by statute or custom.[6]

[1] *Insurance Co.* v. *Norton*, 96 U. S. 234; *Smaldone* v. *Ins. Co.*, 162 N. Y. 580, 57 N. E. 168.

[2] *Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222; *Thuringia Ins. Co.* v. *Goldsmith*, 132 Fed. 456; *Williams* v. *Hartford Ins. Co.*, 54 Cal. 442, 35 Am. Rep. 77; *Commercial Ins. Co.* v. *Ives*, 56 Ill. 403; *Kausal* v. *Minn. Mut. Fire Ins. Assoc.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; see § 158. The editor of May on Ins. says: "It makes no difference that the policy declares the agent to be the agent of the assured, not of the company. For whom a person is acting is a matter of law on the facts of every case. The application precedes the policy; and to hold that a provision in the after-coming policy, unknown to the assured at the time of application, could turn the insurance agent into *his* agent, when he thought all the time he was dealing with him and accepting his advice as agent of the company, would be an outrage," May, Ins. (4th ed.), 286.

[3] Certain states have legislated upon this subject (Appendix, ch. I), as, for example, Iowa, the statute of which provides that the soliciting agent shall be held to be the agent of the insurance company, "anything in the application or policy to the contrary notwithstanding." Such statutes are constitutional and controlling, *Continental Life Ins. Co.* v. *Chamberlain*, 132 U. S. 304; *Phil. Fire Assoc.* v. *New York*, 119 U. S. 110, 7 S. Ct. 108; *McConnell* v. *Iowa Mut. Aid Assoc.*, 79 Iowa, 757. But they go to an opposite extreme. Certain standard policies differ from those of Massachusetts and New York. For example, the South Dakota provides: "Any person who solicits insurance or issues policies of insurance, or procures applications therefor, shall be held to be, and considered, the general agent of the insurer issuing the policy or making a renewal thereof, except as to proof of loss and adjustment thereof." The Wisconsin policy provides: "Up to the time of the delivery of the policy to assured, in all transactions relating to this policy or to the property herein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company."

[4] See § 75, p. 94, note 1.

[5] *Northrup* v. *Piza*, 43 App. Div. 284, aff'd 167 N. Y. 578; *Westchester Fire Ins. Co.* v. *Gurian*, 115 App. Div. 610; *Wisotzkey* v. *Hartford Fire Ins. Co.*, 112 App. Div. 596; *McGrath* v. *Home Ins. Co.*, 88 App. Div. 153. But a solicitor in the employ of one insurance office alone is not a broker, *Girardeau* v. *City of Atlanta Ins. Co.* (Ga. App., 1907), 58 S. E. 314. And under statutes a broker may also become agent for the insurance company, *Wicks Bros.* v. *Scottish U. & N. Ins. Co.*, 107 Wis. 606, 83 N. W. 781.

[6] See § 75, p. 94, note 1.

§ 284. **Renewals.**—*This policy may by a renewal be continued under the original stipulations, etc., provided that any increase of hazard must be made known, etc.*

A policy is sometimes renewed by the execution of a short form of instrument known as a renewal receipt which refers to the old policy and obviates the necessity of issuing a new policy with description and conditions.[1]

The company may make a valid renewal by parol,[2] even though the policy should stipulate that a renewal must be in writing.[3]

Any increase of hazard at time of renewal, if not disclosed, avoids the insurance.[4]

The renewal constitutes in effect a new contract for a further term, but otherwise based upon the same terms and conditions as the old,[5] unless some modification is agreed upon or mentioned.[6] As colloquially used and as sometimes employed by the courts the word "renewal" does not necessarily mean that all the provisions of the expiring policy are to continue.[7]

If an express promise is made by the company to grant a renewal upon the same terms as before, on failure to comply, the company will be compelled to reform in equity though the assured has omitted to read the new policy.[8] But if no such express promise

[1] Renewal receipts are now rarely employed, new policies being used for renewals instead.

[2] *King* v. *Cox*, 63 Ark. 204, 37 S. W. 877; *Squier* v. *Hanover Ins. Co.*, 162 N. Y. 552, 57 N. E. 93; *Abel* v. *Phœnix Ins. Co.*, 47 App. Div. 81, 62 N. Y. Supp. 218.

[3] *Cohen* v. *Continental Fire Ins. Co.*, 67 Tex. 325, 60 Am. Rep. 24. Otherwise under Georgia statute, *Roberts* v. *Germania F. Ins. Co.*, 71 Ga. 478.

[4] *Peoria Sugar Ref. Co.* v. *Peoples' Ins. Co.*, 52 Conn. 581; *Cole* v. *Germania Fire Ins. Co.*, 99 N. Y. 36, 1 N. E. 38. The disclosure may be made orally, *Liddle* v. *Market Ins. Co.*, 29 N. Y. 184.

[5] If nothing is said about premium, the presumption is that the old rate continues, *Train* v. *Holland Purchase Ins. Co.*, 62 N. Y. 598; *Post* v. *Ætna Ins. Co.*, 43 Barb. (N. Y.) 351; *Boice* v. *Ins. Co.*, 38 Hun (N. Y.), 247; *Baldwin* v. *Phœnix Ins. Co.*, 107 Ky. 356, 54 S. W. 13, 92 Am. St. R. 362. Likewise as to length of term, *Scott* v. *Home Ins. Co.*, 53 Wis. 238, 10 N. W. 238.

[6] *De Jernette* v. *F. & C. Co.*, 17 Ky. L. R. 1088, 33 S. W. 828; *Hay* v. *Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607; *Peacock* v. *New York Life Ins. Co.*, 20 N. Y. 293. The Illinois court says of a renewal which was evidenced by a new policy: "A renewal of a policy is in effect a new contract of assurance, and, unless otherwise expressed, on the same terms and conditions as were contained in the original policy," *Hartford Fire Ins. Co.* v. *Walsh*, 54 Ill. 164, 167.

[7] Thus the new contract is subject to local laws in force at the time of renewal, *Brady* v. *Northwestern Ins. Co.*, 11 Mich. 425. It may be issued to the assignee of the policy, *Peoria Ins. Co.* v. *Hervey*, 34 Ill. 46; or to the executor of the assured, *Phelps* v. *Gebhard Ins. Co.*, 9 Bosw. (N. Y.) 404; or to only one of several insured, *Lockwood* v. *Middlesex Ins. Co.*, 47 Conn. 553.

[8] *Palmer* v. *Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. 248, *Hay* v. *Star Ins. Co.*, 77 N. Y. 235; *Burson* v. *Phila. Fire Assoc.*, 136 Pa. St. 267, 20 Atl. 401. So a statement that policy has been renewed together with receipt of premium works estoppel against the company, *International Trust Co.* v

has been made, the assured, in the absence of fraud by the company, is bound by the terms of the renewal policy as written, including all modifications.[1]

By mutual consent the new contract may be modified in respect to any of its provisions, as where, for example, the company consents to a change of location.[2]

It is held that waivers and estoppels based upon knowledge of existing facts and operative on the original policy, will by implication be carried over to sustain renewals.[3]

This provision is omitted from the Massachusetts policy.

§ 285. Cancellation.—*This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short-rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.*

A contract of insurance presupposes mutual confidence and satisfaction. Therefore it is a wise provision which empowers either party to terminate it at his option, at any time, on just terms, with-

Norwich Union Ins. Soc., 71 Fed. 81, 36 U. S. App. 277, 17 C. C. A. 608.

[1] *Thomson* v. *Southern Mut. Ins. Co.*, 90 Ga. 78, 15 S. E. 652 (vacancy clause changed from twenty to ten days). In like manner it is held that a renewal receipt issued in the name of a firm covers the firm as constituted at the time of issuance, without disclosure of the changes, *Firemen's Ins. Co.* v. *Floss*, 67 Md. 403, 10 Atl. 139. The beginning of the term of renewal as defined in the renewal receipt will control even though in fact both application and renewal are of a later date, *Fuchs* v. *Ger. Farmers' Mut. Ins. Co.*, 60 Wis. 286. The terms of the renewal as written prevail, *Shopp* v. *Patrons' Mut. Fire Ins. Co.*, 197 Pa. St. 219, 47 Atl. 201.

[2] *Rathbone* v. *City Fire Ins. Co.*, 31 Conn. 193; *Kunzze* v. *Amer. Exch. Fire Ins. Co.*, 41 N. Y. 412. If the company, knowing of the change of location, without express consent issues the renewal receipt and receives the premium, this amounts to an implied consent to a change of location, *Ludwig* v. *Jersey City Ins. Co.*, 48 N. Y. 379, 8 Am. Rep. 556. But if the terms of the renewal contract are under negotiation and have not been definitely settled, the promise to give a renewal is not yet binding upon the company, *Johnson* v. *Conn. Fire Ins. Co.*, 84 Ky. 470; *O'Reilly* v. *Corporation of London Assurance*, 101 N. Y. 575, since there must be a meeting of the minds of the parties, *Royal Ins. Co.* v. *Beatty*, 119 Pa. St. 6, 12 Atl. 607; *King* v. *Hekla Ins. Co.*, 58 Wis. 508; *Johnson* v. *Connecticut Ins. Co.*, 84 Ky. 470. The burden of proof is upon the assured, *Giddings* v. *Phœnix Ins. Co.*, 90 Mo. 272. And if at time of renewal the property is already destroyed the renewal will not attach, *Dodd* v. *Home Ins. Co.*, 22 Oreg. 13, 29 Pac. 3, 28 Pac. 881.

[3] *Kruger* v. *Western Ins. Co.*, 72 Cal. 91, 13 Pac. 156; *Vanderhœf* v. *Agricultural Ins. Co.*, 46 Hun, 328; *People's Ins. Co.* v. *Spencer*, 53 Pa. St. 353. The full description of the property contained in the original is likewise carried over by inference, *Garrison* v. *Farmers' Mut. F. Ins. Co.*, 56 N. J. L. 235, 28 Atl. 8.

out the consent of the other.[1] Despite this clause, however, it has been held that the parties may, by mutual consent, properly evidenced, call off the contract instantaneously, or on any terms agreed to between them.[2]

Under the clause the right of either party is absolute. Motive or absence of good reason is therefore immaterial.[3]

§ 286. Notice must be Peremptory, Explicit, Unconditional.—A strict fulfillment of the requirements of the cancellation clause must be observed by the party thus seeking to terminate his contract prematurely.[4] Thus while the form of the request or notice, not being prescribed by the policy, may be by parol, or by telegraph, or over the telephone,[5] nevertheless, it must be couched in terms positive, distinct, unequivocal and unconditional. Nor will an expression of wish, or purpose, or intention to cancel in future, be sufficient.[6] So also the request or notice must contemplate an

[1] Without this clause neither could terminate his contract during its term without consent of the other, *Rothschild* v. *Am. Cent. Ins. Co.*, 74 Mo. 41, 41 Am. Rep. 303.

[2] *Sea Ins. Co.* v. *Johnston*, 105 Fed. 286, 44 C. C. A. 477; *Boland* v. *Whitman*, 33 Ind. 64 (mutual agreement); *Kirby* v. *Phœnix Ins. Co.*, 13 Lea (Tenn.), 340 (mutual agreement); *Wicks Bros.* v. *Scottish Union & Nat. Ins. Co.*, 107 Wis. 606, 83 N. W. 781; *Kooistra* v. *Rockford Ins. Co.*, 122 Mich. 626, 81 N. W. 568. Such a rule is doubtless sound if mutual consideration for the new arrangement can be shown, *Supple* v. *Cann*, 9 Ir. C. L. R. 1 (mutual promises will modify); *Miller* v. *Firemen's Ins. Co.*, 54 W. Va. 344, 46 S. E. 181. (surrender of policy on request); Mutual consent to cancel furnishes sufficient consideration, *National L. Ins. Co.* v. *Met. L. Ins. Co.*, 226 Ill. 102, 80 N. E. 747. The United States Supreme Court says, "a contract to cancel it is as solemn an act as a contract to make it," *Head* v. *Prov. Ins. Co.*, 2 Cranch, 127, 168. So the terms of the clause, it is said, may be modified or waived, *Southern Ins. Co.* v. *Williams*, 62 Ark. 382, 35 S. W. 1101; *Bingham* v. *North Am. Ins. Co.*, 74 Wis. 498, 43 N. W. 494 (by surrender of policy); *Ætna Ins. Co.* v. *Weissenger*, 91 Ind. 297 (waiver as to amount of return premium). Cancellation after loss is not valid though both parties be ignorant of loss, *Cassville Roller Mill Co.* v. *Ætna Ins. Co.*, 105 Mo. App. 146, 79 S. W. 720.

[3] *International Ins. Co.* v. *Franklin Ins. Co.*, 66 N. Y. 119; *Phœnix Mut. F. Ins. Co.* v. *Brecheisen*, 50 Ohio St. 542, 35 N. E. 53; *Sun Fire Office* v. *Hart*, L. R. 14 App. Cas. 98. The object being to put an end to a subsisting contract, the party alleging that result holds the burden of proof, *Phœnix Assur. Co.* v. *McArthur*, 116 Ala. 659, 22 So. 903.

[4] *Davison* v. *London & Lan. Ins. Co.*, 189 Pa. St. 132, 42 Atl. 2; *Baldwin* v. *Penn. Ins. Co.*, 206 Pa. St. 248, 55 Atl. 970; *Bradshaw* v. *Fire Ins. Co. of Phila.*, 89 Minn. 334, 94 N. W. 866; *Seamans* v. *Ins. Co.*, 90 Wis. 490, 63 N. W. 1059. A notice is essential, *Ætna Ins. Co.* v. *Rosenburg*, 62 Ark. 507, 36 S. W. 908; *Taylor* v. *Glens Falls Ins. Co.*, 44 Fla. 273, 32 So. 887.

[5] *Schwarzschild* v. *Phœnix Ins. Co.*, 124 Fed. 52, 59 C. C. A. 572; *Colonial Assur. Co.* v. *National F. Ins. Co.*, 110 Ill. App. 471; *Manchester Ins. Co.* v. *Ins. Co. of Ill.*, 91 Ill. App. 609; *Davidson* v. *German Ins. Co.* (N. J. L. 1907), 65 Atl. 996; but see *Healy* v. *Ins. Co.*, 50 App. Div. 327, 63 N. Y. Supp. 1055; *Springfield F. & M. Ins. Co.* v. *McKinnon*, 59 Tex. 507.

[6] *Van Tassel* v. *Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365; *Griffey* v. *N. Y. Cent. Ins. Co.*, 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; *Van Valkenburgh* v. *Lenox Fire Ins. Co.*, 51 N. Y. 465; *Partridge* v. *Mil. Mech. Ins.*

absolute termination of the entire contract, not a reduction of its amount, inasmuch as the terms of the clause offer no option to either party to cancel in part. Any such modification can only be accomplished by mutual agreement.

The rule is exemplified by the famous Van Tassel litigation. Van Tassel was the owner of a grain warehouse in New York City, on which he was carrying $30,000 insurance in several policies shortly expiring. He was induced by one of their solicitors to turn over the account to the brokerage house of Beecher & Benedict, who undertook to renew or replace the same amount upon expiration of the old policies. As part of such renewals a clerk from the placing department of Beecher & Benedict procured from the Greenwich Insurance Company a regular binder for $10,000 in favor of Mr. Van Tassel on his building for the term of twelve months from January 1st at noon. About a week thereafter, January 7th, the company, having meanwhile surveyed the risk,[1] sent this notice to the brokers: "Your application for renewal of insurance is declined for $10,000; would renew for $5,000 if wanted. You will, therefore, consider that the risk is not held binding by this company for more than $5,000." Six days thereafter and before any reply had been sent to the company the building was destroyed by fire. The court held that the binding slip was equivalent to a policy and could only be canceled *ex parte* by a five-day peremptory notice of termination, not by a proposal in effect to continue on the risk at a reduced amount. After many trials and arguments on appeal,[2] the insured, who had sued on the binder, recovered judgment for its full amount with interest.[3]

When the terms of the clause have been complied with, the return

Co., 13 App. Div. 519, 43 N. Y. Supp. 632, aff'd 162 N. Y. 597, 57 N. E. 1119; *Gardner* v. *Standard Ins. Co.*, 58 Mo. App. 611; *Am. Ins. Co.* v. *Brooks*, 83 Md. 22, 34 Atl. 373; *Savage* v. *Phœnix Ins. Co.*, 12 Mont. 458, 31 Pac. 66; *State Ins. Co.* v. *Hale* (Neb.), 95 N. W. 473 (an illegible notice ineffective); *Southern Ins. Co.* v. *Williams*, 62 Ark. 382, 35 S. W. 1101; *Davis Lumber Co.* v. *Hartford Ins. Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131; *Petersburg Ins. Co.* v. *Manhattan Ins. Co.*, 66 Ga. 446; *Newark Ins. Co.* v. *Sammons*, 110 Ill. 166. A proper notice is essential even though motive for cancellation is because of some default of the insured, *Dove* v. *Royal Ins. Co.*, 98 Mich. 122, 57 N. W. 30.

[1] This action was probably taken because the broker formerly in charge, displeased at losing the account, made some disparaging remarks to the company regarding the risk.

[2] See p. 97, note 1, *supra*.

[3] *Van Tassel* v. *Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365, *id.*, 28 App. Div. 163, 51 N. Y. Supp. 79; *McLean* v. *Am. Ins. Co.*, 122 Iowa, 355, 98 N. W. 146; *Western Assur. Co.* v. *Stoddard*, 88 Ala. 612. All these rules apply equally to the contract of fire insurance, whether evidenced by a policy, a renewal receipt, or a binding slip, *Van Tassel* v. *Greenwich Ins. Co.*, 151 N. Y. 130, 45 N. E. 365; *Karelsen* v. *Sun Fire Office*, 122 N. Y. 545, 25 N. E. 921. In the large cities a renewal is usually closed by a binder for convenience.

of the policy and its physical cancellation or defacement are not essential to the cancellation; but the request or notice does not become operative nor the period begin to run until such demand by the one party for cancellation is actually received by the other.[1]

§ 287. Cancellation by the Insured.—The insured can cancel forthwith at any time by request. No written notice is required, and by the better reason the surrender of the policy is not a prerequisite.[2] Cancellation is immediate and does not await return of unearned premium.[3]

But the New York Court of Appeals takes the exceptional view that to accomplish a cancellation the insured must both give notice and surrender the policy. As to whether the insured would be debarred from cancelling, if he had mislaid or lost the policy, no opinion is expressed.[4] One of the learned justices of that court has gone even further than this and says, "whether the insurer or the insured is the actor in the attempt to cancel, cancellation is not complete until the unearned premium is returned."[5] We may safely presume, however, that this phraseology was not intended to indicate, that the insurer, by withholding the unearned premium, may postpone a cancellation upon notice of the insured otherwise regular.

§ 288. Cancellation by the Company.—By other forms of policies either party could cancel *instanter*. But the assured may more

[1] *Farnum* v. *Phœnix Ins. Co.*, 83 Cal. 246, 23 Pac. 869; *Bankers' Mut. Cas. Co.* v. *People's Bank*, 127 Ga. 326, 56 S. E. 429; *Newark Ins. Co.* v. *Sammons*, 110 Ill. 166; *Crown Point Iron Co.* v. *Ætna Ins. Co.*, 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147 (not enough that it is in the mail). But see the extraordinary rule adopted by the Kentucky court, *Continental Ins. Co.* v. *Daniel*, 25 Ky. Law Rep. 1501, 78 S. W. 866 (holding that first there must be an act of cancellation and after that the notice).

[2] *Insurance Commissioners* v. *Peoples' Fire Ins. Co.*, 68 N. H. 51, 44 Atl. 82. If he is dissatisfied with the policy the proper thing to do is to return it and not rely upon a notice only, *Farmers' Ins. Co.* v. *Phœnix Ins. Co.*, 65 Neb. 14, 90 N. W. 1000, 95 N. W. 3; *Clem* v. *German Ins. Co.*, 29 Mo. App. 666.

[3] *Parsons* v. *Northwestern N. Ins. Co.* (Iowa, 1907), 110 N. W. 907. To get his return premium, however, he must surrender the policy. The company then retains short rates (short rates are a little more than the regular rates) and pays back to the assured the balance of the premium received by it, *Home Ins. Co.* v. *Burnett*, 26 Mo. App. 175; *State Ins. Co.* v. *Horner*, 14 Colo. 391, 23 Pac. 788. If no premium has been paid to it, but credit given, the company has its right of action for the proportion of premium due, *Manhattan Ins. Co.* v. *Harlem R. Lumber Co.*, 26 Misc. 394, 56 N. Y. Supp. 186; *St. Paul F. & M. Ins. Co.* v. *Neidecken*, 6 Dak. 494, 43 N. W. 696. As to authority of agent of assured to cancel, see *Northern Assur. Co.* v. *Hamilton*, 50 Neb. 248, 69 N. W. 781; and see § 288. Agent of company cannot rescind the contract without consent of the parties, *Massasoit, etc., Co.* v. *Assur. Co.*, 125 Mass. 110.

[4] *Buckley* v. *Citizens' Ins. Co.*, 188 N. Y. 399, 405.

[5] *Buckley* v. *Citizens' Ins. Co.*, 188 N. Y. 399, 405 (Vance, J., in dissenting opinion).

reasonably be afforded at least a short period within which to replace his insurance whenever notice of cancellation comes from his insurer.[1] The standard policy accordingly gives him five days for this purpose; and during the five days he is still covered.[2]

Prior to the adoption of the standard form, it was held in many decisions under an earlier clause, that in order to effect a cancellation, the company, if in receipt of the premium, must accompany its notice with a payment or tender of the unearned portion of the premium.[3] This rule was onerous to the companies. A company has a fixed habitation and is solvent, else the insurance department would not allow it to transact business. Upon cancellation of a policy the insurer is as much entitled to a surrender of the policy as the assured is to a return of the unearned premium.[4] The insured are scattered all over the country. Sometimes several notices must be sent before the right party can be found. Legal tender can be made only in cash.[5] Rates of premium are so low that no company can afford, in general, to make personal tender. It is not safe to send cash by mail, and though the assured receive the remittance, if unscrupulous, he may deny it, and, though honest, after getting his cash he will seldom take the trouble to return the policy until it is demanded.[6] The framers of the standard policy, therefore, inserted the seemingly unambiguous statement that the notice by itself shall cancel, but that "the unearned premium shall be returned on surrender of this policy or last renewal." In the opinion of some of the courts, the provision must be enforced as it reads.[7]

[1] *Emmott* v. *Slater Mut. F. Ins. Co.*, 7 R. I. 562. In some states statutes have provided for this. Appendix, ch. I.

[2] *Healey* v. *Ins. Co.*, 50 App. Div. 327, 63 N. Y. Supp. 1058; *Wicks Bros.* v. *Scottish U. & N. Ins. Co.*, 107 Wis. 606, 83 N. W. 781. But when broker has replaced he is apt to telephone the prior insurer that it is off the risk, which is then a termination by mutual consent though the five days have not run, *Arnfeld* v. *Guardian Assur. Co.*, 172 Pa. St. 605, 34 Atl. 580.

[3] *Van Valkenburgh* v. *Lenox Ins. Co.*, 51 N. Y. 465; *German Ins. Co.* v. *Rounds*, 35 Neb. 752; *Manlove* v. *Commercial Ins. Co.*, 47 Kan. 309, 27 Pac. 979. The company must return the whole unearned premium and not deduct any part of the broker's commission, *Scottish U. & N. Ins. Co.* v. *Dangaix*, 103 Ala. 388; *McKenna* v. *Ins. Co.*, 30 Misc. 727, 63 N. Y. Supp. 164.

[4] *Senor* v. *Ins. Co.*, 181 Mo. 104, 114, 79 S. W. 687.

[5] *Quong Tue Sing* v. *Assur. Corp.*, 86 Cal. 566, 25 Pac. 58 (other insurance instead is no tender).

[6] Until policy is actually surrendered the company is solicitous lest some claim be based upon it by the insured or some assignee.

[7] *Schwarzchild* v. *Phœnix Ins. Co.*, 124 Fed. 52, 59 C. C. A. 572; *El Paso Reduction Co.* v. *Hartford Ins. Co.*, 121 Fed. 937; *Davidson* v. *German Ins. Co.* (N. J. L., 1907), 65 Atl. 996; *Parsons* v. *Northwestern Nat. Ins. Co.* (Iowa), 110 N. W. 907; *Backus* v. *Exchange Ins. Co.*, 26 App. Div. 91, 49 N. Y. Supp. 677; *Walthear* v. *Penn. Ins. Co.*, 2 App. Div. 328, 37 N. Y. Supp. 857; and see *Buchanan* v. *West. Co. Mut. Ins. Co.*, 61 N. Y. 611, 612; *Ins. Co.* v *Brecheisen*, 50 Ohio St. 542, 35 N. E. 53; *Straker* v. *Phœnix Ins. Co.*, 101 Wis. 413, 421, 77 N. W. 752.

But, by the current of authority up to this date, the duty is laid upon the company, when seeking cancellation under the standard policy, to accompany its notice of cancellation with payment or actual tender of the return premium in order to make the notice operative. Such courts apparently consider it unconscionable to allow the company to get off the risk without simultaneously reinstating the assured, and putting him in funds with which to procure his substitute insurance.[1] It is indeed difficult, however, to escape the conclusion of the dissenting judges in the New York Court of Appeals, voiced by the chief justice, that this is by interpretation to substitute a new contract in place of unambiguous terms adopted by the legislature.[2]

In computing the required time of five days the day of service is excluded and the cancellation is not complete until midnight of the fifth day thereafter though the policy itself runs from noon.[3]

The notice must be given to the assured himself,[4] or to someone duly authorized to receive it on his behalf.[5] A broker or agent em-

[1] *Tisdell* v. *New Hampshire Ins. Co.*, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765; *Nitsch* v. *Am. Cent. Ins. Co.*, 152 N. Y. 635, 46 N. E. 1149; *Buckley* v. *Citizens' Ins. Co.*, 188 N. Y. 399; *Peterson* v. *Hartford Ins. Co.*, 87 Ill. App. 567, 111 Ill. App. 466; *Hartford Ins. Co.* v. *McKenzie*, 70 Ill. App. 615; *Chrisman, etc., Banking Co.* v. *Hartford Ins. Co.*, 75 Mo. App. 310 (the reasoning does not lead to the result); *Phila. Linen Co.* v. *Manhattan Fire Ins. Co.*, 8 Pa. Dist. R. 261; *Phœnix Assur. Co.* v. *Munger Mfg. Co.*, 92 Tex. 297, 49 S. W. 222; *Hartford Ins. Co.* v. *Cameron* 18 Tex. Civ. App. 237, 45 S. W. 158. And see *Hamburg-Bremen Ins. Co.* v. *Browning*, 102 Va. 890, 893. The Mississippi court seems to have gone to yet greater extremes in favor of the insured, *Miss. Fire Assoc.* v. *Dobbins*, 81 Miss. 630. But it is sufficient, if the company's agent, under instructions from the insured, use the money to procure other insurance, *Hillock* v. *Traders' Ins. Co.*, 54 Mich. 531, 20 N. W. 571; *Miller* v. *Home Ins. Co.*, 71 N. J. L. 175, 58 Atl. 98. Or the insured may accept in satisfaction less than the full amount of unearned premium, *Ætna Ins. Co.* v. *Weissinger*, 91 Ind. 297.

[2] *Tisdell* v. *New Hampshire F. Ins. Co.*, 155 N. Y. 163, 170, *supra*.

[3] *Penn. Plate Glass Co.* v. *Spring Garden Ins. Co.*, 189 Pa. St. 255, 42 Atl. 138. But the notice will run from its receipt though the wrong date be given in it, *Phila. Linen Co.* v. *Manhattan F. Ins. Co.*, 8 Pa. Dist. Ct. 261.

[4] *Taylor* v. *Glens Falls Ins. Co.*, 44 Fla. 273, 32 So. 887. It is usually sent by registered mail to secure some proof of service.

[5] *Farnum* v. *Phœnix Ins. Co.*, 83 Cal. 246, 23 Pac. 869; *Edwards* v. *Ins. Co.*, 101 Mo. App. 45, 73 S. W. 886 (bookkeeper); *Von Wien* v. *Ins. Co.*, 54 N. Y. Super. Ct. 276; *Trundle* v. *Prov. Wash. Ins. Co.*, 54 Mo. App. 188 (insured's husband); *Dickert* v. *Ins. Co.*, 52 S. C. 412, 29 S. E. 786. The person liable to pay the premium is said to be, in general, the person to serve, *Peterson* v. *Hartford F. Ins. Co.*, 87 Ill. App. 567. But the assured may ratify an unauthorized cancellation if he accepts as a substitute a new policy in place of that attempted to be canceled, *Larsen* v. *Ins. Co.*, 208 Ill. 166, 70 N. E. 31; *Hopkins* v. *Phœnix Ins. Co.*, 78 Iowa, 344, 43 N. W. 197; *Arnfeld* v. *Assur. Co.*, 172 Pa. St. 605, 34 Atl. 580. So also policy is canceled after five days without a return of premium if insured instructs agent to use amount in procuring other insurance, *Citizens' Ins. Co.* v. *Henderson El. Co.* (Ky., Oct., 1906), 96 S. W. 601. An instruction to the agent to replace ratifies the cancellation, *Hillock* v. *Traders' Ins. Co.*, 54 Mich. 531.

ployed merely for the purpose of procuring insurance has no implied authority to cancel, or to accept an operative notice of cancellation. On receiving the policies and transmitting them to the principal his authority terminates.[1] His duty is to get insurance for his customer, not to destroy it. Hence it follows reasonably, that notice of cancellation by the company served upon such an agent of the insured is unavailing.[2] But, on the other hand, until the policy is delivered or so long as the contract rests upon a binding slip in charge of the broker, the broker may be served and he can also agree to cancellation *instanter* in his discretion.[3] So also notice given to an agent of the assured in general and continuous charge of his insurance matters is sufficient.[4]

In connection with the cancellation or attempted cancellation of a policy, and the substitution or attempted substitution of a policy from another company in its place, the practical question not infrequently arises as to whether both policies are in force at the time of the fire, or, if only one of them, which one. Where the aggregate insurance available exceeds the loss, a controversy over such an issue is sometimes managed, though in the name of the insured, yet in reality by one of the insurers, who claims to be exempt, and who aims in the action first tried to so determine the principle at stake as to fasten the entire responsibility upon the other insurers.

And see *Hamburg-Brem. F. Ins. Co.* v. *Browning*, 102 Va. 890, 48 S. E. 2. A surrender of policy without exacting payment of return premium ratifies cancellation, *Bingham* v. *Ins. Co.*, 74 Wis. 498, 43 N. W. 494; *Buckley* v. *Citizens' Ins. Co.*, 188 N. Y. 399, 81 N. E. 165; *Miller* v. *Firemen's Ins. Co.*, 54 W. Va. 344, 46 S. E. 181. If the new company knows nothing about the proposed substitution and issues a policy unconditionally, then the assured may claim on both policies. See *Beirmeister* v. *City of London Ins. Co.*, 61 Hun, 620, 15 N. Y. Supp. 433, 39 N. Y. St. R. 741, aff'd 133 N. Y. 564, 30 N. E. 1149.

[1] *Niagara F. Ins. Co.* v. *Raden*, 87 Ala. 311, 13 Am. St. R. 36; *Brit.-Am. Assur. Co.* v. *Cooper*, 26 Colo. 452, 58 Pac. 592; *Broadwater* v. *Lion F. Ins. Co.*, 34 Minn. 465, 26 N. W. 455; *Mut. Assur. Soc.* v. *Ins. Co.*, 84 Va. 116, 4 S. E. 178; *Wisconsin Cent. Ry. Co.* v. *Phœnix Ins. Co.*, 123 Wis. 313, 101 N. W. 703.

[2] *Grace* v. *Am. Cent. Ins. Co.*, 109 U. S. 278, 3 S. Ct. 207, 27 L. Ed. 932; *Merchants' Ins. Co.* v. *Shults*, 8 Kan. App. 798, 57 Pac. 306; *Kooistra* v. *Rockford Ins. Co.*, 122 Mich. 626, 81 N. W. 568; *Hermann* v. *Niagara Fire Ins. Co.*, 100 N. Y. 411; *Healy* v. *Ins. Co.*, 50 App. Div. 327, 63 N. Y. Supp. 1055; *Martin* v. *Palatine Ins. Co.*, 106 Tenn. 523, 61 S. W. 1024; *Davis Lumber Co.* v. *Ins. Co.*, 95 Wis. 226, 70 N. W. 84.

[3] *Ikeller* v. *Ins. Co.*, 24 Misc. 136, 53 N. Y. Supp. 323; *Karelsen* v. *Sun Fire Office*, 122 N. Y. 545, 25 N. E. 921; *Lipman* v. *Niagara Ins. Co.*, 121 N. Y. 454, 24 N. E. 699. And if on receiving the notice the assured sends the policy to his broker, that act impliedly puts the broker in charge, *Parker, etc., Mfg. Co.* v. *Exch. Ins. Co.*, 166 Mass. 484, 44 N. E. 614.

[4] *Snyder* v. *Commercial Ins. Co.*, 67 N. J. L. 7, 50 Atl. 509; *Faulkner* v. *Manchester F. Assur. Co.*, 171 Mass. 349, 50 N. E. 529; *Dibble* v. *Northern Assur. Co.*, 70 Mich. 1, 37 N. W. 704; *Stone* v. *Franklin Fire Ins. Co.*, 105 N. Y. 543, 12 N. E. 45. A broker is agent for the assured and whether he

A litigation of this character grew out of the destruction of Snyder's department store in Newark, in the loss of which many insurance companies were interested. The new or substituted company was in that case held liable; and the first company was relieved. The conclusion of the court rested upon the finding of fact that the broker, who had continuous charge of Snyder's insurance, was a general agent for him, and authorized as such to be served with notice of cancellation from the first company, and to replace the amount with the second company, the defendant. Counsel for the first company took charge of the litigation, in the name of Mr. Snyder.[1]

In a Pennsylvania case there was no proof that the broker was a general agent for the assured to receive cancellation notices, and moreover the fire occurred three days, and not five, after the defendant had given notice of cancellation to the broker, which was only an oral notice at that; nevertheless, the defendant was exonerated, and another company which had replaced the amount prior to the fire was held responsible. But here, irrespective of the broker's authority, the insured ratified the substitution by collecting from the second company a share of the loss, and all three principals, to wit, the insured and both companies, were aware of the facts and intended that the second policy should be a mere substitute for the first.[2]

In a New York case the policy for $2,000 issued by the defendant, never having been effectively canceled, remained liable, while the later insurance, procured without authority of the plaintiff and never accepted by her, was not liable. November 24th the defendant sent to its own local agent, Jacoby, a notice of cancellation addressed to the plaintiff. Instead of forwarding the notice to the plaintiff and tendering her the unearned premium, Jacoby procured

has authority to cancel or receive notice is generally a question of fact, *Snyder* v. *Commercial Ins. Co.*, 67 N. J. L. 7, 50 Atl. 509; *Ikeller* v. *Hartford Ins. Co.*, 24 Misc. 136, 53 N. Y. Supp. 323; *Buick* v. *Mechanics' Ins. Co.*, 103 Mich. 75, 61 N. W. 337; *Schauer* v. *Queen Ins. Co.*, 88 Wis. 561, 60 N. W. 994; *Standard Oil Co.* v. *Triumph Ins. Co.*, 64 N. Y. 85. Notice to a mortgagee will not cancel the mortgagor's policy, *Hartford F. Ins. Co.* v. *Peterson*, 209 Ill. 112, 70 N. E. 757, and notice to mortgagor will not cancel as to mortgagee, *State Ins. Co.* v. *Hale* (Neb., 1901), 95 N. W. 473. In like case return premium cannot be paid to mortgagee, *Lattan* v. *Royal Ins. Co.*, 45 L. J. L. 453. But see *Burris* v. *Phœnix Ins. Co.*, 65 Mo. App. 157; *Mueller* v. *Ins. Co.*, 87 Pa. St. 399.

[1] *Snyder* v. *Commercial Union Assur. Co.*, 67 N. J. L. 7, 50 Atl. 507. And see *White* v. *German Alliance Ins. Co.*, 103 Fed. 260, 93 Fed. 161; *Hamm Realty Co.* v. *New Hampshire Fire Ins. Co.*, 80 Minn. 139, 83 N. W. 41 (substituted and not first company held liable).

[2] *Arnfeld* v. *Guardian Assur. Co.*, 172 Pa. St. 605, 34 Atl. 580.

two policies for $1,000 each from two other companies, and mailed the new policies to the plaintiff November 29th, together with a letter informing her that they were in place of the defendant's policy which she was asked to return. This letter with enclosures was received by the plaintiff on a Saturday afternoon, but not examined until after the fire which occurred Saturday night.[1]

The situation is often complicated by the fact that the same person is at once local agent for the companies and agent for the insured to procure fresh insurance in place of that canceled or attempted to be canceled. Thus in one case it was held that the agent for the insurance companies was, at the same time, in so far a general agent for the plaintiff that, without the special knowledge or consent of the plaintiff, the agent could accept cancellation on plaintiff's behalf from one of the companies which the agent represented and replace the amount in another company which he represented.[2]

But where the company's agent had no such general authority to act for the insured, it was held that the cancellation of the first policy was not effectual, inasmuch as the substituted insurance, though written, was never delivered to the plaintiff until after the fire, nor accepted by him at any time.[3]

On the other hand, where even after loss the local agent of insurance companies informs the insured that a policy in one company has been canceled, and the amount replaced in another company, the insured may ratify the unauthorized acts and is concluded by his election to ratify them, thus relieving the first company.[4]

A somewhat different state of facts is presented in a Kentucky case. In pursuance of instructions from the home office, a local agent of the defendant told the insured that the company had ordered the policy canceled and wanted the policy. In response the insured promised to get the policy. The agent also told the insured that the policy would hold good until another policy in another company for like amount was sent him. The old policy was returned to the local agent and by him marked canceled. The agent endeavored to procure fresh insurance but failed. More than five days after notice of cancellation was thus given the fire occurred. The court held that except for the special promise of the agent postponing its operation the cancellation would have been complete, but

[1] *Partridge* v. *Mil. Mech. Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632, aff'd, 162 N. Y. 597.

[2] *Dibble* v. *Northern Assur. Co.*, 70 Mich. 1, 37 N. W. 704, 14 Am. St. R. 470.

[3] *Stebbins* v. *Lancashire Ins. Co.*, 60 N. H. 65.

[4] *Larsen* v. *Thuringia Am. Ins. Co.*, 208 Ill. 166, 70 N. E. 31.

the insured had a right to rely upon the extension for a reasonable time.[1]

But if, however, the insured knows that the agent's orders from the company are to cancel forthwith, or as soon as possible, the insured would have no right to rely upon an inconsistent promise by the agent to postpone the cancellation or to extend the term of the subsisting policy.[2]

The company cannot cancel after loss,[3] or when a fire is approaching or imminent.[4]

The Massachusetts and certain other standard policies are worded differently. The Massachusetts form is as follows: *This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short-rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.*[5]

Where, as in the Massachusetts standard policy, it is provided that the insurance is terminable by the company on giving a ten-day notice and refunding a ratable proportion of the premium, giving the notice of cancellation is not of itself sufficient, but the policy continues in force until after payment or tender of the return premium.[6]

[1] *Citizens' Ins. Co.* v. *Henderson Elevator Co.* (Ky., 1906), 96 S. W. 601.

[2] *Miller* v. *Firemen's Ins. Co.*, 54 W. Va. 344, 46 S. E. 181.

[3] *Ritchie* v. *Home Ins. Co.*, 104 Mo. App. 146, 78 S. W. 341.

[4] *Home Ins. Co.* v. *Heck*, 65 Ill. 111; *Duncan* v. *N. Y. Mut. Ins. Co.*, 61 N. Y. Super. Ct. 13, 18 N. Y. Supp. 863, 46 N. Y. St. R. 241 (both parties being ignorant of loss, cancellation was rescinded in equity). Relief was granted where the wrong policy was surrendered and canceled, *Von Wien* v. *Scottish Union & Nat. Ins. Co.*, 118 N. Y. 94, 23 N. E. 123. Compare *Birnstein* v. *Stuyvesant Ins. Co.*, 83 App. Div. (N. Y.) 436, 82 N. Y. Supp. 140.

[5] The New Hampshire policy adds to the Massachusetts clause: "Mutual companies may vary this clause to suit their methods of business." The Iowa policy is like the New York, but states: "or by the company by giving five days' notice of such cancellation either by registered letter directed to the insured at his last known address, or by personal written notice." The Wisconsin policy varies from the New York in the following phrase: "or by the company by giving five days' notice of such cancellation, unless during a time in which the hazard shall be increased solely by the act of God, and in such case and during such time of such increase of hazard the company shall not cancel this policy, except upon sixty days' notice of such cancellation without the consent of the assured."

[6] *White* v. *Connecticut Ins. Co.*, 120 Mass. 330; *Lyman* v. *State Mut. Fire Ins. Co.*, 14 Allen (Mass.), 329.

§ 289. **Return Premium when Policy becomes Void.**—In addition to the provisions regarding cancellation, it should be observed that by the terms of the New York standard clause, where the policy subsequent to its inception becomes void or ceases from any cause, the assured, on surrender of the policy,[1] becomes entitled to a return of the unearned portion of the premium, if the premium has been paid.[2]

§ 290. **Mortgagee Clause.**—*If with the consent of this company an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto.*

A mortgagee may employ various methods for protecting his interest by insurance.[3] He can take out insurance upon the property for his own benefit exclusively, paying the premiums himself. He is then the sole insured.[4] His interest and right of recovery are limited to the amount of the indebtedness; but the debtor cannot claim the benefit of the insurance.[5] If the debt is paid the insur-

[1] *Senor* v. *Ins. Co.*, 181 Mo. 104, 114, 79 S. W. 687.

[2] Nor in any case can the company deduct anything on account of the amount which has been allowed to the broker of the assured for his commissions, although these commissions have come out of the premium paid. See § 75, note 1.

[3] In *Palmer Savings Bank* v. *Ins. Co.*, 166 Mass. 189, the court says: "A mortgagor and a mortgagee have each an insurable interest in the property; each can insure for his own benefit, the mortgagor for the full value of the property, and the mortgagee for the full value of his interest in the property and neither can avail himself in any way of the money recovered from insurance by the other unless there is some contract making it so available. . . . At first the policy usually was issued to the mortgagor in the common form, and was then assigned by him to the mortgagee to the extent of his interest, and the insurance company assented to the assignment. Afterwards the provisions for the benefit of the mortgagee were inserted in the body of the policy. But such policies, unless there were stipulations to the contrary, were avoided as to the mortgagee by any act of the mortgagor which avoided the policy as to him."

[4] *Boyd* v. *Thuringia Ins. Co.*, 25 Wash. 447, 65 Pac. 785 (the effect of mortgagor's acts upon mortgagee's policy considered).

[5] *Carpenter* v. *Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044; *Dunbrack* v. *Neall*, 55 W. Va. 565, 47 S. E. 303; *Burlingame* v. *Goodspeed*, 153 Mass. 24; *International Trust Co.* v. *Boardman*, 149 Mass. 158, 21 N. E. 239; *McIntire* v. *Plaisted*, 68 Me. 363; *Foster* v. *Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544. But if the insurance has been procured by the mortgagee on account of the mortgagor, or at his cost, the payment of insurance must be applied to reduce the debt, *Waring* v. *Loder*, 53 N. Y. 581. The Vermont court has held that the mortgagee must apply the proceeds of the insurance to the indebtedness as it becomes due and hence may lose for the time a right to foreclose to which otherwise he would be entitled, *Thorp* v. *Croto* (Vt., 1907), 65 Atl. 562.

ance falls, since the mortgagee then loses his insurable interest.[1] This method, however, is seldom satisfactory to the mortgagee, who prefers to take the interest accruing from the mortgage free and clear of any expense of insurance. If the mortgagor has contracted to give the mortgagee the benefit of insurance, the mortgagee will have an equitable lien upon the proceeds;[2] but in the absence of some contract with the mortgagor he has no interest whatsoever in the mortgagor's policies.[3] Likewise as before stated, unless there is some agreement between mortgagor and mortgagee to that effect, the mortgagor cannot avail himself in any way of the proceeds of insurance which the mortgagee has taken out independently and exclusively for his own security.[4]

This doctrine, however, does not mean that a mortgagee with his own independent insurance is to retain for his own benefit a double payment for his debt, one from the insurer and a second from the mortgagor. In most jurisdictions the principle of subrogation is applied to prevent this result, even though the policy contain no express provision on the subject.[5]

Though he contract with the mortgagor so to do, the mortgagee may not, for the benefit of himself and the mortgagor, take out insurance in his own name exclusively, since he would thereby violate the condition of sole and unconditional ownership contained in the policy. Accordingly the usual method of securing to a mortgagee the benefit of insurance is by the addition of a special provision in his favor, inscribed upon the face of the mortgagor's policy, and accompanied by the delivery of the original policy or a duplicate to the mortgagee. A special clause, for this purpose, in former years usually consisted simply of an indorsement on the face of the policy of the words "Loss, if any, payable to A. B., mortgagee," or to "A. B., mortgagee, as his interest may appear," or some similar phrase, and such phrases are still in common use. A mortgagee, however, should not be content with a mere payee clause in New

[1] *Reynolds* v. *London & Lan. Fire Ins. Co.*, 128 Cal. 16, 60 Pac. 467; *Uhfelder* v. *Palatine Ins. Co.*, 44 Misc. 153, 89 N. Y. Supp. 792.

[2] *Wheeler* v. *Ins. Co.*, 101 U. S. 439, 25 L. Ed. 1055; *Ætna Ins. Co.* v. *Thompson*, 68 N. H. 20, 40 Atl. 396; *Swearingen* v. *Hartford Ins. Co.*, 52 S. C. 309, 29 S. E. 722, 56 S. C. 355, 34 S. E. 449.

[3] *Farmers' Loan & Tr. Co.* v. *Penn. Plate Glass Co.*, 186 U. S. 434, 22 S. Ct. 842, 46 L. Ed. 1234 (in which it was also held that a covenant by mortgagor to insure for benefit of mortgagee would not run with the title to a purchaser); *Guill's Admr.* v. *Corinth Bank* (Ky.), 68 S. W. 870. And a mere authority to insure for another does not create an obligation to do so, *Willard* v. *Welch*, 94 App. Div. 179.

[4] *Palmer Savings Bk.* v. *Ins. Co.*, 166 Mass. 189.

[5] See § 53, *supra*. *Gillespie* v. *Scottish Union & N. Ins. Co.* (W. Va., 1906), 56 S. E. 213.

York and in most of the states, since such a form of indorsement leaves him too largely at the mercy of his debtor.[1] In most jurisdictions, in such a case, he is held to be entitled to recover only subject to any defenses available to the company against the insured mortgagor. Hence if the mortgagor has violated any condition of the contract, the mortgagee, a mere payee, will take nothing.[2] Thus an award is binding on the mortgagee as payee, though he was not a party to it.[3] And so is an election on the part of the company to rebuild or reinstate, although the payee may not even have knowledge that the company has chosen this method of fulfilling its contract.[4]

There is a conflict of opinion as to whether the mortgagee thus

[1] *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. 165, 173, 12 C. C. A. 531.

[2] See § 237, *supra; Bates* v. *Equitable Ins. Co.*, 10 Wall. (U. S.) 33; *Holbrook* v. *Baloise F. Ins. Co.*, 117 Cal. 561, 49 Pac. 555; *Scania Ins. Co.* v. *Johnson*, 22 Colo. 476, 45 Pac. 431 (mortgagee held bound by award, though he was not a party to it); *Staats* v. *Georgia Home Ins. Co.*, 57 W. Va. 571, 50 S. E. 815; *Moore* v. *Hanover Fire Ins. Co.*, 141 N. Y. 219, 36 N. E. 191, 56 N. Y. St. R. 801; *Rosenstein* v. *Traders' Ins. Co.*, 79 App. Div. 481, 79 N. Y. Supp. 736; *Farmers' Bank* v. *Manchester Assur. Co.*, 106 Mo. App. 114, 80 S. W. 299, 301 (1904); *Franklin Ins. Co.* v. *Wolff*, 23 Ind. App. 556, 54 N. E. 772 (purely a contract between mortgagor and company); *Monroe B. & L. Assoc.* v. *L. & L. & G. Ins. Co.*, 50 La. Ann. 1243, 24 So. 238; *Milliken* v. *Woodward*, 64 N. J. L. 444, 450, 45 Atl. 796; *Sun Ins. Co.* v. *Bldg. & L. Assoc.*, 58 N. J. L. 367, 33 Atl. 962; *Jaskulski* v. *Ins. Co.*, 131 Mich. 603, 92 N. W. 98; *Cronin* v. *Fire Assoc. of Phila.*, 112 Mich. 106, 70 N. W. 448; *Antes* v. *State Ins. Co.*, 61 Neb. 55, 84 N. W. 412; *Hocking* v. *Va. F. & M. Ins. Co.*, 99 Tenn. 729, 42 S. W. 541; *Hamburg-Bremen F. Ins. Co.* v. *Ruddell* (Tex. Civ. App.), 82 S. W. 826; *Keith* v. *Royal Ins. Co.*, 117 Wis. 531, 94 N. W. 295. In several jurisdictions, however, a mere payee clause, construed in conjunction with the clause at the head of this section is held to create an independent contract with the mortgagee, or other interested payee, and to relieve the mortgagee of the effect of forfeitures by mortgagor, *Crawford* v. *Aachen & M. Ins. Co.*, 100 Ill. App. 454 (cancellation clause); *Queen Ins. Co.* v. *Dearborn Sav. Loan Assoc.*, 175 Ill. 115, 51 N. E. 717 (one year limitation to begin suit); *Christenson* v. *Fidelity Ins. Co.*, 117 Iowa, 77, 90 N. W. 495 (foreclosure proceedings); *East* v. *New Orleans Ins. Assoc.*, 76 Miss. 697, 26 So. 691 (conveyance of title); *Senor* v. *Western Millers' Ins. Co.*, 181 Mo. 104, 79 S. W. 687 (additional insurance does not forfeit as to mortgagee); *Henton* v. *Farmers' Ins. Co.* (Neb.), 95 N. W. 670 (foreclosure proceedings); *Boyd* v. *Thuringia Ins. Co.*, 25 Wash. 447, 65 Pac. 785 (alienation and subsequent insurance). These cases last cited exhibit a strained construction in favor of the appointee and would seem to make the standard policy with such an indorsement a well nigh unconditional agreement to indemnify him. The real purpose of the framers of the policy is illustrated by the similar clause relating to mutual companies.

[3] *Collinsville Sav. So.* v. *Boston Ins. Co.*, 77 Conn. 676, 60 Atl. 647; *Chandos* v. *Am. Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390; but see *Brown* v. *Roger Williams Ins. Co.*, 5 R. I. 394; *Bergman* v. *Commercial Union Assur. Co.*, 92 Ky. 494, 18 S. W. 122, 15 L. R. A. 270; *Georgia Home Ins. Co.* v. *Stein*, 72 Miss. 943, 18 So. 414.

[4] *Heilmann* v. *Westchester F. Ins. Co.*, 75 N. Y. 7. The company and the mortgagor cannot ignore the mortgagee, though merely a payee, to the extent of closing a settlement or effecting an accord and satisfaction without his assent, *Hathaway* v. *Orient Ins. Co.*, 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514.

named as payee will forfeit his interest by commencing foreclosure proceedings without written consent.[1] Not being the insured, however, a mere payee by assigning his interest in the insurance does not violate the clause prohibiting an assignment of the policy.[2]

Where the loss is made payable to the mortgagee as sole payee, and he collects it, he must hold any balance beyond his interest, in the capacity of trustee for the mortgagor, the insured;[3] but where the loss is made payable to mortgagee as his interest may appear, he is entitled to collect only the amount of his interest.[4] By the terms of the policy the insured, and not a mere payee, should make the proof of loss.[5]

§ 291. **The Same—Standard Mortgagee Clause.**—To the mortgagee class belong saving banks, trust companies, and many other institutions, as well as individual creditors. In general, mortgagees offer a moral risk exceptionally desirable. For the misconduct of their debtors, of which they are innocent, they should not be made to suffer. Accordingly the regular and approved method of securing to a mortgagee the benefit of insurance is by attaching to the mortgagor's policy a rider known as the standard mortgagee clause,[6] and delivering to him the original policy or a duplicate. The policy as thus modified is held to include two separate contracts largely

[1] *Delaware Ins. Co.* v. *Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137 (held avoided); *Henton* v. *Far. & Merchants' Ins. Co.* (Neb.), 95 N. W. 670 (held not avoided).

[2] *Whiting* v. *Burkhardt*, 178 Mass. 535, 60 N. E. 1, 52 L. R. A. 788.

[3] *Ermentrout* v. *Am. Ins. Co.*, 60 Minn. 418, 62 N. W. 543; *Burlington Ins. Co.* v. *Lowery*, 61 Ark. 108, 32 S. W. 383; *Cone* v. *Niagara Ins. Co.*, 60 N. Y. 619; *Waring* v. *Loder*, 53 N. Y. 581. According to the practice in most jurisdictions a payee of the entire fund may maintain action on the policy alone or jointly with the insured, but the insured must make the payee a party plaintiff or defendant, if the insured institutes the action, *Lewis* v. *Guardian Ins. Co.*, 181 N. Y. 392, 74 N. E. 224; *Winne* v. *Niagara Ins. Co.*, 91 N. Y. 185; *Cone* v. *Niagara Ins. Co.*, 60 N. Y. 619; *Farmers' Bank* v. *Manchester Assur. Co.*, 106 Mo. App. 114, 80 S. W. 299 (1904).

[4] *Palmer Sav. Bank* v. *Ins. Co. of N. A.*, 166 Mass. 189, 44 N. E. 211; *Attleborough Sav. Bank* v. *Security Ins. Co.*, 168 Mass. 147, 46 N. E. 390 (the amount of subsequent mortgages is not to be added to his original interest). The burden is on the payee to show what his interest is, *Wilcox* v. *Mut. Fire Ins. Co.*, 81 Minn. 478, 84 N. W. 334. And the insured should be joined as a party either as plaintiff, or, if he declines, then as defendant, *Lewis* v. *Guardian Ins. Co.*, 181 N. Y. 392, 74 N. E. 224; *Kent* v. *Ætna Ins. Co.*, 84 App. Div. 428, 82 N. Y. 817; *Franklin Ins. Co.* v. *Wolff*, 23 Ind. App. 549, 54 N. E. 772. But in some jurisdictions it is held that, if the interest of mortgagee exceeds the insurance, he may sue alone, *Lowry* v. *Ins. Co.*, 75 Miss. 43, 21 So. 664; *Capital City Ins. Co.* v. *Jones*, 128 Ala. 361, 30 So. 674. It is immaterial whether the mortgage debt is due, *Planters' Ins. Assoc.* v. *So. Savings Co.*, 68 Ark. 8, 56 S. W. 443.

[5] *Armstrong* v. *Agricultural Ins. Co.*, 130 N. Y. 560, 567; *State Ins. Co.* v. *Maackens*, 38 N. J. L. 564; *Ayres* v. *Hartford Ins. Co.*, 17 Iowa, 176.

[6] Given in Appendix, ch. II.

independent of each other, one in favor of the mortgagor, and the other in favor of the mortgagee. By the terms of the rider, "the insurance, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor or owner," and, therefore, a forfeiture as against the mortgagor does not defeat the interest of the mortgagee.[1] A concrete illustration will greatly clarify the situation existing where there are two or more mortgages.

Brown owns a house worth $15,000. He borrows $5,000 from the Bowery Savings Bank, for which he gives to the bank a first mortgage on his house. Another loan of like amount he procures from his bankers, J. P. Morgan & Co., to whom he gives a second mortgage on the same property. In pursuance of his mortgage covenants, he takes out a policy from the Home Insurance Co. for $5,000, with full mortgagee clause in favor of the savings bank; and another policy from the Royal Insurance Co. of like amount with similar clause in favor of Morgan & Co. The house, thereafter, is damaged by fire to the extent of $4,000. The savings bank promptly collects $4,000 as soon as due from the Home Insurance Co., and credits the

[1] *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. 165, 12 C. C. A. 531; *Mutual F. Ins. Co.* v. *Alvord*, 61 Fed. 752, 9 C. C. A. 623; *Planters' Mut. Ins. Assoc.* v. *Southern Sav. Fund, etc., Co.*, 68 Ark. 8, 56 S. W. 443 (default by insured in paying note); *Glens Falls Ins. Co.* v. *Porter*, 44 Fla. 568, 33 So. 473 (failure of insured owner to serve proofs); *Hanover Ins. Co.* v. *Bohn*, 48 Neb. 743, 67 N. W. 774 (failure of owner to disclose title); *State Ins. Co.* v. *Trust Co.*, 47 Neb. 62, 66 N. W. 9 (prior misstatements as to incumbrances); *Phœnix Ins. Co.* v. *Trust Co.*, 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679 (conveyance of property by insured); *Whiting* v. *Burkhardt*, 178 Mass. 535, 60 N. E. 1 (assignee of mortgagee); *Eddy* v. *London Assur. Co.*, 143 N. Y. 311, 62 N. Y. St. R. 316 (other insurance by owner does not avoid nor foreclosure begun by mortgagee himself); *Breeyear* v. *Rockingham Farmers' M. F. I. Co.*, 71 N. H. 445, 52 Atl. 860 (conveyance of property and additional insurance). Who is to sue, *Meriden Sav. Bank* v. *Home Mut. Ins. Co.*, 50 Conn. 396; *Pioneer Sav. & L. Co.* v. *Prov. Wash. Ins. Co.*, 17 Wash. 175, 49 Pac. 231 (change of ownership after application and before policy issued); *Lancashire Ins. Co.* v. *Boardman*, 58 Kan. 339, 49 Pac. 92 (commencement of foreclosure); *Smith* v. *Union Ins. Co.*, 25 R. I. 260, 55 Atl. 715 (conveyance of title); *Francis* v. *Butler Mut. F. Ins. Co.*, 7 R. I. 159 (failure by insured to pay assessments). Under this clause the mortgagee is, doubtless, entitled to notice by the insurer of an election to repair or rebuild, *Heilmann* v. *Westchester, F. Ins. Co.*, 75 N. Y. 7; *Glens Falls Ins. Co.* v. *Porter*, 44 Fla. 568, 33 So. 473. The company probably can insist upon this right as against the mortgagee, *Westminster Fire Office* v. *Glasgow, etc., Soc.* (1888), 13 App. Cas. 699. The rights of each mortgagee separately insured are separate, *Dunlop* v. *Avery*, 89 N. Y. 592. Each mortgagee has a separate right of recovery under his own contract, though the aggregate recovery greatly exceed the value of the property, *Scottish, etc., Assn.* v. *Northern Assur. Co.*, 21 Scot. L. R. 189; *Westminster F. Office* v. *Glasgow Prov. I. Soc.* (1888), 13 App. Cas. 699. But theoretically, under the doctrine of subrogation the aggregate ultimate recovery from the whole body of insurers is supposed to be limited by the insurable value of the property, De Hart & Simey, Ins. (1907), 18. The following case goes so far as to hold that the one-year limitation for beginning suit is not binding upon mortgagee, *Queen Ins. Co.* v. *Assoc.*, 175 Ill. 115, 51 N. E. 717.

payment on the first mortgage. Morgan & Co. simultaneously collect $4,000 from the Royal Insurance Co., and credit the payment on the second mortgage.[1] At this stage of the transaction, it is manifest, the owner of the house, having lost $4,000 and gained $8,000, has made a profit of $4,000 out of his insurance. But in legal theory the extreme limit of a fire insurance contract is to indemnify.[2] Hence the two insurance companies having paid the fire loss twice over, must become subrogated to claims of $4,000 against Brown, $2,000 in favor of each company, representing in their relations to Brown, though not to the mortgagees, excess payments. Accordingly, after collection of these claims, the net aggregate loss of the insurers is reduced to $4,000, the precise amount of the fire damage, for which amount also in the aggregate they would have been liable to the mortgagor under the same policies if there had been no mortgagee clauses attached to them.[3] Brown has thus in fine sustained a fire loss to his property of $4,000 for which his insurers, by diminishing his net indebtedness to that extent, have exactly indemnified him. But if Brown is insolvent at the time of the fire, and his house has depreciated in value to less than $10,000, obviously the insurers, upon failing to collect their claims against him under subrogation, may, after meeting their several obligations to the mortgagees, be out of pocket considerably more than $4,000.

The words "act or neglect" as used in this clause, it has been held, refer to any act or omission on the part of the mortgagor whether before or after the issuance of the rider or policy.[4] By the terms of the clause, however, the mortgagee, on learning of any

[1] *Eddy* v. *London Assur. Co.*, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686; *Westminster Fire Office* v. *Glasgow Prov. Invest. Soc.* (1888), 13 App. Cas. 699.

[2] § 24, *supra*.

[3] See *Scottish, etc., Assn.* v. *Northern Assur. Co.*, 21 Scot. L. R. 189; *Chi., etc., R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 88, 11 S. Ct. 490 (citing cases). Also §§ 53, 292.

[4] *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. 165, 12 C. C. A. 531; *Scottish Union & Nat. Ins. Co.* v. *Field*, 18 Colo. App. 68, 70 Pac. 149; *North Brit. & M. Ins. Co.* v. *Bohn*, 49 Neb. 572, 68 N. W. 942; *Magoun* v. *Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5; *Smith* v. *Union Ins. Co.*, 25 R. I. 260, 55 Atl. 715. *Contra*, holding that the relief extends only to subsequent forfeitures by mortgagor, *Glens Falls Ins. Co.* v. *Porter*, 44 Fla. 568, 33 So. 473; *Genesee, etc., Loan Assoc.* v. *United States Fire Ins. Co.*, 16 App. Div. (N. Y.) 587, 44 N. Y. Supp. 979 (erroneous statement of interest by mortgagor avoids as to mortgagee). And see *Baldwin* v. *German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326 (prior incumbrances); *Hanover Fire Ins. Co.* v. *Bank* (Tex. Civ. App.), 34 S. W. 333. So also *held*, that misrepresentations of which mortgagee has knowledge will be attributed to him, *Am. Cent. Ins. Co.* v. *Cowan* (Tex. Civ. App.), 34 S. W. 461. So also as to his own misstatements, *Graham* v. *Firemen's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 348; *Cole* v. *Germania F. Ins. Co.*, 99 N. Y. 36, 1 N. E. 38. The mortgagee clause is valid though the mortgagor knows nothing about its issuance, *Hare* v. *Headley*, 54 N. J. Eq. 545, 35 Atl. 445.

change of ownership or of occupancy, or increase of hazard, must inform the company; or else he will imperil the validity of his insurance.[1] This, however, does not refer to the commencement of foreclosure proceedings instituted by himself, but only to those instituted by third parties.[2] So also the mortgagee, being now one of the parties insured, must not, it is said, assign his interest in the policy without the company's consent.[3]

In the Massachusetts standard the provision for mortgagee is inserted in the body of the contract: *If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.*[4]

§ 292. Subrogation by Contract.—The standard mortgagee clause expressly [5] gives to the insurer, upon making payment, a right of subrogation, *pro tanto*, where the company claims that the policy is avoided as to the mortgagor or owner, but this right, it is expressly stipulated, is not to impair full recovery by the mortgagee of his claim against the mortgagor.[6] By the terms of the clause the

[1] *Continental Ins. Co.* v. *Anderson*, 107 Ga. 541, 33 S. E. 887 (1899); *Cole* v. *Germania F. Ins. Co.*, 99 N. Y. 36, 1 N. E. 38. *Contra, dictum* in *Whitney* v. *Am. Ins. Co.*, 127 Cal. 464, 56 Pac. 50 (the words are merely directory). Omission suspends and does not avoid, *Ormsby* v. *Phœnix Ins. Co.*, 5 So. Dak. 72, 58 N. W. 301. And see *Phœnix Ins. Co.* v. *Trust Co.*, 41 Neb. 834, 60 N. W. 133.

[2] *Nat. Bk.* v. *Union Ins. Co.*, 88 Cal. 497, 26 Pac. 509; *Pioneer Sav. & L. Co.* v. *St. Paul F. & M. Ins. Co.*, 68 Minn. 170, 70 N. W. 979; *Lancashire Ins. Co.* v. *Boardman*, 58 Kan. 339, 49 Pac. 92; *Eddy* v. *Lond. A. Corp.*, 143 N. Y. 311, 38 N. E. 307.

[3] *Kase* v. *Hartford Ins. Co.*, 58 N. J. L. 34, 30 Atl. 1057. *Contra*, *Breeyear* v. *Rockingham F. Mut. Fire Ins. Co.*, 71 N. H. 445, 52 Atl. 860. Going to support the last case is the circumstance that the care and custody of the property are not changed by such acts of the mortgagee as the owner's alienation. Where the insured owner and the mortgagee make inconsistent claims, the company may interplead, *Sexton* v. *Home Ins. Co.*, 35 App. Div. 170, 54 N. Y. Supp. 862.

[4] *Attleborough Sav. Bk.* v. *Security Ins. Co.*, 168 Mass. 147, 46 N. E. 390, 60 Am. St. R. 373; *Gordon* v. *Ware Sav. Bk.*, 115 Mass. 588.

[5] There is conflict in the decisions as to common law right, § 53, *supra*.

[6] Appendix of Forms and *Eddy* v. *London Assur. Co.*, 143 N. Y. 311, 38 N. E. 307.

company, on paying to the mortgagee the amount of the mortgage debt, is entitled to an assignment of the mortgage securities, and to foreclose for its own benefit. The mortgagor cannot set up the claim in defense that the debt had been paid by the insurance company.[1] Despite the phraseology of this clause, however, the company's right to realize under subrogation depends, not upon its claim that the policy is avoided as to the mortgagor, but upon proof that it is so.[2]

§ 293. **Mortgagee Party to Appraisal.**—Under the standard mortgagee clause the mortgagee is entitled to notice of appraisal. If he receives none, he is not bound by the award.[3]

§ 294. **Proofs of Loss—Form of Action.**—Under the standard mortgagee clause the mortgagee, being one of the assured, may make and verify the proofs. At all events his right to do so cannot be questioned, after a refusal to act by the mortgagor.[4] But the mortgagee, being entitled to receive only as his interest may appear, and not of necessity the whole amount of insurance, should, by the better reason and authority make the insured also a party in an action upon the policy.[5]

[1] *Ins. Co. of N. A.* v. *Martin*, 151 Ind. 209, 51 N. E. 361 (taking an assignment shows company's denial of liability to mortgagor); *Allen* v. *Ins. Co.*, 132 Mass. 480; *Badger* v. *Platts*, 68 N. H. 222, 44 Atl. 296; *Ordway* v. *Chace*, 57 N. J. Eq. 478, 42 Atl. 149; *Springfield F. & M. Ins. Co.* v. *Allen*, 43 N. Y. 389.

[2] *Traders' Ins. Co.* v. *Race*, 142 Ill. 338, 31 N. E. 392, 23 L. R. A. 101, 25 L. R. A. 681, note, 31 Ill. App. 625; *Wisconsin Nat. L. & B. Assoc.* v. *Webster*, 119 Wis. 476, 97 N. W. 171. An insurance company must avail itself of its right to an assignment within a reasonable time, *Eliot, etc., S. Bank* v. *Commercial Union Assur. Co.*, 142 Mass. 142, 7 N. E. 550. The company must not by delay interfere with settlements by the assured with other companies, *New Hampshire Ins. Co.* v. *Nat. L. Ins. Co.*, 112 Fed. 199, 50 C. C. A. 188.

[3] *Bergman* v. *Ins. Co.*, 92 Ky. 494, 18 S. W. 122; *Georgia Home Ins. Co.* v. *Stein*, 72 Miss. 943, 18 So. 414; *Hall* v. *Fire Assn.*, 64 N. H. 405, 13 Atl. 648. And see *Scania Ins. Co.* v. *Johnson*, 22 Colo. 476, 45 Pac. 431.

[4] *Southern, etc., Assn.* v. *Home Ins. Co.*, 94 Ga. 167, 21 S. E. 375, *id.*, 99 Ga. 65, 24 S. E. 396; *State Ins. Co.* v. *Ketcham*, 9 Kan. App. 552, 58 Pac. 229; *Lombard Invest. Co.* v. *Dwelling House Ins. Co.*, 62 Mo. App. 315; *Graham* v. *Firemen's Ins. Co.*, 8 Daly (N. Y.), 421. A Connecticut statute gives relief to the mortgagee, Gen. Stat. § 2839. And see Appendix, ch. I, as to other states.

[5] *Lewis* v. *Guardian Ins. Co.*, 181 N. Y. 392, 74 N. E. 224; *Farmers' Bank* v. *Manchester Assur. Co.*, 106 Mo. App. 114, 80 S. W. 299; *Minnock* v. *Eureka F. & M. Ins. Co.*, 90 Mich. 236, 51 N. W. 367; *Williamson* v. *Mich. F. & M. Ins. Co.*, 86 Wis. 393, 57 N. W. 46; but see last section.

CHAPTER XV

Standard Fire Policy—Concluded

§ 295. Removal of Property for Safety.—*If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, etc.*

A wise provision, making more definite an obligation of considerable uncertainty; for the general principle obtains, that where a removal is reasonably necessary under the circumstances of the case on account of impending danger by fire, damages resulting from removal are recoverable against the insurer as proximate loss.[1] The principle finds analogy in the doctrine of marine insurance by virtue of which a cargo is still covered by the policy after unavoidable transshipment in consequence of the disability of the vessel named in the policy.[2]

This provision is not inserted in the Massachusetts form.

§ 296. Notice and Proofs of Loss.—*If fire occurs, the insured shall give immediate notice of any loss thereby, in writing, to this company, protect the property from further damage, forthwith separate, etc.*

This and the clauses [3] immediately following are the result of a careful revision of provisions previously existing in other forms of policies relating to proceedings after loss, by means of which the underwriter is to be afforded a prompt opportunity, first of preventing aggravation of damage, and second of ascertaining whether he is liable under the terms of his contract, and, if so, to what amount.

This revision has been in the line of liberality towards the insured. Instead of being compelled to furnish a detailed statement of proofs "forthwith," or within ten, twenty, or thirty days as formerly, he is given sixty days; but this latter period is rigidly limited by the New York standard policy, except as it may be extended in writing. Instead of being required to go to the trouble of obtaining

[1] *Balestracci* v. *Firemen's Ins. Co.*, 34 La. Ann. 844; *White* v. *Republic Fire Ins. Co.*, 57 Me. 91, 2 Am. Rep. 22; *Whitehurst* v. *Fayetteville Mut. Ins. Co.*, 6 Jones's (N. C.) Law, 352; *Stanley* v. *Western Ins. Co.*, L. R. 3 Ex. 71.

[2] See § 193, *supra*.

[3] For clause in full see Appendix, ch. II.

certain additional proofs as matter of course, he is to procure these only in the exceptional instances where a special request is made by the company; but these provisions, in the main reasonable, covering the subject of proofs of loss, are probably of greater importance and value to the insurer than all the other express warranties of the policy combined;[1] and, by the current of authority in England[2] and in this country, a substantial performance of the same, or similar requirements no more exacting, is enforced as an obligatory condition precedent to any right of recovery under the policy.[3]

When, however, it comes to matters of mere detail, for instance, the minute but useful particulars called for in the inventory and verified statement of loss, among other things the itemized lists of articles showing as to each item cost, cash value, and damage, two considerations should be given weight in determining the proper rule of construction; first, that the fire having probably carried off with it much of the evidence wanted, a reasonable or practicable compliance is all that the parties could have intended to provide for;[4] and, second, that the risk having been terminated by the capital event of fire, mere matters of form relating to an estimate of the amount of loss already sustained should not be too punctiliously insisted upon by the courts.[5]

[1] At common law, without express warranty, the insured is obliged to make full and truthful disclosure as to the risk, to exercise the highest good faith and to refrain from increasing the hazard. These common-law doctrines, coupled with the modern methods of surveying and mapping risks by underwriters, furnish them with a large measure of protection without express warranties until the fire occurs. After that they must depend upon the express provisions of the contract for testing the character and estimating the amount of the loss. As to the effect of false swearing in the proofs of loss, see § 250, *supra;* and *Meyer* v. *Home Ins. Co.*, 127 Wis. 293.

[2] Bunyon, Ins. (5th ed.), 10; *Roper* v. *Lendon*, 1 Ell. & Ell. 826, 829.

[3] *Columbia Ins. Co.* v. *Lawrence*, 10 Pet. (U. S.) 507, 7 L. Ed. 335 (insured must plead and prove service of the ordinary proofs); *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370, 11 S. Ct. 133 (award when required is a condition); *Boruszweski* v. *Middlesex, etc., Ass. Co.*, 186 Mass. 589, 72 N. E. 250 (proof of loss a condition); *Hicks* v. *Brit.-Am. Assur. Co.*, 162 N. Y. 284, 56 N. E. 743 (proof of loss a condition even under a binder); *Graham* v. *German-Am. Ins. Co.*, 75 Ohio St. 374, 79 N. E. 930 (proofs and award); *St. Paul F. & M. Ins. Co.* v. *Hodge*, 30 Tex. Civ. App. 257, 70 S. W. 574 (detailed schedule a condition precedent).

[4] *Norton* v. *R. & S. Ins. Co.*, 7 Cow. (N. Y.) 645.

[5] *Solomon* v. *Continental Ins. Co.*, 160 N. Y. 595, 55 N. E. 279 (immediate notice of loss, means what?); *Matthews* v. *Ins. Co.*, 154 N. Y. 449, 48 N. E. 751 (proofs irregularly verified); *McNally* v. *Phœnix Ins. Co.*, 137 N. Y. 389, 398, 33 N. E. 475 (tardy service of proofs); *Paltrovitch* v. *Ins. Co.*, 143 N. Y. 73, 37 N. E. 639 (magistrate's certificate); *Porter* v. *Traders' Ins. Co.*, 164 N. Y. 504, 509, 58 N. E. 641 (examination of insured under oath); *Evans* v. *Crawford Co., etc., Ins. Co.* (Wis., 1906), 109 N. W. 952 (wife of insured may verify proofs *ex necessitate*). And see *Simmons* v. *Western*

An inspection of the New York standard fire policy, as given in full in the Appendix, Chapter II, discloses that in the event of the happening of a fire loss under the policy a duty is laid upon the insured to perform numerous acts. These acts fall into two classes: (1) those which must be done by the insured at his own instance, although the insurer keep silence and make no demand for their performance; (2) those which are to be done by the insured only in case the insurer by affirmative notice specially requires performance. The first class includes the following acts: *a.* giving the immediate written notice; *b.* protecting the property; *c.* forthwith separating damaged and undamaged personal property; *d.* inventorying; *e.* within sixty days serving formal proofs sworn to and containing many specified particulars. The second class embraces: *a.* furnishing verified plans; *b.* furnishing a magistrate's certificate; *c.* exhibiting remains of property; *d.* submitting to personal examination under oath; *e.* producing books, bills, and papers or certified copies; *f.* submitting differences to appraisal.

The corresponding clause of the Massachusetts policy and those patterned after it is simpler: *In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same.* Further on comes a provision for a reference in case of differences.[1]

The insured mortgagor, and not a mortgagee protected by the usual full mortgagee clause, is the proper party to make the proofs. If the mortgagor neglects to do this, the Massachusetts court concludes that the mortgagee may perform the duty, furnishing "to the company in writing, within a reasonable time, proper informa-

Trav. Acc. Assn. (Neb., 1907), 112 N. W. 365 (need not fulfill literally); *Manufacturers' & Merchants' M. I. Co.* v. *Zeitinger*, 168 Ill. 286, 48 N. E. 179, 61 Am. St. R. 105 (must construe strictly against insurer). As to the more liberal rule of construction said to apply to the formal requisites of the policy to be complied with after loss, see § 144, *supra*. The courts are often astute to infer waivers, *Glazer* v. *Home Ins. Co.* (N. Y., 1907), 82 N. E. 727. When proofs of loss have been waived, interest is held to run from date of fire, *Jensen* v. *Palatine Ins. Co.* (Neb., 1908), 116 N. W 286.

[1] Other standard policies have provisions differing both from the New York and Massachusetts forms, for example, those of Iowa and South Dakota see Appendix ch. II.

tion in regard to the loss, as to such matters as a mortgagee reasonably may be expected to know." [1]

§ 297. The Same—Immediate Written Notice of Loss.—This provision, altogether appropriate in all cases, is, however, in most instances, largely a formality in the cities and larger towns. There the underwriters are not so dependent upon the action of the assured, as in a sparsely settled region, for means of gaining prompt knowledge of fires, especially of fires extensive enough to demand the services of the fire department; and it often happens that the insurance companies will have their adjusters at the scene of the loss before the assured has given a thought to a perusal of his policies or to the preparation of any notice thereunder. Nevertheless, this condition must be complied with, unless waived.[2] But if the company has prompt actual notice of the event from any source, the court will be eager to infer a waiver of a provision which has thus become a mere technicality; and if the company act upon any information, as, for example, by negotiating with the assured, or by proceeding to an adjustment, or by accepting proofs of loss, the formal written notice will be considered as dispensed with or waived.[3] Indeed, it has been held, that, if the company has actual information, no further notice will be deemed essential.[4]

The phrase "immediate notice" means with due diligence under the circumstances of the case,[5] of which the jury will ordinarily be the judge,[6] unless the delay seem to the court so great as to be clearly inexcusable as matter of law.[7]

[1] *Union Inst. for Savings* v. *Phœnix Ins. Co.* (Mass., 1907), 81 N. E. 994 (citing cases from other states).

[2] *Niagara Ins. Co.* v. *Scammon*, 100 Ill. 644; *Patrick* v. *Farmers' Ins. Co.*, 43 N. H. 621.

[3] *Partridge* v. *Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632, aff'd 162 N. Y. 597, 57 N. E. 1119; *Thompson* v. *Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. 889; *McClellan* v. *Greenwich Ins. Co.*, 107 La. 124, 30 So. 691; *Welsh* v. *Lond. Assur. Corp.*, 151 Pa. St. 607, 25 Atl. 142 (sending an adjuster is conclusive evidence of receipt of notice of loss).

[4] *Savage* v. *Phœnix Ins. Co.*, 12 Mont. 458, 31 Pac. 66. And see *Phœnix Ins. Co.* v. *Perry*, 131 Ind. 572, 30 N. E. 637.

[5] *Solomon* v. *Continental Fire Ins. Co.*, 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. R. 707 (in which a general assignee not knowing of policy found it fifty days after fire and gave notice three days thereafter. *Held*, no forfeiture); *Fletcher* v. *Ins. Co.*, 79 Minn. 337, 82 N. W. 647; *Ins. Co. of N. A.* v. *Brim*, 111 Ind. 281, 12 N. E. 315. The terms "forthwith" and "as soon as possible" are similarly construed, *Mason* v. *Ins. Co.*, 82 Minn. 336, 85 N. W. 13, 83 Am. St. R. 433; *Central City Ins. Co.* v. *Oates*, 86 Ala. 558, 6 So. 83, 11 Am. St. R. 67; *Harnden* v. *Ins. Co.*, 164 Mass. 382, 41 N. E. 658, 49 Am. St. R. 467.

[6] *Solomon* v. *Ins. Co.*, 160 N. Y. 595, 55 N. E. 279; *O'Brien* v. *Phœnix Ins. Co.*, 76 N. Y. 459.

[7] *Ermentrout* v. *Ins. Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. R. 481; *Rokes* v. *Amazon Ins. Co.*, 55 Md. 512, 34 Am. Rep. 323;

The notice should be sent in the name of the assured;[1] and to some agent having authority to receive it on behalf of the insurer, preferably to the head office of the company, or to some general agency.[2] Moreover, the notice must be actually received to be operative;[3] but mailing in due course raises a presumption of receipt until rebutted.[4]

The immediate notice preliminary to the statement or proofs of loss is not required by the Massachusetts policy; which, however, requires the sworn statement of loss to be furnished "forthwith." This means within a reasonable time.[5] The Iowa standard policy

Weed v. *Hamburg-Bremen Ins. Co.*, 133 N. Y. 394, 31 N. E. 231; *Bennett* v. *Lycoming Co. Mut. Ins. Co.*, 67 N. Y. 274. In the following cases the delay was held to be fatal, *Railway Ins. Co.* v. *Burwell*, 44 Ind. 460 (6 days); *Trask* v. *State F. & M. Ins. Co.*, 29 Pa. St. 198, 72 Am. Dec. 622 (11 days); *Cook* v. *North Brit. & M. Ins. Co.*, 181 Mass. 101, 62 N. E. 1049; *Burnham* v. *Royal Ins. Co.*, 75 Mo. App. 394 (16 days); *Roumage* v. *Ins. Co.*, 13 N. J. L. 110 (5 days); *Edwards* v. *Ins. Co.*, 75 Pa. St. 378 (18 days); *Weed* v. *Hamburg-Bremen Ins. Co.*, 133 N. Y. 394, 31 N. E. 231 (19 days); *Inman* v. *Ins. Co.*, 12 Wend. (N. Y.) 452 (38 days); *Brown* v. *London Assur. Co.*, 40 Hun (N. Y.), 101 (48 days); *Ermentrout* v. *Girard Ins. Co.*, 63 Minn. 305, 65 N. W. 635 (60 days); *McEvers* v. *Lawrence*, 1 Hoff. Ch. 171 (4 months); *Sherwood* v. *Agricultural Ins. Co.*, 10 Hun, 593. On the other hand, a delay of 8 days, where the insured did not know of the fire for 3 days was thought to be in time, *N. Y. Cent. Ins. Co.* v. *N. P. Ins. Co.*, 20 Barb. 468. In another case, where policy required immediate proof and notice of loss, delay of 35 days in sending inventory was considered excusable, *Knickerbocker Ins. Co.* v. *McGinnis*, 87 Ill. 70; *Taber* v. *Royal Ins. Co.*, 124 Ala. 681, 26 So. 252 (2 days); *St. Louis Ins. Co.* v. *Kyle*, 11 Mo. 278, 49 Am. Dec. 74 (4 days); *West Branch Ins. Co.* v. *Holfelstein*, 40 Pa. St. 289, 80 Am. Dec. 573 (5 days); *Donahue* v. *Windsor, etc., Ins. Co.*, 56 Vt. 374 (22 days; question for jury). The great fire at Chicago was deemed good excuse for delay of over 30 days, *Knickerbocker Ins. Co.* v. *McGinnis*, 87 Ill. 70. Sickness may affect the question, *Niagara F. Ins. Co.* v. *Scammon*, 100 Ill. 644; *Partridge* v. *Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632; *Parker* v. *Ins. Co.*, 179 Mass. 528, 61 N. E. 215. As to effect of incapacity of insured, see *Comstock* v. *Asso.*, 116 Wis. 382, 93 N. W. 22. It has been held by one court that a clause requiring immediate notice does not apply to a loss under lightning and tornado rider unless fire ensues, *Epiphany Roman Cath. Church* v. *German Ins. Co.*, 16 S. D. 17, 91 N. W. 332.

[1] *O'Brien* v. *Phœnix Ins. Co.*, 76 N. Y. 459. His death does not dispense with the requirement, *Matthews* v. *Am. Central Ins. Co.*, 9 App. Div. 339, aff'd 154 N. Y. 449, 48 N. E. 751.

[2] *Ermentrout* v. *Girard Ins. Co.*, 63 Minn. 305, 65 N. W. 635; *Bush* v. *Westchester Ins. Co.*, 63 N. Y. 531; *Snyder* v. *Dwelling House Ins. Co.*, 59 N. J. L. 544, 37 Atl. 1022; *Lohnes* v. *Ins. Co.*, 121 Mass. 439. A company acting upon a notice, is bound by it, *Welsh* v. *London Assur. Co.*, 151 Pa. St. 607, 25 Atl. 142; *Davis* v. *Grand Rapids Ins. Co.*, 15 Misc. 263, aff'd 157 N. Y. 685, 51 N. E. 1090; *Burlington Ins. Co.* v. *Lowery*, 61 Ark. 108, 32 S. W. 383.

[3] *Central City Ins. Co.* v. *Oates*, 86 Ala. 558.

[4] *Munson* v. *German-Am. Ins. Co.*, 55 W. Va. 423, 47 S. E. 160; *Pennypacker* v. *Capital Ins. Co.*, 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. R. 395; *Dade* v. *Ætna Ins. Co.*, 54 Minn. 336, 56 N. W. 48; *Susquehanna Mut. Fire Ins. Co.* v. *Tunkhannock Toy Co.*, 97 Pa. St. 424, 39 Am. Rep. 816.

[5] *Cook* v. *North Brit. & Mer. Ins. Co.*, 181 Mass. 101, 62 N. E. 1049, 183 Mass. 50, 66 N. E. 597 (two months too late without proof of reasonable cause for delay); *Parker* v. *Farmers' Fire Ins.*

provides that the written notice of loss shall be given "as soon as practicable after he ascertains the fact." Under the South Dakota policy, "the insured shall promptly give notice of such loss." By the body of the New Hampshire policy the verified statement or proof of loss is to be rendered "forthwith;" but a later enactment, chapter 170 of the Public Statutes, is printed on the back of the policy and made a part thereof, and this governs the contract in many particulars. In other states, also, statutory provisions control the terms of the policy.[1] It is obvious, therefore, that the body of statutory law applicable to each case must be carefully scrutinized.

§ 298. The Same—Duty to Protect from Further Damage.—The insurer is expressly relieved from loss occasioned by the neglect of the insured to protect the property from further damage.[2] The Massachusetts policy provides: *If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.*

Under both wordings of this clause it is manifest that ordinarily any question of neglect on the part of the insured in this regard must go to the jury.[3]

§ 299. Forthwith Separate Damaged and Undamaged—Put in Best Possible Order—Make Complete Inventory, Stating Quantity and Cost of Each Article and Amount Claimed Thereon—Exhibit Remains.—These provisions must be complied with by the assured;[4] and, it is said, the work must be done at his own ex-

Co., 179 Mass. 528, 61 N. E. 215 (delay from Oct. 3d to Dec. 8th held fatal, though death of grandchild and other illness in the family intervened); *Fletcher* v. *German-Am. Ins. Co.*, 79 Minn. 337, 82 N. W. 647 (question is for jury); *Rines* v. *German Ins. Co.*, 78 Minn. 46, 80 N. W. 839 (18 days, held in time). In some jurisdictions delay does not forfeit but is held simply to postpone payment of the insurance money, *Mason* v. *St. Paul F. & M. Ins. Co.*, 82 Minn. 336, 85 N. W. 13; *Rottier* v. *German Ins. Co.*, 84 Minn. 116, 86 N. W. 888.

[1] For example, Missouri and Washington, in which must be added to every fire policy a clause indicating that the policy is subject to the laws of the state. This clause obviates the necessity of adopting a new form of policy.

[2] *Franklin Ins. Co.* v. *Cobb*, 2 Cinc. Super. Ct. 87; *Hoffman* v. *Ætna Ins. Co.*, 1 Robt. 501, aff'd 32 N. Y. 405 (no duty to restore, but only to prevent further deterioration); *Hebner* v. *Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. 627 (expense for raising vessel was laid upon insured. Compare sue and labor clause of marine policy); *Sisk* v. *Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804 (assured neglected to dry the property after water had been played upon it from fire engines). Obligation of good faith exists without special clause, *Devlin* v. *Queen Ins. Co.*, 46 Up. Can. Q. B. 611. The duty applies to walls in danger of falling in consequence of the fire, *Alter* v. *Home Ins. Co.*, 50 La. Ann. 1316, 24 So. 180.

[3] *Boak Fish Co.* v. *Manchester F. Assur. Co.*, 84 Minn. 419, 87 N. W. 932.

[4] *Thornton* v. *Security Ins. Co.*, 117 Fed. 773.

pense.[1] The principal object of these provisions is to enable the company to estimate the loss;[2] and a reasonable and substantial compliance with them is sufficient.[3]

But under the Massachusetts standard policy and the similar policies of other states, the insured is not called upon to separate the damaged and undamaged goods, or to make out a detailed statement of the amount of damage claimed upon each item.[4]

§ 300. Same Subject—Statement or Proof of Loss.—*Within sixty days after the fire unless such time is extended in writing . . . shall render a statement to this company signed and sworn to by the insured stating the knowledge and belief, etc.*

This document, to which the inventory already mentioned is usually attached, furnishes the first authoritative notice of the character of the claim of the assured, and gives the information necessary to enable the insurer in a general way to proceed to an investigation of its validity and accuracy. The company can seldom if ever afford to do without this statement, unless the assured is ready to abandon all claim and surrender his policy for cancellation.[5] Its service, and within the period specified, is of moment to the company; and, by the weight of authority and of reason, the rendering of the verified statement of particulars[6] within the specified period is by the terms of the New York standard policy and those resembling it made a condition precedent to any right of recovery.[7]

[1] *Hebner* v. *Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. 627.

[2] *Oshkosh Match Works* v. *Manchester Assur. Co.*, 92 Wis. 510, 66 N. W. 525.

[3] *Boyle* v. *Hamburg-Bremen Ins. Co.*, 169 Pa. St. 349, 32 Atl. 553; *Peoples' Fire Ins. Co.* v. *Pulver*, 127 Ill. 246, 20 N. E. 18 (the inventory need not necessarily give the cost of every item). The insured need only do what is feasible as to property totally destroyed, or greatly damaged, see *Johnston* v. *Farmers' Ins. Co.*, 106 Mich. 96, 64 N. W. 5; *Power Dry Goods Co.* v. *Imperial Ins. Co.*, 48 Minn. 380, 51 N. W. 123; *Davis* v. *Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, aff'd 157 N. Y. 685, 51 N. E. 1090. The insured is not obliged to use the company's blanks for proofs, *Cushing* v. *Ins. Co.*, 4 Wash. 538, 30 Pac. 736. Nor address the proofs to the company, *Wicking* v. *Ins. Co.*, 118 Mich. 640, 77 N. W. 275. As to right of assured to dispose of and remove damaged property, see *Astrich* v. *German-Am. Ins. Co.*, 131 Fed. 13; *Chainless Cycle Co.* v. *Security Ins. Co.*, 52 App. Div. 104, 64 N. Y. Supp. 1060 aff'd 169 N. Y. 304, 62 N. E. 392.

[4] *Clement* v. *Brit.-Am. Assur. Co.*, 141 Mass. 298, 5 N. E. 847.

[5] Until it receives the particulars the insurer need make no examination of the loss unless it choose, *Boruszweski* v. *Middlesex M. Ins. Co.*, 186 Mass. 589, 72 N. E. 250. Statements by the insured in his proofs may be used as admissions against him but cannot be used as evidence in his favor except to show that the clause of the policy requiring proofs has been complied with, *Lundvick* v. *Westchester F. Ins. Co.*, 128 Iowa, 376, 104 N. W. 429, and § 152, *supra*.

[6] But a sworn notice without particulars was held sufficient in case of total loss on a building, *Pearce Mfg. Co.* v. *Lebanon Mut. Ins. Co.*, 216 Pa. St. 265, 65 Atl. 663 (substantial compliance).

[7] *National Wall Paper Co.* v. *A. M*

A considerable minority of tribunals, however, have announced the opposite rule, and by an unsatisfactory and strained construction have allowed to the assured, under the New York standard policy, *twelve months less sixty days* within which to serve his first statement or proofs of claim, basing this conclusion on the ground that, while service of proofs sixty days before action is unmistakably made a condition precedent, the policy nowhere expressly states that forfeiture will be incurred as a result of a failure to render the proof within the period named.[1] It should also be observed that

M. Fire Ins. Co., 175 N. Y. 226, 67 N. E. 440; *Peabody* v. *Satterlee*, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956; *Quinlan* v. *Prov. Wash. Ins. Co.*, 133 N. Y. 356, 362, 31 N. E. 31, 28 Am. St. R. 645, 45 N. Y. St. R. 200; *Blossom* v. *Lycoming Ins. Co.*, 64 N. Y. 162; *Perry* v. *Caledonia Ins. Co.*, 103 App. Div. 113, 93 N. Y. Supp. 50; *Lake Geneva Ice Co.* v. *Selvage*, 36 Misc. 212, 73 N. Y. Supp. 193. And numerous other cases in New York where the clause was framed, *Teutonia Ins. Co.* v. *Johnson*, 72 Ark. 484, 82 S. W. 840 (deliberately disapproving the cases which have reached the opposite conclusion); *White* v. *Home Ins. Co.*, 128 Cal. 131, 60 Pac. 666 ("the great weight of authority" sustains this rule); *Phœnix Ins. Co.* v. *Mech., etc., S. L. & Bldg. Assoc.*, 51 Ill. App. 479; *Hanover Ins. Co.* v. *Johnson*, 26 Ind. App. 122, 125, 57 N. E. 277; *Westchester Ins. Co.* v. *Coverdale*, 9 Kan. App. 651, 58 Pac. 1029; *Eastern R. R. Co.* v. *Relief Fire Ins. Co.*, 98 Mass. 420; *Leftwich* v. *Royal Ins. Co.*, 91 Md. 597, 612, 46 Atl. 1010; *Gould* v. *Dwelling House Ins. Co.*, 90 Mich. 302, 51 N. W. 455, 52 N. W. 754 (but see, *infra*, the untenable distinction made by Michigan court in later case, 93 Mich. 81, between the words "unless" and "until"); *Shapiro* v. *Western Home Ins. Co.*, 51 Minn. 239, 53 N. W. 463; *Bowlin* v. *Heckla Fire Ins. Co.*, 36 Minn. 433, 434; *Maddox* v. *Dwelling House Ins. Co.*, 56 Mo. App. 343; *Farmers' Ins. Co.* v. *Frick*, 29 Ohio St. 466; *Continental Ins. Co.* v. *Chase*, 89 Tex. 212, 34 S. W. 93 (defendant must plead the breach); *Davis* v. *Pioneer Mut. Ins. Assn.* (Wash., 1906), 87 Pac. 829; *Cornell* v. *Mil. Mut. Fire Ins. Co.*, 18 Wis. 387, 391 (notice not given within the specified period of 20 days *held*, insufficient). The rule is the same in England, *Roper* v. *Lendon*, 1 Ell. & Ell. 826, 829 (Lord Campbell, Chief Justice, says: "Where, therefore, it is conceded that a delivery of such particulars before action is essential, it follows from the wording of the condition that the delivery must be within fifteen days after the loss. And the condition so construed is a very reasonable one; it being obviously of great importance to the defendants' company to know, as soon as possible after a loss, the amount claimed by the assured"). Similarly where a policy required service of the paper "forthwith" a dissenting judge contended that time was not of the essence of the contract, inasmuch as there was no express provision that failure would defeat the policy, but the court held compliance within the time to be a condition precedent, *Scammon* v. *Germania Ins. Co.*, 101 Ill. 621. So also the Massachusetts court, in referring to the sworn statement of loss as required in that commonwealth without express provision for forfeiture, says, "a failure to give the notice within the time required stands upon different ground from a failure to give the notice in due form. The latter defect may be remedied, but the former, if insisted upon, is fatal to the assured," *Cook* v. *North Brit. & Mer. Ins. Co.*, 181 Mass. 101, 104, 62 N. E. 1049, 183 Mass. 50, 66 N. E. 597.

[1] *Hartford Ins. Co.* v. *Redding* (Fla., 1904), 37 So. 62; *India River State Bank* v. *Hartford Ins. Co.* (Fla., 1903), 35 So. 228; *Southern Ins. Co.* v. *Knight*, 111 Ga. 622, 624, 36 S. E. 821, 78 Am. St. R. 216, 52 L. R. A. 70; *St. Paul F. & M. Ins. Co.* v. *Owens*, 69 Kan. 602, 77 Pac. 544; *Orient Ins. Co.* v. *Clark*, 22 Ky. L. Rep. 1066, 59 S. W. 863; *Allen* v. *Mil. Mech. Ins. Co.*, 106 Mich. 204, 64 N. W. 15; *Steele* v. *German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85 (making

from an early date the Massachusetts and New York courts have stood for the proposition that a limited period specified for service of proofs is of the very essence of the contract, and the standard policies of both classes, now in general though not universal use throughout this country, were originally framed in those states, and were worded in the light of the decisions of their courts.

The New York policy provides for numerous acts which must be done after loss; some without and some with affirmative request by the company, but in no instance is there necessarily a precise time limit which could be known in advance for the orderly performance of the act; since even with reference to the period specified for service of the verified statement, it is provided that the time may be extended by writing. The law was well settled in England and in this country that a compliance with these various provisions, including even the furnishing of a magistrate's or notary's certificate when required, was a condition precedent, although the provisions were not connected with any specific declaration of forfeiture;[1] but it seemed hardly appropriate to sum up this long list of requirements, some absolute and some conditional, with the statement that the policy would be avoided upon their nonfulfillment at various indefinable times. Instead of adopting phraseology so awkward the committee followed up all these clauses with the seemingly unambiguous provision "no suit or action on this policy . . . shall be sustainable in any court . . . until after full compliance by the insured with all the foregoing requirements." The question of law involved, therefore, is this, whether the insured has fully complied with the foregoing requirement relating to service of verified proofs within sixty days or within the time extended by writing when,

untenable distinction between words "until and "unless"); *Northern Assur. Co.* v. *Hanna*, 60 Neb. 29, 82 N. W. 97; *Gerringer* v. *North Car. Home Ins. Co.*, 133 N. C. 407, 45 S. E. 773; *Continental Ins. Co.* v. *Whittaker*, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451; *Munson* v. *German-Am. Ins. Co.*, 55 W. Va. 423, 47 S. E. 160. And see *Coventry Ins. Assoc.* v. *Evans*, 102 Pa. St. 281; *Sun Ins. Co.* v. *Mattingly*, 77 Tex. 162, 13 S. W. 1016. The authority of some of these cases is considerably weakened by the circumstance that they are based in part upon decisions in Wisconsin, Minnesota, or New York construing policies essentially different from the New York standard. As matter of fact the courts of those three states are in harmony with the prevailing rule, cases *supra*. The South Dakota standard policy provides, "should proof of loss not be furnished within six months from the date of loss this policy shall be void, unless such proof of loss shall have been waived."

[1] *Worsley* v. *Ward*, 6 T. R. 710, 722; *Johnson* v. *Phœnix Ins. Co.*, 112 Mass. 49; *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385. At common law the doctrine originally was that any statement of fact or promise of performance appearing on the face of the policy was a warranty or condition precedent, *Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. (N. Y.) 72, 80, and English cases cited. And see § 104, *supra*.

without any extension of time at all in writing or otherwise, he neglects to render any statement of his claims until the expiration of nearly ten months succeeding the fire. The company need make no investigation until it receives these statements of the claim.[1] After ten months there would probably be no visible evidences of the fire loss left on the premises to investigate.

Where as in the case of some of the standard forms the policy contains no such clause making compliance a condition precedent there is possibly better excuse for postponing by implication the time for serving the proofs, at least so it has seemed to several courts.[2]

The period within which proofs must be served begins to run from the time when the fire has so far abated that the damaged property may be inspected.[3] As to whether the proofs must be received within the sixty days, or whether mailing within that period is a sufficient "rendering," under the terms of the requirement, is matter of conflict in the decisions.[4]

§ 301. Excusable Failure in Strict Compliance.—So also there is difference of opinion as to what will avail to excuse delay in the service of a notice or statement of loss. In such matters the parties cannot be presumed to have expected impossibilities.[5]

[1] *Boruszweski* v. *Middlesex, etc., Ass. Co.*, 186 Mass. 589, 72 N. E. 250.

[2] *Kahnweiler* v. *Phœnix Ins. Co.*, 57 Fed. 562; *Taber* v. *Royal Ins. Co.*, 124 Ala. 681, 26 So. 252; *Mason* v. *St. Paul F. & M. Ins. Co.*, 82 Minn. 336, 85 N. W. 13, 83 Am. St. R. 433; *Burlington Ins. Co.* v. *Toby*, 10 Tex. Civ. App. 425, 30 S. W. 1111; *Welch* v. *Fire Assoc.*, 120 Wis. 456, 98 N. W. 227.

[3] *National Wall Paper Co.* v. *Associated Mfrs. M. F. I. Co.*, 175 N. Y. 226, 67 N. E. 440. Though the insurance rests simply in a binder, the terms of the usual policy are implied and proof must be served in compliance therewith, *Hicks* v. *Brit. Am. Ins. Co.*, 162 N. Y. 284, 56 N. E. 743. Unless proofs are waived by a denial of liability or otherwise, *Farmers' Ins. Co.* v. *Baker*, 94 Md. 545, 51 Atl. 184; *Baile* v. *St. Jo. Ins. Co.*, 73 Mo. 371.

[4] Some courts hold that proofs must be received within the period, *Peabody* v. *Satterlee*, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956; *Perry* v. *Caledonia Ins. Co.*, 103 App. Div. 113, 93 N. Y. Supp. 50; *Huse & Loomis Ice & T. Co.* v. *Wielar* (N. Y. App. Term), 86 N. Y. Supp. 24; *Lake Geneva Ice Co.* v. *Selvage*, 36 Misc. R. 212, 73 N. Y. Supp. 193. See *Pennypacker* v. *Capital Ins. Co.*, 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 2 Am. St. R. 395. *Contra*, *Manufacturers' & Merchants' M. I. Co.* v. *Zeitinger*, 168 Ill. 286, 48 N. E. 179, 61 Am. St. R. 105, and see cases *supra*. Mailing creates a presumption of delivery, *Dade* v. *Ætna Ins. Co.*, 54 Minn. 336, 56 N. W. 48. Receipt in time by Post Office where company is located is said to be sufficient, *Caldwell* v. *Dwelling House Ins. Co.*, 61 Mo. App. 4. If time expires Sunday, Monday will answer, *McKibban* v. *Des Moines Ins. Co.*, 114 Iowa, 41, 86 N. W. 38. As to the method of computing the period of sixty days under the New York Construction Act see *Benoit* v. *R. R. Co.*, 94 App. Div. 24; *Ryer* v. *Prudential Ins. Co.*, 185 N. Y. 6.

[5] Insanity held a good excuse in *Insurance Cos.* v. *Boykin*, 12 Wall. (U. S.) 433, 20 L. Ed. 442; *McGraw* v. *Germania Ins. Co.*, 54 Mich. 145, 19 N. W. 927; *Wheeler* v. *Conn. Mut. Life Ins. Co.*, 82 N. Y. 543, 37 Am.

Whenever it is possible the insured himself must sign and verify the statement of loss. The company has a right, not only to the information, but also to the personal oath of a party to the contract, whose swearing, if false, will vitiate it, and who is presumed to be best acquainted with the facts;[1] but if there are several insured any one may act. It is not necessary to join all.[2] And if there is one assured with more than one policy in the same company covering the same property, one proof will be sufficient.[3]

As to the many particulars called for, in the statement, a reasonable compliance, according to the circumstances of each case, is all that is required; but the itemized statement of cash or sound value and damage should be given, if practicable.[4]

Rep. 594. But see Conn. Gen. Stat. § 2839. So sickness or physical disability has been thought to avail when no definite period is prescribed, *Parker* v. *Middlesex Assur. Co.*, 179 Mass. 528, 61 N. E. 215; *American Ins. Co.* v. *Hazen*, 110 Pa. St. 530. And under the New York standard form, where the assured has died and his estate is for a time without representation, delay reasonably necessary may be allowed, *Matthews* v. *Am. Central Ins. Co.*, 154 N. Y. 449, 48 N. E. 751. But the only safe practice for the assured to follow is, in spite of accident or sickness, to comply, if possible, with the condition, *Sherwood* v. *Agricultural Ins. Co.*, 10 Hun, 595, aff'd 73 N. Y. 447; *Scammon* v. *Germania Ins. Co.*, 101 Ill. 621. Furnishing proofs being a condition precedent, loss of policy or ignorance of its requirements is no excuse for not performing, *Munson* v. *German-Am. F. Ins. Co.*, 55 W. Va. 423, 47 S. E. 160; *Blakeley* v. *Phœnix Ins. Co.*, 20 Wis. 205, 91 Am. Dec. 388. See *Thornton* v. *Security Ins. Co.*, 117 Fed. 773, aff'd 123 Fed. 664; *Quinlan* v. *Providence Wash. I. Co.*, 133 N. Y. 356, 31 N. E. 31, 45 N. Y. St. R. 200.

[1] Execution by a substitute held good in the following cases: *Lumbermen's Mut. Ins. Co.* v. *Bell*, 166 Ill. 400, 45 N. E. 130 (agent, when it was impossible for assured to do it); *German Ins. Co.* v. *Grunert*, 112 Ill. 68, 1 N. E. 113 (agent in absence of assured); *Burns* v. *Mich. Manuf. Ins. Co.*, 130 Mich. 561, 90 N. W. 411 (agent when the assured was critically ill); *Swan* v. *L. & L. & G. Ins. Co.*, 52 Miss. 704 (agent in sole charge of property and insurance, best acquainted with the facts); *Burge* v. *Greenwich Ins. Co.*, 106 Mo. App. 244, 80 S. W. 342 (employee in absence of partners); *Sims* v. *State Ins. Co.*, 47 Mo. 54 (agent who alone knew the facts); *Pearlstine* v. *West. Ins. Co.*, 70 S. C. 75, 49 S. E. 4 (agent who knew the facts, in the absence of the assured); *Findeisen* v. *Metropole Ins. Co.*, 57 Vt. 520 (husband who was in full charge of the insurance); *Evans* v. *Crawford, etc., Ins. Co.* (Wis., 1906), 109 N. W. 952 (wife *ex necessitate*); *O'Connor* v. *Hartford Ins. Co.*, 31 Wis. 160 (wife, the assured being absent for three years); *Roberts* v. *Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. 1048 (husband, the assured having disappeared). If the assured is dead any one of his legal representatives executors, administrators, heirs, next of kin, legatees, or devisees, may make the proofs, *Matthews* v. *American Cent. I. Co.*, 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. R. 627. But a mere payee or appointee is not the insured, *State Ins. Co.* v. *Maackens*, 38 N. J. L. 565. As to attaching creditor see *Northwestern Ins. Co.* v. *Atkins*, 66 Ky. 328; receiver, *Sims* v. *Union Assur. Soc.*, 129 Fed. 804. As to mortgagee, see § 294, *supra*.

[2] *Myers* v. *Council Bluffs Ins. Co.*, 72 Iowa, 176, 33 N. W. 453 (one of a partnership); *Walsh* v. *Washington Ins. Co.*, 32 N. Y. 427.

[3] *Dakin* v. *L. & L. & G. Ins. Co.*, 13 Hun, 122, aff'd 77 N. Y. 600. Statements in the proofs refer to the date of the fire, *Wicking* v. *Citizens' Mut. Ins. Co.*, 118 Mich. 640, 77 N. W. 275; *Jones* v. *Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. 578.

[4] *Gauche* v. *L. & L. Ins. Co.*, 10 Fed. 347; *Brock* v. *Des Moines Ins. Co.*, 96

The policy is, by another clause, made payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received. "Satisfactory proof" means proof which ought to be considered satisfactory.[1]

Whether the written proofs constitute a compliance with the warranty of the policy, is properly a question for the court.[2]

§ 302. **Where Served.**—The proofs should be served at the home office of the company, or at a general agency, or upon a local agent designated by statute to receive papers.[3] And where a local counter-

Iowa, 39, 64 N. W. 685 (cash values); *Scottish Un. & N. Ins. Co.* v. *Keene*, 85 Md. 263, 37 Atl. 33 (allowing method of starting with past inventory of stock and giving subsequent purchases and sales less profits—often the only method of estimating loss); *Davis* v. *Grand Rapids Ins. Co.*, 15 Misc. 263, 36 N. Y. Supp. 792, aff'd 157 N. Y. 685, 51 N. E. 1090 (holding the assured only to what is practicable); *Riker* v. *Ins. Co.*, 90 App. Div. 391, 85 N. Y. Supp. 546; *Gottlieb* v. *Dutchess Co. Ins. Co.*, 89 Hun, 36, 35 N. Y. Supp. 71; *Ætna Ins. Co.* v. *Peoples' Bank*, 62 Fed. 222, 106 C. C. A. 342. As to interest of the insured, *Wicking* v. *Ins. Co.*, 118 Mich. 640, 77 N. W. 275. Need not disclose an interest acquired after loss, *Mauck* v. *Ins. Co.*, 4 Penneywill (Del.), 325, 54 Atl. 952. As to disclosing cause of fire see *White* v. *Royal Ins. Co.*, 149 N. Y. 485, 44 N. E. 77; *McNally* v. *Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *Howard Ins. Co.* v. *Hocking*, 115 Pa. St. 415, 8 Atl. 592; *Warshawky* v. *Anchor Ins. Co.*, 98 Iowa, 221. But the cost prices need not be given in the statement of loss, only sound values and damage, *McManus* v. *West. Assur. Co.*, 22 Misc. (N. Y.) 269. As to stating other insurance and various particulars, see *Jones* v. *Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. 578; *Fuller* v. *Detroit Ins. Co.*, 36 Fed. 469 (it is not necessary for the assured to apportion the loss among the companies); *Partridge* v. *Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632, aff'd 162 N. Y. 597, 57 N. E. 1119. Where goods are totally destroyed the insured may do the best he can for a schedule, *Schilansky* v. *Ins. Co.*, 4 Penneywill (Del.), 293, 55 Atl. 1014. As to carrier's insurance on property, his own or belonging to others, *Force* v. *St. Paul Fire & M. I. Co.*, 81 App. Div. 633, 80 N. Y. Supp. 708. If company claims defect in proofs it must allege it with definiteness, *Phœnix Ins. Co.* v. *Hedrick*, 178 Ill. 212, 52 N. E. 1034.

[1] *Walsh* v. *Washington M. Ins. Co.*, 32 N. Y. 427; *London Guarantee & Acc. Co.* v. *Fearnley*, 43 L. T. N. S. 390; see § 243, *supra*. The assured need give no particulars except those specified in the policy, *De Raiche* v. *L. & L. & G. Ins. Co.*, 83 Minn. 398, 86 N. W. 425; *McManus* v. *Western Assur. Co.*, 43 App. Div. 550, 60 N. Y. Supp. 1143, aff'd 167 N. Y. 602, 60 N. E. 1115.

[2] *Travellers' Ins. Co.* v. *Sheppard*, 85 Ga. 802. A carpenter's statement of the cost of rebuilding is no compliance with the clause, *Heusinkveld* v. *St. Paul F. & M. Ins. Co.*, 96 Iowa, 224, 64 N. W. 769; *Citizens' Ins. Co.* v. *Doll*, 35 Md. 89. As to rule in Pennsylvania when building is a total loss, see *German-Am. Ins. Co.* v. *Hocking*, 115 Pa. St. 398; *McGonigle* v. *Ins. Co.*, 168 Pa. St. 1, 31 Atl. 868. As to waiver of formal defects, see *Sutton* v. *Am. Ins. Co.*, 188 Pa. St. 380, 41 Atl. 537; *Schmurr* v. *State Ins. Co.*, 30 Oreg. 29, 46 Pac. 363; and § 144, *supra*.

[3] *Edgerly* v. *Farmers' Ins. Co.*, 48 Iowa, 644 (office of company); *Minnock* v. *Ins. Co.*, 90 Mich. 236, 51 N. W. 367 (president); *Minn., etc., R. Co.* v. *Home Ins. Co.*, 64 Minn. 61, 66 N. W. 132 (adjuster); *Greenlee* v. *Hanover Ins. Co.*, 104 Iowa, 481, 73 N. W. 1050 (local agent); *Trustees* v. *Brooklyn Ins. Co.*, 18 Barb. 69; *Ins. Co. of N. A.* v. *McLimans*, 28 Neb. 653, 44 N. W. 991 (general agent); *Walker* v. *Beecher*, 15 Misc. 149, 36 N. Y. Supp. 470 (attorneys in fact for Lloyds); *Harnden* v. *Mil. Mech. Ins. Co.*, 164 Mass. 382, 41

signing agent, by custom or otherwise, has apparent authority to receive proofs of loss, service upon him is effective.[1]

§ 303. Same Subject—Plans—Magistrate's Certificate.—Verified plans and specifications of any building, fixtures, or machinery, destroyed or damaged, must be furnished; but only if affirmatively required.[2] This may be either for the purpose of aiding the company in estimating damage, or in determining whether it will exercise its option to rebuild.[3]

There is no such clause in the Massachusetts policy.

So also, but only if affirmatively required,[4] the assured must furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to an amount certified.[5]

The sixty-day limit after the fire does not apply to the extra or additional proofs provided for by the policy. These must be called for and furnished within reasonable time;[6] and the demand by the company must be explicit and unequivocal. It is not enough to

N. E. 658; *Welsh* v. *London Assur. Co.*, 151 Pa. St. 607, 25 Atl. 142 (local countersigning agent). May serve on a company which is absorbing the original company, *Whitney* v. *Am. Ins. Co.*, 127 Cal. 464, 59 Pac. 897. As to authority of countersigning agent and adjusters to waive proofs altogether see §§ 178, 180, *supra*.

[1] *Walker* v. *Lancashire Ins. Co.*, 188 Mass. 560, 75 N. E. 66; *Harnden* v. *Mil. Mech. Ins. Co.*, 164 Mass. 382, 41 N. E. 658, 49 Am. St. R. 467.

[2] *Fawcett* v. *Liverpool, London & Globe Ins. Co.*, 27 U. C. Q. B. 225.

[3] *Lancashire Ins. Co.* v. *Barnard*, 111 Fed. 702, 49 C. C. A. 559 (holding also that assured had waived right to demand plans after an award). As to waiver of right to plans, see *Ligon* v. *Equitable Ins. Co.*, 87 Tenn. 341, 10 S. W. 768. Objections to papers furnished under the demand must be promptly made, *Breckinridge* v. *Am. Cent. Ins. Co.*, 87 Mo. 62. Demand for plans and specifications *held*, no waiver of other defenses, *Boyd* v. *Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. 470, approved in *Armstrong* v. *Agricultural Ins. Co.*, 130 N. Y. 560. Such should be the rule under the New York standard form, § 148, *supra*. It has been held that under valued policy laws, making the amount written the measure of damage in case of total loss, plans cannot be demanded, *Mil. Mech. Ins. Co.* v. *Russell*, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159; *West. Assur. Co.* v. *Brown* (Tex. Civ. App., 1895), 33 S. W. 994. And see *German-Am. Ins. Co.* v. *Hocking*, 115 Pa. St. 398, 8 Atl. 586; *Roe* v. *Dwelling House Ins. Co.*, 149 Pa. St. 94, 23 Atl. 718.

[4] *Jones* v. *Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. 578.

[5] *McNally* v. *Phœnix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *Sullivan* v. *Germania Ins. Co.*, 89 Mo. App. 106; *Lane* v. *St. Paul Ins. Co.*, 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197; *Kelly* v. *Sun Fire Office*, 141 Pa. St. 10, 21 Atl. 447, 23 Am. St. R. 254. But see, *contra*, *Home Ins. Co.* v. *Hammang*, 44 Neb. 567, 62 N. W. 883; *German-Am. Ins. Co.* v. *Norris*, 100 Ky. 29, 37 S. W. 267.

[6] *McNally* v. *Phœnix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *Gottlieb* v. *Dutchess Co. Mut. Ins. Co.*, 89 Hun, 36, 35 N. Y. Supp. 71; *Merchants' Ins. Co.* v. *Gibbs*, 56 N. J. L. 679, 29 Atl. 485, 44 Am. St. R. 413; *Badger* v. *Glens Falls Ins. Co.*, 49 Wis. 389, 5 N. W. 845.

inform the insured generally that he will be required to conform strictly to the conditions in the policy.[1]

As to the residence of the notary or magistrate the court will not go into a very nice calculation to determine whether one magistrate is a little nearer to the place of the fire than another.[2] If the assured has acted in good faith, it seems that he may procure the certificate from the nearest magistrate who will consent to act.[3]

A notary who had married a first cousin of the assured was held to be so "related" as to be disqualified.[4] A creditor of the insured, it is said, will not be debarred from acting as notary unless he has some interest in the property insured, or in the proceeds of the insurance.[5]

If after the exercise of reasonable diligence the assured, through no fault of his own, is unable to get a certificate, he should be excused for the failure, since the certificate is a mere matter of evidence to be obtained, if practicable, from a third party; but on this point there is conflict.[6]

[1] *Moyer* v. *Sun Ins. Co.*, 176 Pa. St. 579, 35 Atl. 221; *Swearingen* v. *Pacific Ins. Co.*, 66 Mo. App. 90; *Ætna Ins. Co.* v. *Shacklett* (Tex. Civ. App.), 57 S. W. 583. But if the insured voluntarily furnishes a certificate, the validity of objections made to it will be determined as though due demand had been made, *Ætna Ins. Co.* v. *Peoples' Bank*, 62 Fed. 222, 10 C. C. A. 342; *Williams* v. *Queen Ins. Co.*, 39 Fed. 167.

[2] *Daniels* v. *Equitable Fire Ins. Co.*, 50 Conn. 551; *Amer. Cent. Ins. Co.* v. *Rothchild*, 82 Ill. 166; *Williams* v. *Niagara Fire Ins. Co.*, 50 Iowa, 561; *Dolliver* v. *St. Joseph Fire & Marine Ins. Co.*, 128 Mass. 315, 35 Am. Rep. 378; *Oswalt* v. *Hartford Ins. Co.*, 175 Pa. St. 427, 34 Atl. 735; *Turley* v. *North Am. Fire Ins. Co.*, 25 Wend. (N. Y.) 374; *Smith* v. *Home Ins. Co.*, 47 Hun (N. Y.), 30. If the company objects on the ground that there is a nearer notary, it should give his name and address, *Paltrovitch* v. *Phœnix Ins. Co.*, 143 N. Y. 73, 37 N. E. 639; *Agricultural Ins. Co.* v. *Bemiller*, 70 Md. 400, 17 Atl. 380. If the company objects, and calls attention to a nearer notary, the insured may forfeit his policy by ignoring the requirement, *Gilligan* v. *Commercial Ins. Co.*, 20 Hun, 93, aff'd 87 N. Y. 626.

[3] *Noone* v. *Ins. Co.*, 88 Cal. 152, 26 Pac. 103; *Walker* v. *Phœnix Ins. Co.*, 62 Mo. App. 209; *Lang* v. *Eagle Fire Ins. Co.*, 12 App. Div. 39, 42 N. Y. Supp. 539. If the company employs the nearest magistrate to prevent the assured from doing so, it cannot enforce the clause, *DeLand* v. *Ætna Ins. Co.*, 68 Mo. App. 277.

[4] *Peoples' Bank* v. *Ætna Ins. Co.*, 74 Fed. 507, 20 C. C. A. 630, 42 U. S. App. 81. The insured cannot qualify himself to act as notary by assigning all his interest in the claim, *Stevens* v. *Phœnix Ins. Co.*, 32 N. B. 394.

[5] *Dolliver* v. *St. Joseph Ins. Co.*, 131 Mass. 39. As to magistrate, and when disqualified, see *Margeson* v. *Commercial Union Assur. Co.*, 31 N. S. 337; *Ætna Ins. Co.* v. *Miers*, 5 Sneed (Tenn.), 139; *Wright* v. *Hartford Ins. Co.*, 36 Wis. 522 (holding that an impartial arbiter is arrived at not merely one having no pecuniary interest in the insurance, but not under standard form of policy).

[6] *McNally* v. *Phœnix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *German-Am. Ins. Co.* v. *Norris*, 100 Ky. 29, 37 S. W. 267, 66 Am. St. R. 324; *Agricultural Ins. Co.* v. *Bemiller*, 70 Md. 400, 17 Atl. 380; *DeLand* v. *Ætna Ins. Co.*, 68 Mo. App. 277. *Contra*, *Leadbetter* v. *Ætna Ins. Co.*, 13 Me. 265, 29 Am. Dec. 505; *Johnson* v. *Phœnix Ins. Co.*, 112 Mass. 49, 17 Am. Rep. 65; *Lane* v. *St. Paul F. & M. Ins. Co.*, 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197; *Roumage*

As to the contents of the certificate a substantial compliance with the requirements of the policy will suffice.[1] Nor is the insured concluded by the estimate of loss or other statements contained in the certificate.[2]

This requirement is omitted from the Massachusetts policy.

§ 304. Exhibit Remains—Submit to Examination.—*The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company and subscribe the same.*

These provisions, and the next following, connected with it, relating to the production of books and bills on demand, confer great privileges upon the insurers, and ought to be enforced by the latter only within bounds of reason and propriety. They are, however, binding upon the insured so far as it lies within his power to comply with them,[3] and a fulfillment, at least to that extent, is a condition precedent to a right of recovery under the standard policy.[4] Therefore, before opportunity for an examination of the property by the adjuster,[5] or with knowledge that a further examination is required,[6] the assured must not remove or dispose of the property so as to deprive the company of its rights.

The demand for a personal examination of the insured under oath must be clear and distinct, and not ambiguous or inferential.[7] The notice also must designate a reasonable time, a reasonable place, and the person by whom it is to be conducted;[8] and the notice must

v. *Mech. Fire Ins. Co.*, 13 N. J. L. 110; *Kelly* v. *Sun Fire Office*, 141 Pa. St. 10, 21 Atl. 447.

[1] *Ætna Fire Ins. Co.* v. *Tyler*, 16 Wend. 385, 30 Am. Dec. 90; *National Ins. Co.* v. *Strong*, 25 Ohio C. C. 101; *Brown* v. *Hartford Fire Ins. Co.*, 52 Hun, 260, 5 N. Y. Supp. 230, aff'd 132 N. Y. 539, 30 N. E. 68. Objections will be held waived unless promptly pointed out, *Schmurr* v. *State Ins. Co.*, 30 Oreg. 29, 46 Pac. 363; *Bailey* v. *Hope Ins. Co.*, 56 Me. 474; *DeWitt* v. *Assn.*, 157 N. Y. 353, 51 N. E. 977. But see *Gilligan* v. *Commercial Ins. Co.*, 20 Hun, 93, aff'd 87 N. Y. 626.

[2] *Birmingham Ins. Co.* v. *Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. R. 598. As to statutes governing requirements after loss, see Appendix, ch. I.

[3] *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, 3 S. Ct. 507; *Firemen's Fund I. Co.* v. *Sims*, 115 Ga. 939, 42 S. E. 269; *O'Brien* v. *Commercial Fire Ins. Co.*, 63 N. Y. 108; *Titus* v. *Glens Falls Ins. Co.*, 81 N. Y. 410.

[4] *Harris* v. *Phœnix Ins. Co.*, 35 Conn. 310; *Firemen's Fund I. Co.* v. *Sims*, 115 Ga. 939, 42 S. E. 269. *Contra, Scottish Union & Nat. Ins. Co.* v. *Strain*, 24 Ky. L. R. 958, 70 S. W. 274.

[5] *Oshkosh Match Works* v. *Manchester F. A. Co.*, 92 Wis. 510, 66 N. W. 525.

[6] *Astrich* v. *German-Am. Ins. Co.*, 131 Fed. 13, 65 C. C. A. 251.

[7] *Dougherty* v. *German-Am. Ins. Co.*, 67 Mo. App. 526; *State Ins. Co.* v. *Maackens*, 38 N. J. L. 565.

[8] *Ætna Ins. Co.* v. *Simmons*, 49 Neb. 811, 69 N. W. 125 (place out of county where assured resides may not be reasonable); *American Cent. Ins. Co.* v.

itself be made within a reasonable time.[1] Hence the company may not postpone the exercise of its option until an action has been brought against it under the policy.[2]

The company is entitled to the personal oath of the assured, unless he is incompetent or absent, through no fault of his own. He cannot substitute an agent,[3] or his receiver in bankruptcy,[4] in his stead. Therefore if the assured voluntarily absents himself, so that he cannot with due diligence be found, this amounts to a refusal to be examined on oath;[5] and after an examination clearly incomplete, a refusal to continue will have the same effect.[6] But if the company concludes its examination it cannot give a fresh notice, and open up a new hearing.[7]

It is held that before entering upon the examination the insured may insist upon the presence of his attorney;[8] but, since the policy expressly provides that the examination shall be made by the representative of the company, the attorney for the assured would

Simpson, 43 Ill. App. 98 (foreign company cannot compel assured to leave state where he resides and where property is located); *Fleisch* v. *Ins. Co. of N. A.*, 58 Mo. App. 596 (the place of contract and of fire *held*, the proper place for examination of the assured and his books of account, though he resided out of the state).

[1] *Fleisch* v. *Ins. Co. of N. A.*, 58 Mo. App. 596.

[2] *Aurora Fire Ins. Co.* v. *Johnson*, 46 Ind. 315.

[3] *Pearlstine* v. *Westchester Ins. Co.*, 70 S. C. 75, 49 S. E. 4 (where assured had fled the country to avoid arrest and could not be notified at all).

[4] *Sims* v. *Union Assur. Soc.*, 129 Fed. 804. Mortgagee is no substitute, *Fire Ins. Co.* v. *Felrath*, 77 Ala. 194, 54 Am. Rep. 58.

[5] *Firemen's Fund Ins. Co.* v. *Sims*, 115 Ga. 939, 42 S. E. 269; *Harris* v. *Phœnix Ins. Co.*, 35 Conn. 310.

[6] *Bonner* v. *Home Ins. Co.*, 13 Wis. 677.

[7] *Moore* v. *Protection Ins. Co.*, 29 Maine, 97, 48 Am. Dec. 514. The company, because of the trouble and expense to itself, seldom requires the insured to submit to a personal examination, except in those cases where fraud is suspected. "The purpose is to afford a method of detecting imposition and fraud," *Pearlstein* v. *Westchester Ins. Co.*, 70 S. C. 75, 49 S. E. 4, 6. But in such cases this provision of the policy sometimes proves of great value to it. If the insured gives false testimony in detail upon his examination had under the terms of the policy, it is generally a source of embarrassment to him upon the subsequent trial of his lawsuit. Upon this preliminary examination the representative of the company finds it particularly desirable to interrogate him in regard to the precise location of the various items of property said to be in the building at the time of the fire, and also to compel him to state in detail when and where he purchased them. These inquiries are material and proper, *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, 3 S. Ct. 507. If the property is fictitious, it is difficult for the witness to tell a plausible story, and he soon finds himself obliged to have recourse to the suspicious response, that he cannot remember. If he attempts to locate the fictitious property in detail, and does not have a copy of his testimony at the subsequent trial months or perhaps years afterwards, he will be apt before the jury to tell an entirely different story. If he states the times and places of purchases from merchants, the books of the latter will furnish a valuable check upon his accuracy and good faith.

[8] *American Cent. Ins. Co.* v. *Simpson*, 43 Ill. App. 98; *Thomas* v. *Burlington Ins. Co.*, 47 Mo. App. 169.

seem to have no right to share in its active conduct. As to the proper scope of the inquiry, the insured is only bound to answer such questions as have a material bearing upon the origin of the fire, the insurance, and the loss;[1] and after he has finished the examination, he must receive a specific notice to sign it, before he can be adjudged in default for not so doing.[2]

The Massachusetts policy has no such clause.

§ 305. When Required, Production of Books of Accounts, Vouchers, etc.—Books of account, vouchers or, if lost, certified copies, are almost invariably called for as an incident to any personal examination of the insured, and, often, when no personal examination is demanded. The notice must be made within a reasonable time, and appoint a reasonable time and place.[3] On his part, the insured must make a reasonable effort to comply with the demand, called

[1] *Ins. Co.* v. *Weides*, 14 Wall. (U. S.) 375 (cannot be compelled to state on what terms he settled with other companies); *Titus* v. *Glens Falls Ins. Co.*, 81 N. Y. 410; *Enos* v. *St. Paul Ins. Co.*, 4 S. D. 639, 57 N. W. 919. Whether the conduct of the insured, upon the examination, amounts to a disobedience of the injunction of this clause, may be a question of fact for a jury, *Phillips* v. *Protection Ins. Co.*, 14 Mo. 220; for, while logically, the sufficiency of the examination, and the relevancy of the questions asked, would seem to present issues of law for the court to determine, *Fleischner* v. *Beaver*, 21 Wash. 6, 56 Pac. 840; and see *North Am. Life & Acc. Ins. Co.* v. *Borroughs*, 69 Pa. St. 43, 8 Am. Rep. 212, yet, in practice, courts are very reluctant to dismiss the complaint on such grounds, and generally leave the question of reasonable compliance to the jury, provided the insured has in good faith submitted to any sort of an examination, which he believes to be a fulfillment of his duty, *Porter* v. *Traders' Ins. Co.*, 164 N. Y. 504, 58 N. E. 641 (holding that clause must be construed liberally in favor of the assured, and that the relevancy of the interrogatories there put raised a mixed question of law and fact).

[2] *Scottish Union & Nat. Ins. Co.* v. *Keene*, 85 Md. 263, 37 Atl. 33; *O'Brien* v. *Ohio Ins. Co.*, 52 Mich. 131. The insured is not concluded by misstatements innocently made in his examination, *Huston* v. *State Ins. Co.*, 100 Iowa, 402, 69 N. W. 674; *Knop* v. *National Ins. Co.*, 107 Mich. 323, 65 N. W. 228. But if the jury finds that a willfully false statement of fact was made though with reference to only one item the entire policy is vitiated, *Dolloff* v. *Phœnix Ins. Co.*, 82 Me. 266 (fraud as to part vitiates the whole); *Hamberg* v. *St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. 388; *Worachek* v. *New Denmark Home F. Ins. Co.*, 102 Wis. 88 (false swearing as to part forfeits the whole). After demanding an examination of the insured the company may waive it, *Wicking* v. *Citizens' Mut. Ins. Co.*, 118 Mich. 640, 77 N. W. 275; or by examining his representative instead of the assured himself, *Western Assur. Co.* v. *McGlathery*, 115 Ala. 213, 22 So. 104. By the better authority, requiring examination and production of books and bills does not waive forfeitures, § 148, *supra*.

[3] *Jones* v. *Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. 578 (place of fire, a proper place when books are kept there); *Fleisch* v. *Ins. Co. of N. A.*, 58 Mo. App. 596; *Murphy* v. *North Brit. & M. Ins. Co.*, 61 Mo. App. 323; *Tucker* v. *Colonial Ins. Co.*, 58 W. Va. 30, 51 S. E. 86. It is too late to make demand after action is begun, *Wells Whip Co.* v. *Farmers' Mut. Fire Ins. Co.*, 209 Pa. St. 488, 58 Atl. 894. De-

for under this clause of the policy;[1] and, if he cannot comply in full, he must do so as far as circumstances render a compliance practicable.[2] Under this clause the courts do not require the production of proofs which cannot be produced by reason of their destruction by the fire, or because for any reason they are beyond the control of the insured.[3] And so also if, by diligent effort, duplicate bills, invoices, or vouchers cannot be obtained, their production will be excused.[4] But, otherwise, they must be produced.[5]

A call for certified copies of bills or vouchers must be specific. A call for bills is not enough, though the originals are in fact lost.[6]

The Massachusetts form provides, "the company may also examine the books of account and vouchers of the insured and make extracts from the same."

§ 306. Appraisal.—*In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.*

This is called the appraisal or arbitration clause. It offers a prompt and inexpensive method[7] of adjusting the most prolific cause of dispute between the parties, namely, divergent opinions

mand is ineffectual if no place is named, *Seibel* v. *Firemen's Ins. Co.*, 212 Pa. St. 604, 62 Atl. 101.

[1] *Seibel* v. *Lebanon Ins. Co.*, 197 Pa. St. 106, 46 Atl. 851; *Langan* v. *Royal Ins. Co.*, 162 Pa. St. 357, 29 Atl. 710; *American Cent. Ins. Co.* v. *Ware*, 65 Ark. 336, 46 S. W. 129.

[2] *Farmers' Ins. Co.* v. *Mispelhorn*, 50 Md. 180, 53 Atl. 473; *Stephens* v. *Union Assur. Soc.*, 16 Utah, 22, 50 Pac. 626; *Ward* v. *Nat. Ins. Co.*, 10 Wash. 361, 38 Pac. 1127. Inventory called for, *Manchester F. Ins. Co.* v. *Simmons*, 12 Tex. Civ. App. 607, 35 S. W. 722; *Fire Assn.* v. *Masterson*, 25 Tex. Civ. App. 518, 61 S. W. 962.

[3] *L. & L. & G. Ins. Co.* v. *Kearney*, 180 U. S. 132, 45 L. Ed. 460, 21 S. Ct. 326; *Eggleston* v. *Council Bluffs Ins. Co.*, 65 Iowa, 308; *Sneed* v. *Brit.-Am. Ins. Co.*, 73 Miss. 279, 18 So. 928; *Brookshier* v. *Ins. Co.*, 91 Mo. App. 599.

[4] *Miller* v. *Hartford Fire Ins. Co.*, 70 Iowa, 704, 29 N. W. 411; *Jones* v. *Mechanics' F. Ins. Co.*, 36 N. J. L. 29, 13 Am. Rep. 405; *Ward* v. *Nat. F. Ins. Co.*, 10 Wash. 361, 38 Pac. 1127.

[5] *Mispelhorn* v. *Farmers' Ins. Co.*, 53 Md. 473; *O'Brien* v. *Commercial Fire Ins. Co.*, 63 N. Y. 108; *Langan* v. *Royal Ins. Co.*, 162 Pa. St. 357, 29 Atl. 710. Where without explanation or excuse it was shown that insured had altered his invoices, *held*, that he could not recover, *Virginia F. & M. Ins. Co.* v. *Saunders* (June, 1890), 86 Va. 969.

[6] *Whip Co.* v. *Farmers' Ins. Co.*, 209 Pa. St. 488, 58 Atl. 894; *Johnson* v. *Phœnix Ins. Co.*, 69 Mo. App. 226.

[7] *Fleming* v. *Phœnix Assur. Co.*, 75 Hun (N. Y.), 530.

regarding values and extent of damage, and is very important to the companies in many instances to relieve them from extravagant or fraudulent claims. The option to take advantage of this procedure to fix the amount of loss is extended to both parties alike, but must be exercised by affirmative demand made within a reasonable time, otherwise the clause becomes inoperative.[1] Another essential factor is a preëxisting disagreement between the parties as to the amount of loss, without which any stipulation to appraise would not fall under the terms of the policy, but would be revocable as at common law.[2]

[1] *Hamilton* v. *Phœnix Ins. Co.*, 61 Fed. 379, 9 C. C. A. 530 (reasonable time). Thus after disagreement if the company wants to avail itself of this clause it must take the initiative. *Nerger* v. *Eq. F. Assn.* (So. Dak., April, 1906), 107 N. W. 531. It is not a condition precedent unless demand is made, *Lesure, etc., Co.* v. *Mut. F. Ins. Co.*, 101 Iowa, 514, 70 N. W. 761; *Baillie* v. *Western Assur. Co.*, 49 La. Ann. 658, 21 So. 736; *Davis* v. *Atlas Ins. Co.*, 16 Wash. 232, 47 Pac. 436; *National, etc., Assn.* v. *Ins. Co.*, 106 Mich. 236, 64 N. W. 21; *Grand Rapids F. Ins. Co.* v. *Finn*, 60 Ohio St. 513, 54 N. E. 545 (reasonable time); *Randall* v. *Ins. Co.*, 10 Mont. 362, 25 Pac. 960; *Chainless Cycle Mfg. Co.* v. *Security Ins. Co.*, 169 N. Y. 304, 62 N. E. 392 (reasonable time); *Davis* v. *Am. Cent. Ins. Co.*, 7 App. Div. 488, 40 N. Y. Supp. 248, aff'd 158 N. Y. 688; *Garretson* v. *Mer. & Bankers' Fire Ins. Co.*, 114 Iowa, 17, 86 N. W. 32; *Capitol Ins. Co.* v. *Wallace*, 48 Kan. 400, 29 Pac. 755. But see *contra*, that compliance is a condition precedent without demand if there is a disagreement, *Adams* v. *Ins. Co.*, 70 Cal. 198, 11 Pac. 627; *Phœnix Ins. Co.* v. *Lorton*, 109 Ill. App. 63; *Hutchinson* v. *Ins. Co.*, 153 Mass. 143, 26 N. E. 439; *Mosness* v. *German-Am. Ins. Co.*, 50 Minn. 341; *Murphy* v. *Ins. Co.*, 61 Mo. App. 323; *Graham* v. *Ins. Co.*, 75 Ohio St. 374, 79 N. E. 930. A demand by registered letter which assured refuses to receive is operative, *American Cent. Ins. Co.* v. *Simpson*, 43 Ill. App. 98. And the demand must be for the appraisal described in the policy, *Walker* v. *German Ins. Co.*, 51 Kan. 725, 33 Pac. 597; *Swearinger* v. *Ins. Co.*, 66 Mo. App. 90. A joint demand by several companies for one appraisal will not be effective, *Conn. F. Ins. Co.* v. *Hamilton*, 59 Fed. 258, 8 C. C. A. 114; *Palatine Ins. Co.* v. *Morton, etc., Co.*, 106 Tenn. 558, 61 S. W. 787; *Hartford F. Ins. Co.* v. *Asher* (Ky., 1907), 100 S. W. 233. The party that more frequently calls for appraisal is the insurance company. If company elects to replace or rebuild it cannot demand appraisal, *Wynkoop* v. *Niagara Ins. Co.*, 91 N. Y. 478.

[2] *British-Am. Assur. Co.* v. *Darragh*, 128 Fed. 890; *Continental Ins. Co.* v. *Vallandingham*, 25 Ky. Law Rep. 468, 76 S. W. 22; *Hogadone* v. *Grange Mut. Ins. Co.*, 133 Mich. 339, 94 N. W. 1045; *Kelly* v. *L. & L. & G. Ins. Co.*, 94 Minn. 141, 102 N. W. 380. But it has been held that the disagreement may be assumed when both parties have signed the appraisal agreement, *Kersey* v. *Phœnix Ins. Co.*, 135 Mich. 10, 97 N. W. 57; *Fowble* v. *Phœnix Ins. Co.*, 106 Mo. App. 527, 530, 81 S. W. 485. In case of total loss of a building a valued policy law prevails over an appraisal clause, *Hartford F. Ins. Co.* v. *Bourbon Co. Ct.*, 115 Ky. 109, 72 S. W. 739; *Caledonia Ins. Co.* v. *Cooke*, 101 Ky. 412, 41 S. W. 279; *O'Keefe* v. *Ins. Co.*, 140 Mo. 558, 41 S. W. 922. The award determines simply the amount of loss, therefore the action of the assured is not on the award but on the policy, *Smith* v. *Herd*, 110 Ky. 56, 65, 60 S. W. 841; *Soars* v. *Home Ins. Co.*, 140 Mass. 345, 5 N. E. 149. By the prevailing rule to take advantage of the appraisal clause is no waiver of known forfeitures under the New York standard policy, *Western Assur. Co.* v. *Hall*, 120 Ala. 547, 24 So. 936; *Willoughby* v. *St. Paul German Ins. Co.*, 68 Minn. 373; *London & L. Ins. Co.* v. *Honey*, 2 Vict. L. R. (Law) 7. Standard policy expressly

The Massachusetts standard policy provides: *In case of loss under this policy, and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months.*

Under the Michigan standard policy the award is only "*prima facie* evidence of the amount of such loss." By the terms of the New Hampshire policy, if the parties fail to agree upon referees within fifteen days after notice of loss, either party, upon giving written notice, "may apply to a justice of the Supreme Court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered." [1] The Iowa standard policy contains no provision for appraisal. Certain of the standard policies except from the scope of the appraisal a total loss on buildings.[2]

Under the Massachusetts general insurance law, detailing the procedure upon arbitration,[3] if the insurer fail to apply for arbitration within the time specified in the law, he waives his right to an arbitration.[4] So also if he ignore the request of the insured for arbitration.[5]

§ 307. Standard Clause a Valid Condition.—Courts are the legally appointed tribunals for determining controversies, and are jealous of interference with their prerogatives. Any agreement, therefore, to refer to arbitration the general question of the liability of the insurers under the policy, or all matters of dispute under the policy, would be void; since it is held to be against public policy to oust

provides that waiver shall not result, § 314.

[1] Similarly by the N. J. General Insurance Act, § 79, application may be made to court for the appointment of appraisers. In like manner by Massachusetts General Ins. Act (1907), § 60, on failure, to appoint the third referee, application may be made to the insurance commissioner to appoint him.

[2] For example, Minnesota, New Hampshire, and South Dakota. In Minnesota if total insurance on building, exclusive of foundation, is less than insurable value specified in policy, insured need not submit to arbitration. *Ohage* v. *Union Ins. Co.*, 82 Minn. 426, 85 N. W. 212.

[3] Gen. Ins. Act (1907), § 60.

[4] *Hayes* v. *Milford Mut. F. Ins. Co.*, 170 Mass. 492, 49 N. E. 754.

[5] *McDowell* v. *Ætna Ins. Co.*, 164

the courts altogether of their jurisdiction.[1] But the provision of the New York standard policy, which simply refers to appraisal the question of the amount of loss, leaving any dispute in regard to the company's liability to be determined by the courts, is valid, and an award thereunder whenever the appraisal has been demanded by the company is expressly made a prerequisite to any right of recovery upon the policy.[2] Nor are the provisions of this clause unconstitutional.[3]

§ 308. Appraisers Competent, Disinterested.—The appraisers and

Mass. 444, 41 N. E. 665. A question of waiver is often for the jury, *Lamson Cons. S. S. Co.* v. *Prudential F. Ins. Co.*, 171 Mass. 433.

[1] *Sanford* v. *Conn. Trav. Mut. Acc. Assoc.*, 147 N. Y. 326, 41 N. E. 694; *Delaware & H. Canal Co.* v. *Penn Coal Co.*, 50 N. Y. 250; *Reed* v. *Washington Ins. Co.*, 138 Mass. 575; *Clement* v. *British-Am. Assur. Co.*, 141 Mass. 298, 5 N. E. 847; *Scott* v. *Avery*, 20 English Law & Eq. 327, 5 H. L. Cases, 811. And see *Chadwick* v. *Phœnix, etc., Assn.*, 143 Mich. 481, 106 N. W. 1122.

[2] *Hamilton* v. *Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419; *Chainless Cycle Co.* v. *Security Ins. Co.*, 169 N. Y. 304, 62 N. E. 392 (which also holds that default by assured is matter of defense to be alleged and proved by the company); *Phœnix Ins. Co.* v. *Lorton*, 109 Ill. App. 63; *Zalesky* v. *Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566; *Continental Ins. Co.* v. *Vallandingham*, 116 Ky. 287, 76 S. W. 22; *Kersey* v. *Phœnix Ins. Co.*, 135 Mich. 10, 97 N. W. 57; *Fisher* v. *Mer. Ins. Co.*, 95 Me. 486, 50 Atl. 282, 85 Am. St. R. 428; *Grand Lodge* v. *Gaddis*, 65 N. J. Eq. 1, 55 Atl. 465; *Phœnix Ins. Co.* v. *Carnahan*, 63 Ohio St. 258, 58 N. E. 805 (the right being absolute, motive or good faith in making the demand is immaterial); *Palatine Ins. Co.* v. *Morton, etc., Co.*, 106 Tenn. 558, 61 S. W. 787; *Chapman* v. *Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422; *Spurrier* v. *La Cloche* (1902), A. C. 446, 450; *Caledonian Ins. Co.* v. *Gilmour* (1893), A. C. 85; *London & L. Ins. Co.* v. *Honey*, 2 Vict. L. R. (Law) 7 (nor is it any waiver of known defenses). But in certain states appraisal prior to award even under the standard form of policy is held to be revocable by either party on the ground that on so important an issue a party must not be deprived of the protection of the courts, *Hartford Ins. Co.* v. *Hon*, 66 Neb. 555, 92 N. W. 746, 60 L. R. A. 436; *Franklin* v. *New Hampshire Ins. Co.*, 70 N. H. 251, 47 Atl. 91; *Needy* v. *German-Am. Ins. Co.*, 197 Pa. St. 460, 47 Atl. 739; *Yost* v. *Dwelling House Ins. Co.*, 179 Pa. St. 381, 35 Atl. 517; *Mentz* v. *Armenia Ins. Co.*, 79 Pa. St. 478, 21 Am. Rep. 80. Appraisal and award are not a condition precedent where a policy does not expressly make them so, *Hamilton* v. *Ins. Co.*, 137 U. S. 370, 11 S. Ct. 133, 34 L. Ed. 708; *Birmingham Fire Ins. Co.* v. *Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. R. 598; *Seward* v. *City of Rochester*, 109 N. Y. 164, 16 N. E. 348; *Collins* v. *Locke*, 4 App. Cas. 674. Where an appraisal has been demanded under the Massachusetts policy and those like it, an award, unless waived, is a condition precedent, *Lamson Cons. S. S. Co.* v. *Prudential Ins. Co.*, 171 Mass. 433; *Schrepfer* v. *Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005.

[3] *Re Opinion Justices* (Me.), 55 Atl. 828. The assured must be careful not to remove or dispose of the property before the company has had a reasonable opportunity of making its election, and the appraisers an opportunity of investigation, *Hamilton* v. *Ins. Co.*, 136 U. S. 242; *Astrich* v. *German-Am. Ins. Co.*, 131 Fed. 13, 16; *Reading Ins. Co.* v. *Egelhoff*, 115 Fed. 393; *Schrepfer* v. *Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005; *Prov. Wash. Ins. Co.* v. *Wolf* (Ind. App.), 72 N. E. 606; *Davis* v. *Am. Cent. Ins. Co.*, 7 App. Div. 488, 40 N. Y. Supp. 248, aff'd 158 N. Y. 688 (perishable goods need not be kept long).

umpire must be competent and disinterested. "Disinterested" does not refer simply to an absence of pecuniary interest. A disinterested appraiser is one who is free from bias or prejudice towards either party.[1] While theoretically the appraisers, it is said, are supposed to act in a quasi-judicial capacity and wholly without partisanship, both in their selection of umpire and in the conduct of the appraisal,[2] nevertheless, in practice each appraiser is apt to be a zealous advocate before the umpire, to the end that the interests of the party appointing him may be advanced, and not overlooked; and within limits such an attitude seems to be recognized by the courts as legitimate and indeed unavoidable.[3]

He is, however, a judicial officer rather than an agent and is under obligations to be fair and disinterested. The appointment of a biased or unsuitable appraiser, coupled with concealment of his character, is ground for vacating the award.[4] But if, with knowledge of his objectionable disposition or lack of competency, a party proceeds with the appraisal, such conduct amounts to a waiver, and the award will be binding upon both parties.[5]

§ 309. Scope of Appraisal, Entire Loss.—By the better reason and authority the appraisers are not simply to pass upon property partially damaged, some remains of which are left in sight, but as

[1] *Bradshaw* v. *Agricultural Ins. Co.*, 137 N. Y. 137, 32 N. E. 1055; *Produce Refrig. Co.* v. *Norwich Union Fire Ins. Co.*, 91 Minn. 210, 97 N. W. 875 ("the arbitration being compulsory, it is highly important that the men selected should in every sense be disinterested," a judicial proceeding); *Fowble* v. *Phœnix Ins. Co.*, 106 Mo. App. 527, 81 S. W. 485 (what is a proper selection of appraisers); *Hickerson* v. *German Ins. Co.*, 96 Tenn. 193, 33 S. W. 1041; *Royal Ins. Co.* v. *Parlin Co.*, 12 Tex. Civ. App. 572, 34 S. W. 401. Whether appraisers are competent and disinterested generally presents a question of fact for the jury, and this rule brings much advantage to the assured, *Bradshaw* v. *Agricultural Ins. Co.*, 137 N. Y. 137, 32 N. E. 1055; *National Ins. Co.* v. *O'Bryan*, 75 Ark. 211, 87 S. W. 129; *Meyerson* v. *Hartford Ins. Co.*, 17 Misc. 121, 39 N. Y. Supp. 329.

[2] *Hall* v. *Western Assur. Co.*, 133 Ala. 637, 32 So. 257; *Goodwin* v. *Merchants' Ins. Co.*, 118 Iowa, 601, 92 N. W. 894; *Christianson* v. *Norwich Union F. Ins. Co.*, 84 Minn. 526, 88 N. W. 16.

[3] *Am. Cent. Ins. Co.* v. *Landau*, 62 N. J. Eq. 73, 49 Atl. 738; *Schmidt* v. *Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767.

[4] *Hall* v. *Western Assur. Co.*, 133 Ala. 637, 32 So. 257; *Ins. Co.* v. *Hegewald*, 161 Ind. 631, 66 N. E. 902; *Kiernan* v. *Dutchess Co. Ins. Co.* 150 N. Y. 190, 44 N. E. 698; *N. Y. Mut. S. & L. Assoc.* v. *Manchester Assur. Co.*, 94 App. Div. 104, 87 N. Y. Supp. 1075; *Kaiser* v. *Hamburg-Brem. Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, aff'd 172 N. Y. 663, 65 N. E. 1118 (in which award was $3,031, and true damage $3,830.28).

[5] *Indiana Ins. Co.* v. *Brehm*, 88 Ind. 578; *Produce Refrig. Co.* v. *Norwich M. Ins. Assoc.*, 91 Minn. 210, 97 N. W. 875. The circumstance that the appraiser had frequently before acted for the company does not necessarily disqualify him, *Remington Paper Co.* v. *London Assur. Co.*, 12 App. Div. 218, 43 N. Y. Supp. 431; *Stemmer* v. *Scottish Ins. Co.*, 33 Oreg. 65, 53 Pac. 498;

well upon property totally destroyed.[1] The policy provides that they are to estimate not only the "damage" but also "the loss," meaning apparently the entire loss, and that, if an appraisal is demanded, the loss is payable only when so estimated.[2]

The opposite rule is hopelessly indefinite as applied to personal property, and the cases standing for it [3] cannot be approved. They rely for support upon a case in a lower court, which construed a somewhat different form of arbitration clause; [4] and they proceed upon the mistaken theory, announced in another case in a lower court, that appraisers, appointed as experts, are limited to a personal inspection of the remains of the property to enable them to estimate sound values and damages.[5] But it would be almost impossible, by means of inspection only, in most instances of damage to personal property, to arrive at any satisfactory solution of the preliminary inquiry, namely, what articles are so far intact that an intelligible estimate may be made of their sound value and damage. No expert, however wise and experienced, can by eyesight alone fairly arrive at the sound value of a bedstead and the amount of money damage occasioned by its combustion, if nothing of it is left but its casters and springs. Moreover, the principal purpose of creating the appraisal clause would be defeated if the way were always open to a dishonest claimant to evade its practical effect by swearing that the bulk of his property is burned out of sight, and is therefore not included in the award.[6]

Van Winkle v. *Continental F. Ins. Co.*, 55 W. Va. 286, 47 S. E. 82. But such relationship should not be concealed by the company, *Cheney* v. *Martin*, 127 Mass. 304. An indorser on a note of the insured is not necessarily disqualified, *Bullman* v. *North Brit. & M. Ins. Co.*, 159 Mass. 118, 34 N. E. 169.

[1] *Stout* v. *Phœnix Assur. Co.*, 65 N. J. Eq. 566, 56 Atl. 691; *Rutter* v. *Hanover Fire Ins. Co.*, 138 Ala. 202, 35 So. 33 (1903); *Adams* v. *N. Y. Bowery Ins. Co.*, 85 Iowa, 6, 51 N. W. 1149; *Chippewa L. Co.* v. *Phœnix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055; *Schrepfer* v. *Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005; *Mossness* v. *German-Am. Ins. Co.*, 50 Minn. 347; *Herndon* v. *Imperial Fire Ins. Co.*, 110 N. C. 279, 14 S. E. 742; *Conn. F. Ins. Co.* v. *Carnahan*, 63 Ohio St. 258, 58 N. E. 805; *Palatine Ins. Co.* v. *Morton-Scott-Robertson Co.*, 106 Tenn. 558, 61 S. W. 787; *Hong Sling* v. *Scottish U. & Nat. Ins. Co.*, 7 Utah, 941, 29 Pac. 170. And see *Kaiser* v. *Hamburg-Brem. Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, aff'd 172 N. Y. 663, 65 N. E. 1118; *Rutter* v. *Ins. Co.*, 138 Ala. 202, 35 So. 33.

[2] *Williamson* v. *L. & L. & G. Ins. Co.*, 122 Fed. 59, 58 C. C. A. 241.

[3] *Lang* v. *Eagle Fire Co.*, 12 App. Div. 39, 42 N. Y. Supp. 539; *Yendel* v. *Western Assur. Co.*, 21 Misc. 348, 47 N. Y. Supp. 141; *L. & L. & G. Ins. Co.* v. *Colgin* (1896, Tex. Civ. App.), 34 S. W. 291.

[4] *Rosenwald* v. *Phœnix Ins. Co.*, 50 Hun, 172, 5 N. Y. Supp. 215.

[5] *Fleming* v. *Phœnix Ins. Co.*, 75 Hun (N. Y.), 530. See later case, *Kaiser* v. *Hamburg-Bremen Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, aff'd 172 N. Y. 663, 65 N. E. 1118.

[6] In like manner the appraisers and umpire may determine the issue whether there has been a total loss, *Williamson* v. *L. & L. & G. Ins. Co.*, 122 Fed. 59; *Yendel* v. *Western Assur.*

§ 310. Conduct of Appraisal.—No very definite code of regulations for the guidance of umpire and appraisers can be deduced from the many decisions upon the subject. The rigid common-law rules of evidence and court procedure do not apply.[1] Nor is the appraisal precisely the same as an ordinary common-law arbitration;[2] but it is rather intended to afford a simple, informal, and speedy remedy[3] to be applied prior to the removal of the remains. Nevertheless the umpire and appraisers occupy very much the same position, and owe substantially the same duty, as common-law arbitrators; therefore, above all things, they must act fairly, without bias, and in good faith.[4]

The policy does not dictate as to the character of evidence that may be received.[5] Consequently in proper cases the arbitrators, if left to pursue their own methods, may content themselves with a personal inspection of the damaged property without further evidence,[6] or they may call in an expert on their own account to aid

Co., 21 Misc. 348, 47 N. Y. Supp. 141. The written appraisal agreement usually exchanged after the fire covers the entire loss and the award under it is conclusive as to the amount of loss, and must correspond with the scope of the submission, *Rutter* v. *Hanover Ins. Co.*, 138 Ala. 202, 35 So. 33; *Georgia Home Ins. Co.* v. *Kline*, 114 Ala. 366, 21 So. 958. But the policy provides for no such written agreement, and the assured is not bound to execute one, *Walker* v. *German Ins. Co.*, 51 Kan. 725. If the parties execute an agreement which is not in accord with the terms of the policy, such agreement may nevertheless be binding after award, as a common-law arbitration, or as an agreed modification of the policy provision, *Broadway Ins. Co.* v. *Doying*, 55 N. J. L. 569, 27 Atl. 927; *Montgomery* v. *Am. Cent. Ins. Co.*, 108 Wis. 146, 84 N. W. 175 (forms of agreement and award are given in full). But before award, a common-law arbitration is revocable, *Harrison* v. *Hartford Fire Ins. Co.*, 112 Iowa, 77, 83 N. W. 820. The execution of an agreement differing from the terms of the policy amounts to a waiver of the policy clause, *Davis* v. *Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436, 16 Wash. 239, 47 Pac. 485. If a written agreement of appraisal is executed, its terms cannot be varied by antecedent or contemporaneous conversations, *Rutter* v. *Ins. Co.*, 138 Ala. 202, 33 So. 33. If there have been two fire losses unadjusted, any appraisal must cover both, *Mechanics' Ins. Co.* v. *Hodge*, 149 Ill. 298, 37 N. E. 51.

[1] *Vincent* v. *German Ins. Co.*, 120 Iowa, 272, 94 N. W. 458.

[2] *Stout* v. *Phœnix Ins. Co.*, 65 N. J. Eq. 566, 570.

[3] *Farrell* v. *German Ins. Co.*, 175 Mass. 340, 347, 56 N. E. 572.

[4] *Kaiser* v. *Hamburg-Brem. Fire Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, aff'd 172 N. Y. 663, 65 N. E. 1118. Parties themselves must also act in good faith, *Silver* v. *Western Assur. Co.*, 164 N. Y. 381, 58 N. E. 284; *Uhrig* v. *Williamsburgh City Fire Ins. Co.*, 101 N. Y. 362, 4 N. E. 745 (holding it to be a question of fact for the jury whether they do so act). If the company is in fault, lack of award is no defense, *Hall* v. *Western Assur. Co.*, 133 Ala. 637, 32 So. 257.

[5] *Strome* v. *London Assur. Corp.*, 20 App. Div. 571, 47 N. Y. Supp. 481.

[6] *Hall* v. *Norwalk Fire Ins. Co.*, 57 Conn. 105, 17 Atl. 356; *Vincent* v. *German Ins. Co.*, 120 Iowa, 272, 94 N. W. 458; *Ins. Co.* v. *Payne*, 57 Kan. 291, 46 Pac. 315. The umpire need not examine except on points of difference between the appraisers, *Hartford Fire Ins. Co.* v. *Bonner Mfg. Co.*, 56 Fed. 378, 15 U. S. App. 134, 5 C. C. A. 524.

them;[1] but if either party to the policy affirmatively offers testimony he should have reasonable opportunity to appear before the appraisers and present it.[2] And the umpire, in arriving at his conclusions, must not ignore either appraiser or his estimates, or the facts and considerations which he is prepared to present for the umpire's edification.[3]

In a Kentucky case in which the appraisers made a hasty and incomplete schedule of the personal property, the assured was not allowed to be present with his books of account at their meeting, and the award was set aside.[4]

So also it is clear that, where the property to be appraised has been totally destroyed by the fire, the insured must receive notice of the meeting of the appraisers, and be allowed an opportunity to put before them such pertinent evidence as he may possess.[5]

In a Massachusetts case it was held that, without fatal irregularity, an arbitrator might converse with a third party about the fire, might privately examine the books of another arbitrator to get at the prices of goods similar to those destroyed, might privately experiment as to the effect of intense heat on certain goods, where the results of his investigations were communicated to the other arbitrators.[6]

It must be observed, however, that certain directions as to the conduct of the appraisal may be gathered from the express terms of the policy. Thus sound value, as well as damage, must be ascertained and separately stated, or else the award is void.[7] So also proper deduction must be made for depreciation in values, caused by age and use;[8] and in no event may the damage allowed exceed

[1] *Bangor Bank* v. *Niagara Ins. Co.*, 85 Me. 68, 26 Atl. 991.

[2] *Redner* v. *N. Y. Fire Ins. Co.*, 92 Minn. 306, 99 N. W. 886; *Phœnix Ins. Co.* v. *Moore* (Tex. Civ. App.), 46 S. W. 1131; *Van Winkle* v. *Continental F. Ins. Co.*, 55 W. Va. 286, 47 S. E. 82 (testimony not offered is not "rejected"). Formal notice to the assured of meetings may not be necessary in all cases, *Schmitt* v. *Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767; *Remington Co.* v. *Ins. Co.*, 12 App. Div. 218, 43 N. Y. Supp. 431. But each party should have full opportunity to present his facts, *Continental Ins. Co.* v. *Garrett*, 125 Fed. 589; *Stout* v. *Phœnix Assur. Co.*, 65 N. J. Eq. 566, 56 Atl. 691; *Coons* v. *Coons*, 95 Va. 434, 28 S. E. 885, 64 Am. St. R. 804.

[3] *Strome* v. *London Assur. Corp.*, 20 App. Div. (N Y.) 571, 47 N. Y. Supp. 481, aff'd 162 N. Y. 627, 57 N. E. 1125; *New York Mut. & L. A.* v. *Manchester Fire Assur. Co.*, 94 App. Div. 104, 87 N. Y. Supp. 1075; *Schmitt* v. *Boston Ins. Co.*, 82 App. Div. 234, 81 N. Y. Supp. 767. As to what acts will invalidate an award, and as to practice where one party refuses to abide by award, see *Christianson* v. *Norwich Union F. Ins. Co.*, 84 Minn. 526, 88 N. W. 16.

[4] *Harth Bros. Grain Co.* v. *Continental Ins. Co.* (Ky.), 102 S. W. 242.

[5] *Carlston* v. *St. Paul F. & Mar. Ins. Co.* (Mont., 1908), 94 Pac. 756; *Continental Ins. Co.* v. *Garrett*, 125 Fed. 589, 60 C. C. A. 395.

[6] *Farrell* v. *German-American Ins. Co.*, 175 Mass. 340, 56 N. E. 572.

[7] *Continental Ins. Co.* v. *Garritt*, 125 Fed. 589, 60 C. C. A. 395.

[8] *Michels* v. *Western Underwriters' Assoc.*, 129 Mich. 417, 89 N. W. 56.

what it would cost to replace at the time of the fire.[1] The scope of the appraisal also is expressly limited to two points, sound value and loss. Beyond these two matters the appraisers must not go. Therefore they have nothing to do with the question as to whether the company is liable to the insured;[2] nor with any issue of fraud or breach of warranty on the part of the assured;[3] and if, as is customary, a schedule of articles is given to them as part of the submission, they must follow its items, and not add or subtract because of their construction of what the scope and meaning of the policy ought to be.[4] The policy also expressly provides that, after first selecting an umpire, "the appraisers *together* shall then estimate and appraise the loss." This phraseology gives special point to the important proposition that neither appraiser ought to act secretly or independently of the other in taking testimony, or in examining the premises with outside experts, or in submitting their results to the umpire. The two judges, or, if the umpire is called upon to act, all three, should, in company and coöperation, enjoy the full benefit of all legitimate information and influences and should be afforded the opportunity of knowing what the experts look at, and of calling their attention to pertinent facts.[5]

Where the two appraisers are unable to agree, the umpire and one of them may make a valid award in the absence of the other.[6]

§ 311. Unfinished Appraisals.—If an appraiser or umpire de-

[1] *Prov. Wash. Ins. Co.* v. *Board of Education*, 49 W. Va. 360, 38 S. E. 679.

[2] *Smith* v. *Herd*, 110 Ky. 56, 60 S. W. 841; *Townsend* v. *Greenwich Ins. Co.*, 86 App. Div. 323, 83 N. Y. Supp. 909, aff'd 178 N. Y. 634, 71 N. E. 1140.

[3] *Kearney* v. *Washtenaw Mut. F. I. Co.*, 126 Mich. 246, 85 N. W. 733.

[4] *Adams* v. *N. Y. Bowery Ins. Co.*, 85 Iowa, 6, 51 N. W. 1149; *American Ins. Co.* v. *Bell* (Tex. Civ. App., 1903), 75 S. W. 319. And see *Chandos* v. *Am. Ins. Co.*, 84 Wis. 184 (holding the presumption to be that they have passed upon the right property).

[5] *Citizens' Ins. Co.* v. *Hamilton*, 48 Ill. App. 593; *Christianson* v. *Norwich Union Ins. Soc.*, 84 Minn. 526, 88 N. W. 16; *Strome* v. *London Assur. Corp.*, 20 App. Div. 571, 47 N. Y. Supp. 481, aff'd 162 N. Y. 627, 57 N. E. 1125; *Caledonia Ins. Co.* v. *Traub*, 83 Md. 524, 35 Atl. 13 (holding, also, that if one appraiser withdrew before his work is complete no valid award can be made by the other). But see *Am. Central Ins. Co.* v. *Landau*, 62 N. J. Eq. 73, 49 Atl. 738. In one case the court concluded that an umpire had sufficiently performed his duty, though he neglected to visit the premises and simply shut himself up in his room with clerks, and split the difference between the estimates of the appraisers, *Hartford Fire Ins. Co.* v. *Bonner Mer. Co.*, 56 Fed. 378, 381. But see *Brit.-Am. Ins. Co.* v. *Darragh*, 128 Fed. 890, 63 C. C. A. 426. One appraiser may obtain information and lay it before the other, *Farrell* v. *Ins. Co.*, 175 Mass. 340, 56 N. E. 572. If the two appraisers agree, they sign the award without calling upon the umpire, *Vincent* v. *German Ins. Co.*, 120 Iowa, 272, 94 N. W. 458; *Broadway Ins. Co.* v. *Doying*, 55 N. J. L. 569, 27 Atl. 927; *Enright* v. *Montauk Fire Ins. Co.*, 61 Hun, 625, 15 N. Y. Supp. 893, aff'd 142 N. Y. 667, 37 N. E. 570. Each appraiser is entitled to a reasonable compensation, *Alden* v. *Christianson*, 83 Minn. 21, 85 N. W. 824.

[6] *German Ins. Co.* v. *Hazard Bank* (Ky., 1907), 104 S. W. 725.

clines to act or to proceed, a new appointment should promptly be made;[1] but if, through the connivance or fault of the company, no award is reached, its absence furnishes no defense to it,[2] and in such a case the assured need not make an attempt at a second appraisal. The rule also, in most jurisdictions, seems to be substantially the same as just stated, where the award fails solely because of the fault of the company's appraiser, to some extent an appraiser being thus regarded as the representative of the party appointing him.[3]

Where the appraisal drops through no fault or misconduct of either party, the question is not uniformly decided whether the insured must do anything more, though it is not easy to see how a mere attempt to comply with an important condition of the contract can be taken as an equivalent for performance. Some courts accordingly enforce the condition more rigorously, holding in effect that the assured must pursue his efforts, including if need be a fresh appointment, until it appears that through no fault or omission of his own it is impracticable to furnish an award.[4] Other

[1] *Westenhaver* v. *German-Am. Ins. Co.*, 113 Iowa, 726, 84 N. W. 717; *Caledonia Ins. Co.* v. *Traub*, 83 Md. 524, 35 Atl. 13. If before the withdrawal of an appraiser a disagreement has relegated the task of deciding to the umpire and other appraiser, the withdrawal will not prevent an award by the two, *Caledonia F. Ins. Co.* v. *Traub*, 86 Md. 86, 37 Atl. 782; *Broadway Ins. Co.* v. *Doying*, 55 N. J. L. 569, 27 Atl. 927. But see *Franklin* v. *N. H. Fire Ins. Co.*, 70 N. H. 251, 47 Atl. 91.

[2] *Uhrig* v. *Williamsburgh City Fire Ins. Co.*, 101 N. Y. 362, 4 N. E. 745 (for the jury; *Western Assur. Co.* v. *Hall*, 120 Ala. 547, 24 So. 936; *Michel* v. *American Cent. Ins. Co.*, 17 App. Div. 87, 44 N. Y. Supp. 832. It is recently held that if both appraisers are partial, the company cannot set up an appraisal clause in defense, *Hartford F. Ins. Co.* v. *Asher* (Ky., 1907), 100 S. W. 233.

[3] *Bishop* v. *Agricultural Ins. Co.*, 130 N. Y. 488, 59 N. E. 844; *Bradshaw* v. *Agricultural Ins. Co.*, 137 N. Y. 137, 32 N. E. 1055; *Austen* v. *Niagara Ins. Co.*, 16 App. Div. 86, 45 N. Y. Supp. 106; *Niagara Ins. Co.* v. *Bishop*, 49 Ill. App. 388; *Fowble* v. *Phœnix Ins. Co.*, 106 Mo. App. 527, 81 S. W. 485; *Carp* v. *Queen Ins. Co.*, 104 Mo. App. 502, 79 S. W. 757; *Braddy* v. *N. Y. Bowery Ins. Co.*, 115 N. C. 354, 20 S. E. 477; *Chapman* v. *Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

[4] *Davenport* v. *Ins. Co.*, 10 Daly, 535; *Vernon Ins. Co.* v. *Maitlen*, 158 Ind. 393, 63 N. E. 755 (appraisers could not agree on umpire, *held*, no excuse for breach of condition); *Westenhaver* v. *German-Am. Ins. Co.*, 113 Iowa, 726, 84 N. W. 717 (failure to agree on umpire no excuse for lack of award); *Fisher* v. *Merchants' Ins. Co.*, 95 Me. 486, 50 Atl. 282 (must arbitrate or give good legal excuse); *Kersey* v. *Phœnix Ins. Co.*, 135 Mich. 10, 97 N. W. 57 (difficulty in agreeing on umpire is no excuse); *Carp.* v. *Queen Ins. Co.*, 104 Mo. App. 502. But see *Hamilton* v. *L. & L. & G. Ins. Co.*, 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419; *Carroll* v. *Ins. Co.*, 72 Cal. 297, 13 Pac. 863; *Silver* v. *Western Assur. Co.*, 164 N. Y. 381, 58 N. E. 284; *Williams* v. *German Ins. Co.*, 90 App. Div. 413; *Spurrier* v. *La Cloche* (1902), App. Cas. 446. But *held*, that the company should demand a fresh appraisal if it wants one, *Levine* v. *Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855. If the company's appraiser acts unfairly or refuses to proceed the company should not decline to appoint another, *O'Rourke* v. *German Ins. Co.* (Minn., 1905), 104 N. W. 900. If it does so decline it waives its right to an appraisal, *Niagara Ins. Co.* v. *Bishop*, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. R. 105; *Brock* v. *Ins. Co.*, 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. R. 562;

courts construe the condition more liberally towards the assured. Regarding the provision as incidental and collateral to the main contract, they are more disposed to consider that, in once selecting a suitable appraiser, and in standing ready to furnish in aid of an appraisal all pertinent testimony within his control, the assured has performed the full measure of his obligation under this clause of the policy.[1]

The Michigan court declares: "It is the established rule in this state that no right of action on the part of an insured exists until an appraisal provided for in the policy has been made." And the court held that if an appraiser failed to act another should be chosen.[2]

If the appraisal extends beyond the limit of time for beginning action such period is by implication extended until sixty days after award.[3]

§ 312. **Scope of Award.**—The scope of the submission determines the valid scope of the award.[4] Thus if the parties expressly include in a written submission only property partially damaged, the insured in his action on the policy may subsequently show in addition to the award, the value of property totally lost.[5]

Inasmuch as the award does not determine the liability of the insurer, but only the amount of the loss, it is in the nature of evidence, and the action of the insured to recover the amount must be on the policy, not on the award.[6]

McCullough v. *Ins. Co.*, 113 Mo. 606, 21 S. W. 207.

[1] *Western Assur. Co.* v. *Decker*, 98 Fed. 381, 39 C. C. A. 383, Sanborn, J., dissenting; *Western Assur. Co.* v. *Hall*, 120 Ala. 547, 24 So. 936; *Bernhard* v. *Rochester German Ins. Co.* (Conn.), 65 Atl. 134; *Conn. Fire Ins. Co.* v. *Cohen*, 97 Md. 294, 55 Atl. 675 (no umpire ever selected); *Pretzfelder* v. *Merchants' Ins. Co.*, 116 N. C. 491, 21 S. E. 302, *id.*, 123 N. C. 164, 31 S. E. 470; *Fire Assn.* v. *Appel* (Ohio St.), 80 N. E. 952; *Fritz* v. *Brit.-Am. Assur. Co.*, 208 Pa. St. 268, 57 Atl. 573, Mitchell, C. J., and Brown, J., dissenting. If the assured demand an appraisal and nominate his appraiser, and the company refuse to nominate one, no binding award can be made, *Penn. Plate Glass Co.* v. *Ins. Co.*, 189 Pa. St. 255, 42 Atl. 138.

[2] *Baumgarth* v. *Firemen's Fund Ins. Co.* (Mich., 1908), 116 N. W. 449; *Vernon Trust Co.* v. *Maitlen*, 158 Ind. 393.

[3] *Williams* v. *German Ins. Co.* and *Fritz* v. *Brit.-Am. Assur. Co.*, 208 Pa. St. 268, 57 Atl. 573.

[4] *Rutter* v. *Hanover F. Ins. Co.*, 138 Ala. 202, 35 So. 33; *Kearney* v. *Ins. Co.*, 126 Mich. 246, 85 N. W. 733.

[5] *Rutter* v. *Ins. Co.*, 138 Ala. 202, 35 So. 33; *Lang* v. *Eagle F. Co.*, 12 App. Div. 39, 42 N. Y. Supp. 539; *Fire Assn.* v. *Colquin* (Tex. Civ. App.), 33 S. W. 1004. If agreement of the parties and the submission depart from terms of policy the scope of the award is controlled by the submission, *Brit.-Am. Assur. Co.* v. *Darragh*, 128 Fed. 890, 63 C. C. A. 426; *London & L. Ins. Co.* v. *Storrs*, 71 Fed. 120, 17 C. C. A. 645; *Hall* v. *Norwalk F. Ins. Co.*, 57 Conn. 105, 17 Atl. 356; *Springfield F. & M. Ins. Co.* v. *Payne*, 57 Kan. 291, 46 Pac. 315. The award was presumed to cover also a question of apportionment in *Cassidy* v. *Royal Exch. Assn.*, 99 Me. 399, 59 Atl. 549.

[6] *Soars* v. *Home Ins. Co.*, 140 Mass. 343, 5 N. E. 149.

Where several insurance companies interested in the one loss unite in signing one appraisal agreement, the submission is not void, but will be regarded as separate submissions, one for each insurer.[1]

§ 313. **Setting Aside Award.**—Where the arbitrators are governed by proper methods and act in good faith, much discretion is vested in them. Their award will not be vacated merely because it is in fact either excessive,[2] or inadequate.[3] In general, an award is conclusive as to the amount of loss;[4] but, where the error is so great as to be indicative of gross partiality, undue influence, or corruption, then there exists ground for setting aside the award.[5] The same is true, if the award "is obviously and extremely unjust,"[6] though there be no evil intent or improper motive on the part of any person concerned.[7] Where the *methods* of arbitrators, acting as judicial officers, are shown to be unjust or unlawful, the award will be the more readily annulled. Thus the refusal to take pertinent and material testimony;[8] or an estimate of the damage on an improper basis;[9] or a neglect to allow one of the appraisers a fair participation in the proceedings;[10] or an omission to afford proper opportunity to one of the parties to present his case;[11] or the fraud-

[1] *Giles* v. *Royal Ins. Co.*, 179 Mass. 261, 60 N. E. 786.

[2] *Hartford Ins. Co.* v. *Bonner Mer. Co.*, 56 Fed. 378, 15 U. S. App. 134, 5 C. C. A. 524.

[3] *Michels* v. *Assoc.*, 129 Mich. 417, 89 N. W. 56; *Kearney* v. *Washtenaw Ins. Co.*, 126 Mich. 246, 85 N. W. 733; *Stemmer* v. *Scottish Ins. Co.*, 33 Oreg. 65, 53 Pac. 498; *Strome* v. *London Assur. Corp.*, 20 App. Div. 571, 47 N. Y. Supp. 481, aff'd 162 N. Y. 627, 57 N. E. 1125. The court said: "If in every case it might be shown that the arbitrators omitted to consider some elements of damage, the arbitration would rarely be final," *Remington Paper Co.* v. *London Assur. Corp.*, 12 App. Div. 218, 225, 43 N. Y. Supp. 431.

[4] *Billmyer* v. *Ins. Co.*, 57 W. Va. 42, 49 S. E. 901.

[5] *Kaiser* v. *Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, aff'd 172 N. Y. 663, 65 N. E. 1118 (loss $3,930; award $3,031); *Strome* v. *London Assur. Co.*, *supra; N. Y. Mut. S. & L. A.* v. *Manchester Fire Assur. Co.*, 94 App. Div. 104, 87 N. Y. Supp. 1075 (loss $1,300; award $1,032); *Ins. Co. of N. A.* v. *Hegewald*, 161 Ind. 631, 66 N. E. 902 (award less than one-half the loss); *Vincent* v. *German Ins. Co.*, 120 Iowa, 272, 94 N. W. 458; *Produce R. Co.* v. *Ins. Soc.*, 91 Minn. 210, 97 N. W. 875; *Royal Ins. Co.* v. *Parlin Co.*, 12 Tex. Civ. App. 572, 34 S. W. 401; *Glover* v. *Rochester German Ins. Co.*, 11 Wash. 143, 39 Pac. 380.

[6] *Perry* v. *Greenwich Ins. Co.*, 137 N. C. 402, 49 S. E. 889 (award $73.50; loss $750).

[7] *Prov. Wash. Ins. Co.* v. *Board of Education*, 49 W. Va. 360, 38 S. E. 679.

[8] *Mosness* v. *German-Am. Ins. Co.*, 50 Minn. 341, 52 N. W. 932; *Stemmer* v. *Scottish U. Ins. Co.*, 33 Oreg. 65, 53 Pac. 498; *Canfield* v. *Watertown Ins. Co.*, 55 Wis. 419; and see *Hart* v. *Kenney*, 47 N. J. Eq. 51, 20 Atl. 29.

[9] *Prov. Wash. Ins. Co.* v. *Board of Education*, 49 W. Va. 360, 38 S. E. 679; *Clover* v. *Greenwich Ins. Co.*, 101 N. Y. 277, 4 N. E. 724.

[10] *Hills* v. *Home Ins. Co.*, 129 Mass. 345 (in which two out of three prejudged the case on *ex parte* testimony); *Springfield F. & M. Ins. Co.* v. *Payne*, 57 Kan. 291, 46 Pac. 315.

[11] *Redner* v. *N. Y. Fire Ins. Co.*, 92 Minn. 306, 99 N. W. 886; *Schreiber* v. *German-Am. Ins. Co.*, 42 Minn. 367; and see § 310, *supra*.

ulent concealment of books and inventory or other evidence;[1] or the failure to include in the estimate a part of the property submitted,[2] will be good ground for upsetting the award and defeating the plaintiff altogether,[3] or for relegating the parties to the verdict of a jury to determine the actual amount of loss, as the case may be. But the legal presumptions are in favor of the validity of the award. Consequently, in the absence of fraud, misconduct or gross mistake it is a final adjustment of the amount of loss.[4]

In New York and other states where legal and equitable relief may be obtained in the same action, either party may assail the award in an action on the policy, the plaintiff, as part of his cause of action, the defendant, by way of defense.[5] But in other jurisdictions a suit in equity must be brought for the express purpose of setting aside the award with stay meanwhile of trial of the action on the policy; since, at common law, in an action on the policy the award is conclusive.[6]

In an action brought for the express purpose of setting aside the award and recovering on the policies the New York Supreme Court allowed a joinder of all the companies as defendants that had united in the appraisal.[7]

§ 314. Enforcing Contract is no Waiver.—*This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, etc., relating to the appraisal or examination; and the loss shall not become payable until sixty days*

[1] *Stockton, etc., Works* v. *Glens Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633.

[2] *Adams* v. *N. Y. Bowery Ins. Co.*, 85 Iowa, 6, 51 N. W. 1149; *Am. F. Ins. Co.* v. *Bell*, 33 Tex. Civ. App. 319, 75 S. W. 319; *Phœnix Ins. Co.* v. *Moore* (Tex. Civ. App.), 46 S. W. 1131; *Hong Sling* v. *Ins. Co.*, 7 Utah, 441, 27 Pac. 170.

[3] See § 310.

[4] *Hanover F. Ins. Co.* v. *Lewis*, 28 Fla. 209, 10 So. 297; *Bates* v. *Brit.-Am. Ins. Co.*, 100 Ga. 249, 28 S. E. 155; *Townsend* v. *Greenwich Ins. Co.*, 86 App. Div. 323, 83 N. Y. Supp. 909, aff'd 178 N. Y. 634, 71 N. E. 1140; *Am. Cent. Ins. Co.* v. *Bass*, 90 Tex. 380, 38 S. W. 1119. Subsequent denial of liability is no waiver of award, *Montgomery* v. *Am. Cent. Ins. Co.*, 108 Wis. 146, 84 N. W. 175. Parties may set aside the award by mutual consent, *Goodwin* v. *Ins. Co.*, 118 Iowa, 601, 92 N. W. 894.

[5] *Sullivan* v. *Traders' Ins. Co.*, 169 N. Y. 213, 62 N. E. 146; *Maher* v. *Home Ins. Co.*, 75 App. Div. 226, 78 N. W. Supp. 44; *Bellinger* v. *German Ins. Co.*, 95 App. Div. 262, 88 N. Y. Supp. 1022; *Davis* v. *Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436; *Canfield* v. *Watertown Ins. Co.*, 55 Wis. 419, 13 N. W. 252.

[6] *Continental Ins. Co.* v. *Garrett*, 125 Fed. 589, 60 C. C. A. 395; *Robertson* v. *Ins. Co.*, 68 Fed. 173; *Ga. Home Ins. Co.* v. *Kline*, 114 Ala. 366, 21 So. 958; *Fire Assoc.* v. *Allesina*, 45 Oreg. 154, 77 Pac. 123; *Billmyer* v. *Hamburg-Brem. Ins. Co.*, 57 W. Va. 42, 49 S. E. 901; *Garrebrant* v. *Continental Ins. Co.* (N. J., 1907), 67 Atl. 90. Minnesota allows an equity suit against all the companies interested as defendants and recoveries on the policies in the same suit, *Redner* v. *N. Y. Fire Ins. Co.*, 92 Minn. 306, 99 N. W. 886.

[7] *Mayer* v. *Phœnix Ins. Co.*, 124 App. Div. 241.

after the notice of ascertainment, estimate, and satisfactory proofs have been received, including an award by appraisers when appraisal has been required.

As has been observed, in the absence of this provision certain courts have been disposed to hold that a demand by the company for an appraisal or an examination under oath amounts to a waiver of a known cause of forfeiture;[1] but this clause of the policy allows the company to pursue the contract methods for ascertaining the character and extent of the loss, before exercising its option to decide whether or not it will contest the claim of the insured.[2] And the provision that the loss is not payable until after the award by the appraisers makes it clear that a compliance with the appraisal clause when demanded is intended to be a condition precedent to any right of action under the policy. Unless, then, the requirement is waived, the assured must await the expiration of the sixty days before instituting his action on the policy.[3]

The Massachusetts form does not contain this clause, but makes the loss payable within sixty days after the submission of the sworn statement of particulars. By the Iowa form the loss is payable forty days after receipt of proofs of loss, and the policy provides, "that this company shall not be held to have waived any of the provisions or conditions of this policy or any forfeiture thereof by any examination or investigation herein provided for."

§ 315. Pro Rata Clause—Other Insurance.—*Shall not be liable for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property; and the extent of the application of the insurance under this policy, or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto.*

This is known as the *pro rata* or contribution clause. To admit of its application there must be more than one policy to contribute, and the total concurrent insurance must exceed the general loss.[4]

[1] See § 147.

[2] See § 148, *supra*.

[3] *Bellinger* v. *German Ins. Co.*, 95 App. Div. 262, 88 N. Y. Supp. 1020; *Boruszewski* v. *Middlesex Mut. Assur. Co.*, 186 Mass. 589, 72 N. E. 250. Complaint should show that sixty days have expired, *Clemens* v. *American Fire Ins. Co.*, 70 App. Div. 435; 75 N. Y. Supp. 484. As to whether denial of liability operates as a waiver, see § 145, *supra*.

[4] *Lesure Lumber Co.* v. *Mutual Ins Co.*, 101 Iowa, 514, 70 N. W. 761

The provision is calculated to benefit the insurers, since it places upon the insured the burden of establishing what share of the loss is collectible from each company under the terms of its own policy, and limits him in his recovery against each to its ratable proportion of the loss.[1] Whereas without this provision he was at liberty to bring his proceedings against the companies of his selection, leaving it to them to obtain equitable contribution from the others.[2]

It is commonly said that this clause was designed to avoid circuity of action,[3] and this in a sense is true. It must be observed, however, that when the only dispute relates to the proper method of apportioning an award or admitted amount of loss among the various insurers, to compel the assured to try out with each an issue in which all are interested, not only tends to multiply actions, but may involve embarrassment, since the results in later actions may prove that the recovery in earlier actions is too small or too large.[4] Influenced by such considerations certain courts have ruled that where the main dispute relates to apportionment of the loss among several companies,[5] or where several companies on the risk are substantially united in their attitude of defense, they may all be joined

(where insurance on the portion of the property lost was less than loss, though the whole insurance exceeded the value of the property); *Pencil* v. *Home Ins. Co.*, 3 Wash. 485, 28 Pac. 1031 (if loss exceed the whole insurance each policy pays in full, and no question of apportionment arises).

[1] *Fireman's Fund Ins. Co.* v. *Palatine* (Cal., 1907), 88 Pac. 907 (each policy independent); *Hanover F. Ins. Co.* v. *Brown*, 77 Md. 64, 72, 25 Atl. 989, 27 Atl. 314; *Cassity* v. *New Orleans Ins. Assoc.*, 65 Miss. 49; *North Brit. & M. Ins. Co.* v. *L. & L. & G. Ins. Co.* (1877), 5 Ch. D. 569, 581; *West of Eng. F. Ins. Co.* v. *Isaacs* (1896), 2 Q. B. 377, aff'd 66 L. J. N. S. Q. B. 36. But a valued policy law may override this clause, *Home F. Ins. Co.* v. *Weed*, 55 Neb. 146, 151, 75 N. W. 539 (cases cited); *West. Assur. Co.* v. *Phelps*, 77 Miss. 625, 27 So. 745.

[2] *Godin* v. *Assurance Co.*, 1 Burr. 489, 1 W. Black. 103; *Thurston* v. *Koch*, 4 Dall. (U. S.) 348. The terms of the clause bring into the apportionment invalid or uncollectible insurance, *Bateman* v. *Lumbermen's Ins. Co.*, 189 Pa. St. 465, 42 Atl. 184; *Gandy* v. *Orient Ins. Co.*, 52 S. C. 224, 29 S. E. 655. This it has been claimed is inequitable. Premiums are not based upon the existence of other insurance nor is a disclosure of other insurance required until the fire. On the other hand, the underwriters contend that they are not responsible for the selection of other insurers, and ought not to be called upon to guarantee their solvency.

[3] *Firemen's Fund Ins. Co.* v. *Pekor*, 106 Ga. 1, 11, 31 S. E. 779.

[4] Thus after judgments were obtained and settlements made with various companies by authority of *Arlington Co.* v. *Colonial Assur. Co.*, 180 N. Y. 337, 73 N. E. 34, and upon the supposition that all the companies were to *pro rate* on the loss at the Arlington plant the Appellate Division subsequently decided that the policy of one company, though in the same terms, did not cover the building burned, *Arlington Co.* v. *Empire City Ins. Co.*, 116 App. Div. 458, 101 N. Y. Supp. 772.

[5] *Schmaelzle* v. *London & Lan. Ins. Co.*, 75 Conn. 397, 53 Atl. 863; *Underwriters' Ins. Co.* v. *Powell*, 94 Ga. 359, 21 S. E. 565; *Am. Cent. Ins. Co.* v. *Landan*, 56 N. J. Eq. 513, 39 Atl. 400.

in one omnibus suit in equity, with stay of separate actions at law.[1] Other tribunals have extended this rule, and, solely by virtue of the *pro rata* clause, have sustained such a joint action in equity, though the companies have tendered different sets of defenses.[2] The cases last cited are not easily harmonized with those decisions which hold that under the standard apportionment clause, the liability of each company is separate, not joint, and is by the terms of its own contract limited to a fixed share of the loss.[3] Similarly it is held that it is no defense for the company in suit under such a policy to allege and prove that the entire loss has been paid by the other companies.[4]

The New York Supreme Court holds that the liability of each underwriter, under the Lloyd's policy, is separate and distinct.[5] And the federal court allowed an exception to the joinder of two companies under policies of marine insurance.[6]

§ 316. What is Other Contributing Insurance.—Policies of fire insurance, to come into the apportionment or contribution, must insure the same interest, and be upon the same property or some part thereof.[7] They must also be subsisting, unexpired, or uncan-

[1] *Virginia Chemical Co.* v. *Ins. Co.*, 113 Fed. 1, 51 C. C. A. 21; *Tisdale* v. *Ins. Co. of N. A.*, 84 Miss. 709, 36 So. 568 (1904); and see *City of Albert Lea* v. *Nielsen*, 83 Minn. 246, 86 N. W. 83.

[2] *Fegelson* v. *Niagara Fire Ins. Co.*, 94 Minn. 486, 103 N. W. 495 (six companies, but Minnesota standard clause does not contain the words "valid or invalid"); *Pretzfelder* v. *Merchants' Ins. Co.*, 116 N. C. 491, 21 S. E. 302; *Fuller* v. *Detroit F. & M. Ins. Co.*, 36 Fed. 469, 1 L. R. A. 801 (nine companies).

[3] *Hartford F. Ins. Co.* v. *Post*, 25 Tex. Civ. App. 428 (two companies improperly joined); *Bardwell* v. *Conway Ins. Co.*, 118 Mass. 465 ("the liability of each is determined by the terms of its own contract and is not modified by anything in the contract of the other which may enable the insured to claim or recover for a larger valuation or amount of loss").

[4] *Fireman's Fund Ins. Co.* v. *Palatine* (Cal., 1907), 88 Pac. 907; *Lucas* v. *Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635; *Goodwin* v. *Merchants' Ins. Co.*, 118 Iowa, 601, 92 N. W. 894 (immaterial that others have paid the whole loss); *Ins. Co.* v. *Turnbull*, 86 Ky. 236, 5 S. W. 542; *Hanover Ins. Co.* v. *Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314 (each contract entirely separate and independent, giving the companies no right of contribution); *Good* v. *Buckeye Mut. F. Ins. Co.*, 43 Ohio St. 394, 2 N. E. 420; *Am. Cent. Ins. Co.* v. *Heath*, 29 Tex. Civ. App. 445, 69 S. W. 235; *Fitzsimmons* v. *City Fire Ins. Co.*, 18 Wis. 234, 86 Am. Dec. 761; and see *Palmer* v. *Great Western Ins. Co.*, 10 Misc. 167, 173, aff'd 153 N. Y. 660, 48 N. E. 1106; *Ogden* v. *East River Ins. Co.*, 50 N. Y. 388, 390. It is the duty of the assured after loss to disclose all other insurance, *Teutonia Ins. Co.* v. *Bussell* (Tenn.), 48 S. W. 703. Before loss there is no implied warranty or agreement that he will keep up other insurance which, if it had been mentioned, would contribute, *Indiana Ins. Co.* v. *Hoffman*, 128 Ind. 250, 27 N. E. 561; *Lattan* v. *Royal Ins. Co.*, 45 N. J. L. 453; *Hand* v. *Williamsburg City Ins. Co.*, 57 N. Y. 41; *Quarrier* v. *Peabody Ins. Co.*, 10 W. Va. 507.

[5] *Straus* v. *Hoadley*, 23 App. Div. 360. See § 11, *supra*.

[6] *Rogers* v. *Ætna Ins. Co.*, 76 Fed. 569.

[7] See discussion of other insurance, §§ 252, 253, *supra*; *Niagara F. Ins.*

celed at the time of the loss.[1] Thus, if a mortgagor insures his interest, and a mortgagee, either by a separate policy or by a mortgagee clause attached to the mortgagor's policy, insures his interest on the same property, there is no double or other insurance.[2] But if the mortgagor's policy is simply made payable to the mortgagee without a mortgagee clause, and the mortgagor should take out another policy upon the same property and against the same risk, it would constitute a case of double insurance.[3] If a common carrier or other bailee insure his own interest and liability only, with respect to the goods of the owners in his custody, the insurance is not contributing insurance with the policies of the owners, because the interests are not the same.

But to constitute other or contributing insurance it is not necessary that the persons insured under the different policies should be named by the same description. For example, if a common carrier, warehouseman, or commission merchant, takes out insurance upon goods "his own or held by him in trust," or "on account of whom it may concern," or by any designation for the benefit of himself and others interested in the same property, provided such other persons have either given original authority for the procuring of the insurance or have subsequently ratified it, the policy covers their interest as well as the interest of the party named as insured;[4] and in that case a policy by the owners or the other persons in interest will constitute other or double insurance, and both sets of policies will come into any apportionment.[5] Nor is it essential that

Co. v. *Scammon*, 144 Ill. 490, 28 N. E. 919; *Lowell Mfg. Co.* v. *Safeguard Ins. Co.*, 88 N. Y. 592, 597 (parol evidence is admissible to explain the intent in the case of general descriptions like "their own or held in trust"). Thus an excess floater cannot be called upon to contribute with the other insurance, *Klotz Tailoring Co.* v. *Eastern F. Ins. Co.*, 116 App. Div. 723, 102 N. Y. Supp. 82. For definition of excess floater, see § 20, *supra*.

[1] *Farmers' Feed Co.* v. *Scottish U. & N. Ins. Co.*, 65 App. Div. 70, 72 N. Y. Supp. 732, reversed on another point, 173 N. Y. 241, 65 N. E. 1105, and cases last section, notes. But insurance taken out without authority of insured is no insurance at all, *London & Lan. Ins. Co.* v. *Turnbull*, 86 Ky. 230, 5 S. W. 542. Assured cannot take insurance on one item of the policy and apply it to another item, *Ætna Ins. Co.* v. *Glasgow*, 107 Ky. 77, 52 S. W. 975.

[2] *Home Ins. Co.* v. *Koob*, 113 Ky. 360, 68 S. W. 453; *Eddy* v. *London Assur. Co.*, 143 N. Y. 311, 38 N. E. 307, 62 N. Y. St. R. 316, 25 L. R. A. 686; *Hardy* v. *Lancashire Ins. Co.*, 166 Mass. 210, 44 N. E. 209. Policy of second mortgagee does not contribute with policy of first mortgagee, *Fox* v. *Phœnix Ins. Co.*, 52 Me. 333; *Scottish, etc., Assn.* v. *Northern Assur. Co.*, 11 S. S. C. 287, 4th series, 21 Sc. L. R. 189; *Westminster F. Office* v. *Glasgow, etc., Soc.* (1888), 13 App. Cas. 699.

[3] *Hine* v. *Woolworth*, 93 N. Y. 75; *Hastings* v. *Westchester Fire Ins. Co.*, 73 N. Y. 141. As to whether a marine policy is other insurance with fire, see *Australian, etc., Co.* v. *Saunders* (1875), 10 C. P. 668.

[4] *Kellner* v. *Fire Asso.*, 128 Wis. 233 (many cases cited in briefs and opinion).

[5] *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365;

the properties described in the different policies be the same; it is enough, in most jurisdictions, if they are in part the same.[1] The other insurance may cover less,[2] or it may cover more;[3] but, unfortunately for the assured, policies that have been avoided for breach of warranty must be included in the category of other insurance,[4] and so must those of insolvent companies.

§ 317. Policies with Nonconcurrent Terms.—On the back of almost every policy is printed the following warning: "It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once."[5] Where, in accordance with this warning, the different policies contain similar terms, and are identical in their descriptions of the property covered, there is usually little embarrassment in dividing the loss proportionately among them;[6] but when the policies cover only in part the same property, or con-

Home Ins. Co. v. *Baltimore Warehouse Co.*, 93 U. S. 527; *Home Ins. Co.* v. *Minn., St. Paul & M. R. R. Co.*, 71 Minn. 296, 74 N. W. 140; *Ferguson* v. *Pekin Plow Co.*, 141 Mo. 161, 42 S. W. 711. Any balance above his own interest the party named must hold in trust for the others, see cases *supra* and *Hough* v. *Peoples' Fire Ins. Co.*, 36 Md. 398; *Roberts* v. *Fire Ins. Co.*, 165 Pa. St. 55, 30 Atl. 450; *Southern Cold Storage Co.* v. *Dechnan* (Tex. Civ. App.), 73 S. W. 545. The owners or others in interest are entitled to full and equal benefit with the insured named, in proportion to their interests, *Johnston* v. *Abresch Co.*, 123 Wis. 130, 101 N. W. 395 (1904); *Snow* v. *Carr*, 61 Ala. 363; *Liter* v. *Marrs*, 13 Pa. St. 220. The modern coinsurance clause is likely to drive the common carrier, warehouseman, etc., into the position that he had no intention of insuring more than his own interest and liability. In this the courts will aid the insured as far as the language of the policy will permit.

[1] *Corkery* v. *Security Ins. Co.*, 99 Iowa, 382, 68 N. W. 792. See many cases next section and § 252, notes, *supra*. *Contra*, Pennsylvania, which seems to stand very much alone, *Clarke* v. *Western Assur. Co.*, 146 Pa. St. 561, 23 Atl. 248; *W. Branch Lumbermen's Exchange* v. *Am. Cent. Ins. Co.*, 183 Pa. St. 366, 38 Atl. 1081; *Meigs* v. *Ins. Co. of N. A.*, 205 Pa. St. 378, 54 Atl. 1053. On the same facts the Federal court concluded that the Pennsylvania court was clearly wrong, *Meigs* v. *London Assur. Co.*, 126 Fed. 781. But see *United Underwriters' Ins. Co.*, 94 Ga. 359, 21 S. E. 565.

[2] *N. J. Rubber Co.* v. *Commercial Union Ins. Co.*, 64 N. J. L. 580, 582, 46 Atl. 777 ("concurrent insurance is that which to any extent insures the same interest, against the same casualty, at the same time as the primary insurance, on such terms that the insurance would bear proportionately the loss happening within the provisions of both policies").

[3] *Washburn, etc., Co.* v. *Merchants', etc., Ins. Co.*, 110 Iowa, 423, 81 N. W. 707.

[4] *Rickerson* v. *German-Am. Ins. Co.*, 6 App. Div. 550, 39 N. Y. Supp. 547; *Bateman* v. *Lumbermen's Ins. Co.*, 189 Pa. St. 465, 42 Atl. 184; *Gandy* v. *Orient Ins. Co.*, 52 S. C. 224, 29 S. E. 655. Unless a statute intervenes, *Gurnett* v. *Atlas Mut. Ins. Co.*, 124 Iowa, 547, 100 N. W. 542. For example, Iowa Code, § 1746.

[5] A broker usually employs a uniform printed rider for the one set of policies.

[6] Thus defendant's policy was for $3,000, other insurance $7,000, whole loss $6,250, sound value $9,274.62. Defendant pays $1,875, to wit, three-tenths of the loss, *Eacrett* v. *Gore, etc., Ins. Co.*, 6 Ont. L. R. 592.

tain different and inconsistent provisions applicable to the one loss, it may readily be seen that it becomes a difficult matter to determine the amount of liability under each policy.[1]

Thus where the policy in suit contains no coinsurance clause, but the other policy does contain such a clause, the question arises which, under the *pro rata* clause of the policy in suit, shall be considered the amount of the other policy, the whole face amount or the amount operative as insurance, to wit, the amount resulting after the application of the coinsurance clause? Two courts, one in the East, the other in the West, deciding the matter in favor of the companies gave the same answer on the same day, "the whole face amount of the other policy is the amount intended."[2] Two lower courts, perhaps more in harmony with analogous decisions, in construing the meaning of the same phrase "whole insurance" as used in the apportionment clause,[3] have come to the opposite conclusion.[4]

[1] See discussion, Bunyon (5th ed.), ch. IX.

[2] *Farmers' Feed Co.* v. *Scottish U. & N. Ins. Co.*, 173 N. Y. 241, 65 N. E. 1105 (reversing five judges below. The Court of Appeals cites no cases in point, and says "the question is new"); *Stephenson* v. *Agricultural Ins. Co.*, 116 Wis. 277, 93 N. W. 19. That portion of the reasoning adopted in the opinions of both these cases to the effect that the assured had agreed to become a coinsurer to some amount is not in itself convincing, because certainly no such agreement had been made with the defendant, but, if at all, only with the other company, *Kansas City Co.* v. *Am. F. Ins. Co.*, 100 Mo. App. 691, 75 S. W. 186. The plaintiff might offer the counter arguments: (1) that the main promise of the defendant is that the plaintiff shall enjoy a full actual indemnity up to the amount of the policy in suit undisturbed by any doctrine or extraneous agreement regarding coinsurance not contained in the policy in suit; and (2) that the exigencies of business in many instances call for nonconcurrent policies and that underwriters who have worded the policies are responsible for the lack of clearness in this regard; (3) that other insurance is not taken into account in fixing the rate of premium, and that if the defendant gains the benefit of any after the loss it is a piece of pure good luck. Nor perhaps is it correct to say that such an agreement to become coinsurer is ever made by virtue of the standard coinsurance clause though such a stipulation was contained in earlier forms, *Chesebrough* v. *Home Ins. Co.*, 61 Mich. 333, 28 N. W. 110. The provision of the standard clause "is merely a mode of fixing the proportion to be paid by the defendants;" so stated in *Quinn* v. *Fire Association*, 180 Mass. 560, 562, 62 N. E. 980. In the defendant's policy there was no such clause either in the *Farmers' Feed Co.* case or in the *Stephenson* case.

[3] *Schmaelzle* v. *London & Lan. Ins. Co.*, 75 Conn. 397, 53 Atl. 863 (must adopt the method that will give full indemnity); *Baltimore F. Ins. Co.* v. *Loney*, 20 Md. 20; *Angelrodt* v. *Delaware Ins. Co.*, 31 Mo. 593 (must adopt the method that will make the loss good); *Deming* v. *Merchants' Cotton Co.*, 90 Tenn. 306, 347, 17 S. W. 89 ("in no case will contribution be enforced so as to deny indemnity"); *Sloat* v. *Royal Ins. Co.*, 49 Pa. St. 14, 88 Am. Dec. 77; *Sherman* v. *Madison Mut. Ins. Co.*, 39 Wis. 104 (the other policies must make good the reduction); Bunyon, Ins. (5th ed.), 303. Lord Mansfield said: "In no case must the contribution clause be construed in such a manner as to throw loss upon the insured, against which he would have

[4] *Farmers' Feed Co.* v. *Scottish U. & N. Ins. Co.*, 65 App. Div. 70, 72 N. Y. Supp. 732 (five judges); *Armour Packing Co.* v. *Reading Fire Ins. Co.*, 67

§ 318. Partially Concurrent Apportionments.—A difficult class of problems is frequently presented for adjustment, where blanket or general insurance, covering the larger range of property, is called upon to contribute with specific or less general insurance, covering a part or several parts of the same property. These problems relate to a subject known as "partially concurrent apportionments." Thus suppose, for convenience of illustration, that a common carrier has a blanket policy on all the property, "his own, or held in trust," which happens to be located on his pier. At the time of a fire, stacked up on different sections of the pier, are shipments of cotton, jute, coffee, and sugar, just arrived and belonging to four consignees, respectively, each of whom, at the time of the fire, has some specific insurance on his own property. The fire injures all the shipments, and the aggregate insurance exceeds the loss. The owner of each shipment brings separate action upon his specific policy; and each defendant in turn claims for itself the benefit of the full face of the blanket policy as a contributor towards its particular loss, hoping thereby greatly to reduce it. How, in such an instance, shall the loss be apportioned by the court as between each specific policy and the blanket insurance? The same sort of question arises where a merchant or manufacturer, or other owner, has both blanket and specific insurance running directly in his own favor, and covering only in part the same property.

been fully protected had the policies been free from that clause," *Godin* v. *London Assur. Co.*, 1 Burr. 489. And see *Lucas* v. *Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635. In an interesting apportionment by the arbitration committee of the New York Board of Fire Underwriters, growing out of a fire in the Rossiter stores in New York City, some years ago, but not under the present form of coinsurance clause, the arbitrators laid down these principles which they considered fundamental. "(1) That the insured shall not suffer by nonconcurrence of policies, if the aggregate of the insurance exceeds the loss. (2) That a coinsurance clause serves its purpose if it is a guaranty that at least the benefits of full insurance are secured. (3) That a floating policy, with condition that it shall not attach until all specific insurance is exhausted, cannot be held by reason of nonconcurrence of specific policies, save for the excess of the aggregate amount covered by all such nonconcurrent policies."

Mo. App. 215 (unanimous). As to the effect of three-fourths value clause, see *Haley* v. *Dorchester Ins. Co.*, 12 Gray (Mass.), 545; *Millis* v. *Scottish U. & N. Ins. Co.*, 95 Mo. App. 211, 68 S. W. 1066. As to effect of limit of loss on any one article, see *Golde* v. *Whipple*, 7 App. Div. 48, 39 N. Y. Supp. 964. As to excess floaters, see *Macon Ins. Co.* v. *Powell*, 116 Ga. 703, 43 S. E. 73; *Fairchild* v. *L. & L. & G. Ins. Co.*, 51 N. Y. 65. Valued policy law may make the apportionment clause inoperative, *Havens* v. *Germania Ins. Co.*, 123 Mo. 403, 27 S. W. 718, 135 Mo. 649, 37 S. W. 497. Some courts hold that the complaint need not state other insurance, *Ætna Ins. Co.* v. *McLead*, 57 Kan. 95, 45 Pac. 73; *Ermentrout* v. *American Ins. Co.*, 60 Minn. 418, 62 N. W. 543. *Contra*, *Coats* v. *West Coast F. & M. Ins. Co.*, 4 Wash. 375, 30 Pac. 404. And see *Continental Ins. Co.* v. *Coons*, 14 Ky. L. Rep. 136.

The courts have never agreed upon any uniform and clearly defined set of rules to be applied to all the varying conditions presented in such and similar cases. Shall the blanket be piled up to its full amount, successively, on the various classes or parcels of property sustaining the loss, so that the whole of it shall contribute with each specific policy, or, before seeking to apportion the loss, shall the more general insurance be first distributed in some way either among all the classes or parcels of property which it covers, or among those only which have sustained damage, or among those only which need it, or among those which most need it, and if so, in what way shall it be distributed? In other words, what is the "whole insurance," both general and specific, upon the classes of property or items damaged, the policies nowhere defining the phrase. In searching for an answer to these practical inquiries, we find it impossible to harmonize the decisions of the courts or the views of experts. One principle, however, the courts seem to hold in common, to wit, that, unless the express phraseology of the policies prohibits,[1] the contribution clause ought not to be so applied as to diminish the protection of the insured; since usually the insurer fixes the amount of his premium regardless of other insurance, and if, after the fire, he happens to find other insurance which relieves him in part from his liability, it is a piece of pure good fortune. His principal engagement is to pay the loss in full up to the face of his policy, and the insured has given no promise to take out or to keep up other insurance.[2]

Where, however, the apportionment involves only what is called simple nonconcurrence, that is, where only one of the several classes of property covered by the blanket policy is also covered by specific insurance, two rules have been adopted by the courts, which when the facts warrant may be invoked to determine the proper apportionment. These rules are as follows: First, the full amount of the blanket or general policy must contribute with the specific policy to pay the loss on property covered by the specific policy where this

[1] As in *Kansas City, etc., Co.* v. *Am. F. Ins. Co.*, 100 Mo. App. 691, 75 S. W. 186. The modern coinsurance clause powerfully affects the question and renders impracticable some of the earlier rules of adjustment. See Mr. Robb's treatment of this subject in a note at the end of this section.

[2] *Lucas* v. *Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635; *Schmaelzle* v. *London & Lan. Ins. Co.*, 75 Conn. 397, 53 Atl. 863; *Niagara Ins. Co.* v. *Heenan*, 81 Ill. App. 678, aff'd 181 Ill. 575, 54 N. E. 1052; *Illinois Mut. Ins. Co.* v. *Hoffman*, 132 Ill. 522, 24 N. E. 413; *Angelrodt* v. *Delaware Ins. Co.*, 31 Mo. 593; *Deming* v. *Merchants' Cotton Co.*, 90 Tenn. 306, 347, 17 S. W. 89; *Sherman* v. *Madison Ins. Co.*, 39 Wis. 104; *Godin* v. *London Assur. Co.*, 1 Burr. 489.

is the only loss.[1] Second, where there is a loss both on the property which the specific policy covers and on that which it does not cover, the blanket policy must first pay the latter loss, and then with its balance contribute with the specific to pay the loss covered by both.[2]

But where the nonconcurrence is double or complex, that is, where two or more of the classes of property covered by the blanket policy are the subjects of specific policies, and are involved in loss, there are no uniform and generally accepted rules of law or practice by aid of which the apportionment may be authoritatively settled. The experts who framed the standard fire policies were, of course, familiar with the difficulties and uncertainties of the present situation, but they preferred not to attempt any further definition, leaving applicable the decisions of the courts already rendered, with which also they must have been familiar.

The Connecticut court has arbitrarily held in such a case, that if there are several such classes of property damaged, all under cover of a blanket policy, and each specifically insured as well, they will be taken up in the order of greatest loss, and, after contribution between the blanket and the specific, to the loss on the first class, say the cotton, the entire balance of the blanket will be called upon to contribute with the specific insurance on the second class, say the

[1] *Page* v. *Sun Ins. Co.*, 74 Fed. 203, 20 C. C. A. 397, 33 L. R. A. 249 (plaintiff's lumber worth $59,095.52, of which $16,727.06 was in block A and $42,368.46 in block B. Loss of $30,982.02 confined to lumber in B. Plaintiffs had blanket of $40,000 on both blocks and $10,000 of specific policies on lumber in B., of which defendant's policy for $2,500 was one. *Held* that defendant was liable for two thousand five hundred fifty thousandths, to wit, $1,549.10 of the loss).

[2] *Cromie* v. *Kentucky, etc., Ins. Co.*, 15 B. Mon. (Ky.) 432. And see *American Cent. Ins. Co.* v. *Heath*, 29 Tex. Civ. App. 445, 69 S. W. 235. This, known as the Cromie rule, is sometimes stated as follows: "In apportioning losses between policies which are only partially concurrent, the nonconcurrent liability of the general policy shall be discharged before contribution is made to a loss for which all are liable." The specific in such a case is entitled to contribution from the more general policy, if the more general is not otherwise exhausted, *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Ogden* v. *Ins. Co.*, 50 N. Y. 388, 10 Am. Rep. 492; *Hough* v. *Ins. Co.*, 36 Md. 398; *Blake* v. *Ins. Co.*, 12 Gray (Mass.), 265; *Meigs* v. *London Assur. Co.*, 126 Fed. 781 (*contra* on same facts 205 Pa. St. 378, 54 Atl. 1053, the *Hill School* case, in which there was blanket insurance covering main building and addition, also blanket covering their contents. The addition was covered by specific policies. Its contents were covered to a part of their value by specific. The Pennsylvania court took the exceptional view that the insured could look to specific insurance alone for recovery for loss on the addition and its contents, though there was not enough specific on contents to furnish full indemnity for the loss thereon. By like reasoning, if there had been specific insurance on the main building and its contents, the general insurance would have escaped altogether. They argued that it was carrying out the intent of the insured; but the insured clearly intends to get the benefit of insurance where there is a loss, not where there is no loss).

jute, to meet its loss, and so on until all the loss is provided for.[1] Other authorities, however, contend with force, especially where the question is solely between different sets of underwriters, that it is inequitable thus to pile up the blanket insurance by mere interpretation, perhaps nearly to its full amount several times over, and thereby perhaps largely overinsuring certain damaged parcels. They argue that the specific insurer never calculated upon, and has no right to expect, any such extraordinary and fortuitous assistance, and they maintain that, before calling upon the blanket for contribution, it is fairer to apportion its amount over the classes of property covered by it, in the ratio of their values, making it in effect for this purpose separate policies, one on each class of property.[2] Another rule analogous to the last was applied by the arbitration committee of the New York Board of Underwriters, first to apportion the general insurance among the different classes of property in the ratios, not of their values, but of their losses respectively.[3] Other rules, quite as valuable and perhaps more so, together with an admirable summary of this complex subject, follow in the footnote by Mr. Willis O. Robb, the secretary and experienced adjuster of the loss committee of the New York Board of Fire Underwriters. His explanation of the effect of the modern coinsurance clause in rendering largely impracticable the Connecticut rule, and other earlier methods of apportionment, will receive the careful attention which it deserves.[4]

[1] *Schmaelzle* v. *London & Lan. Ins. Co.*, 75 Conn. 397, 53 Atl. 863 (see Mr. Robb's comments upon this case in the last note of this section).

[2] *Chandler* v. *Ins. Co. of N. A.*, 70 Vt. 562, 41 Atl. 502. And see *Blake* v. *Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265, 272; *Ogden* v. *East River Ins. Co.*, 50 N. Y. 388, 10 Am. Rep. 492. *Contra*, in case of simple nonconcurrence, *Meigs* v. *London Assur. Co.*, 126 Fed. 781; *Page* v. *Sun Ins. Co.*, 74 Fed. 203, 20 C. C. A. 397, 33 L. R. A. 249. Mr. Griswold says: "The contribution clause, like contribution under the old form, is held to be operative only between the companies, in case of double insurance, and between policies containing it; and then only when the concurrent insurance exceeds the general loss. . . . The liability of coinsuring companies under this clause is based upon the degree of concurrency of the policies, and is restricted to the ratable proportions of the loss, within the amount of the concurrent insurance; though some of the policies may cover other property in addition to that destroyed, or protect specific items not embraced in any of the others," Fire Underwriters' Text Book (1899), p. 713.

[3] *Mayer* v. *Am. Ins. Co.*, 2 N. Y. Supp. 227.

[4] The history and the present condition of this subject of nonconcurrent (or, strictly speaking, partially concurrent) apportionments may be summarized as follows: Starting with the proposition that the question of doubt in this whole class of cases is, "what is the whole insurance upon the item or items damaged, the policies nowhere defining the phrase?" (but this proposition may be challenged, see *Farmers' Feed Co.* v. *Scottish U. & N. Ins. Co.*, 173 N. Y. 241, 65 N. E. 1105, in which, in another connection, the court defined the full face of a policy to be its true amount), and then applying the

§ 319. Reinsurance.—*Liability for reinsurance shall be as specifically agreed hereon.*

Reinsurance has already been described.[1] It constitutes a new

general rule that ambiguities in the policy language are to be resolved most favorably to the insured, the courts and the experts have only agreed in deducing these two specific conclusions: First. The full amount of the blanket or general policy must contribute with the specific policy to pay the loss on property covered by the latter, where this is the only loss (*Page* v. *Sun*, *supra*); and second, When there is a loss both on the property the specific policy covers and on that it does not cover, the blanket policy must first pay the latter loss, then contribute with the specific to pay the loss they both cover. This is the Cromie rule, *supra*. These two rules comprise the whole body of generally accepted law on the subject of nonconcurrent apportionments, and it will be noted that they apply only to cases of what is called simple nonconcurrence, *i. e.*, cases where only one of the several classes of property covered by the blanket policy is also covered by specific insurance. When two or more of the classes comprised in the cover of the blanket policy are the subjects of specific insurance, and involved in loss, the apportionment becomes a "free for all," neither courts nor adjusters having arrived at anything like an agreement as to method. Perhaps the commonest rule in practice, though it is certainly losing ground, is the (1) "Gradual Reduction" rule, lately adopted by the Connecticut Court of Errors in the *Schmaelzle* case. This makes the blanket policy contribute first on its full amount on that item where the loss is greatest (which some interpret to mean greatest, having regard to deficiency in the specific insurance applicable, and others to mean absolutely largest), then with its remainder on the next greatest loss, etc. Of course this is based on the desire to give the insured the fullest possible indemnity, and it is in fact the rule that goes furthest in that direction in the largest number of cases. But when, as often happens, any one of several rules will alike indemnify the insured in full, so that the apportionment is a question among underwriters only, the unconscionable way in which this rule penalizes the blanket policy (which is often abstractly the most nearly correct in form of all the policies on the risk) makes most fair minded experts revolt from its application. But in seeking a substitute they scatter in all directions. Other principal rules are: (2) The Reading rule, which divides the blanket policy among the several items of property in the ratio of their respective values. This was adopted by the Vermont Supreme Court in the *Chandler* case, *supra*. Some adjusters would make the division only among items involved in loss (harmonizing with the rule in *Page* v. *Sun* for simple nonconcurrence), others among all items or classes of property whether damaged or not. (3) The modified Reading rule, which so divides the blanket policy among all classes of property, whether involved in damage or not, that when possible, and as nearly as possible, the ratio of available insurance to value will be the same on each class as on all together. (4) The Finn, or Griswold, or Kinne rule (they are in essentials the same), which divides the blanket policy among the classes of property in the ratio of the respective losses thereon. This was adopted in the New York Supreme Court case of *Mayer* v. *The American Insurance Co.*, *supra*, which never went to the Court of Appeals. (5) The Rice rule, which, though basing the division of the blanket policies, like the Finn rule, on losses, not values, makes that division in such a way that the excess of aggregate insurance over aggregate loss shall be apportioned to the separate items in the same ratio that would result from assigning the whole blanket insurance successively to each item for contribution. (6) The simplified Finn, or Rice rule, which so divides the blanket policy among all classes of property involved in loss that when possible, and as nearly as possible, the ratio of available insurance to loss will be the same on each class as on all together. This has practically the

[1] See § 23, *supra*.

contract and is governed by the law of the place where it is made; but it largely rests upon the provisions of the original policy.[1] Its

same relation to rule 4 as rule 3 has to rule 2, and aims, in effect, to cut the Gordian knot by making all policies pay the same ratio of loss when that is possible. These, then, are some, though by no means all, of the various rules applied by various legal and lay authorities on apportionments, to what are called double or compound nonconcurrences. Of course there are other cases of complex or combined nonconcurrence where the simple Cromie rule will be first applied, and the work of apportionment then carried on under some one of these rules for compound nonconcurrence. But those cases, as well as the frequently occurring instances where reapportionments are rendered necessary under many of these rules, we may ignore altogether in this general survey. Now, anyone who merely reads over these various rules will be prepared, I think, for the conclusion which careful study of their respective underlying principles and long experience in their practical application to actual problems has forced on me, viz., that no one of them is either demonstrably sound in theory, or universally applicable in practice. And the subject is getting no clearer. Indeed, one feature of modern underwriting practice of more recent development than most of these rules has powerfully contributed to discredit almost all of them and to hasten their progress to the junk heap. That is the coinsurance clause. This is in effect a limited liability clause, and provides that the policy, or any item or division of the policy, to which it is attached, shall not be liable for any greater share of the loss on the property covered thereby than the amount of such policy or item constitutes of, say 80 (or 100) per cent of the entire value of such property. There can be no doubt (1) that this clause must be applied to the result of any apportionment, concurrent or nonconcurrent, after that apportionment has been completed, with the effect in many cases of reducing the loss payment figured out by that apportionment; and (2) that for the purpose of applying the coinsurance clause the policy will be divided only into those items or divisions which it originally contained, not into those which may be arbitrarily and temporarily forced on it in making a nonconcurrent apportionment of loss with other policies. Manifestly, therefore, if a nonconcurrent apportionment based on losses instead of values, or especially one that follows the "gradual reduction" rule, has been worked out, a blanket policy company would thereby be called on to pay a sum far in excess of its coinsurance clause liability, even though there is, in the aggregate, and under all policies, ample insurance, and this excess payment it will promptly and successfully refuse to make, relying for its refusal upon its rights under the coinsurance clause, with the result either that the insured fails to recover his loss, or that a different apportionment must be arbitrarily adopted. In other words, the very rule which, in the absence of a coinsurance clause, will go furthest towards indemnifying the insured will, where that clause is present, heap up a nominal liability on the blanket policy far above what can be enforced in practice, while the other policies will get off with payments far below their coinsurance clause limit of liability. It is curious to note that in the *Schmaelzle* case, where the gradual reduction rule was applied by the Connecticut Court of Errors and Appeals, the court and the lawyers alike, in their engrossment with the apportionment, forgot that the blanket policy had a coinsurance clause and that it was therefore absolutely protected from paying the whole amount apportioned to it by the judgment; in other words, that the insured could not be made whole, in that case, by the very rule adopted for that sole purpose. But adjusters and brokers, in practice, are not allowed to be so forgetful, and their efforts to apply the general rule of providing the fullest indemnity for the insured to the double

[1] *Phœnix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 323, 6 S. Ct. 750, 29 L. Ed. 873; *Sun Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485; *Mackenzie* v. *Whitworth*, L. R. 10 Exch. 142.

immediate subject-matter is not property, but the liability, or a share of the liability, of the original insurer. It must not be confounded with other or double insurance, or with renewals.

The practice of reinsuring risks, though formerly prohibited by statute in England, has always been lawful at common law, and in this country,[1] and is of convenience and benefit to the public, primarily, because it imposes upon the original or straight insurer the necessary burden of dividing up a large risk among many companies, and, secondarily, because it adds, though indirectly, to the security of the original insured. The original insurer may reinsure his entire liability on a risk, or only a part of it, or he may reinsure his entire

problem presented by nonconcurrent policies, subject also to coinsurance clauses, have already begun to make waste paper of almost all the rules given above for double nonconcurrent apportionments, which were devised before coinsurance clauses were attached to fire policies. Rule 3 alone of the seven just given can be made to do duty fairly well under coinsurance conditions, and that by no means always. Among the inventions or adaptations devised to meet this changed situation are the so-called Giesse and Morristown rules. The former reads thus: "First find the limit of liability of each class of insurance, under the average or coinsurance clause, and find the total of those limits (which will usually be somewhat greater than the aggregate loss) by adding them together; then find what each class would pay if it got the full benefit of its contribution clause, *i. e.*, contribution from the face or full amount of all other insurance covering the whole or any part of the property which itself covers, and find the total of these amounts (which of course will be less than the aggregate loss) by adding them together. We thus find the most each class can be made to pay, and also the least it can possibly get off for. Add the several differences between these pairs of limits, find what proportion of that total the aggregate excess of the upper limits over aggregate loss constitutes, and deduct that proportion of each of the differences from the respective upper limits, to find what each class of insurance shall pay to make up the loss." The Morristown rule starts each policy at its lower limit, as fixed by the Giesse rule, and then distributes to each, *pro rata*, the loss remaining unpaid, if necessary until each reaches its coinsurance clause limit. A curious result of these efforts to make new apportionment rules suitable to coinsurance clause conditions is that, since there is no fixed rule of the courts governing nonconcurrent apportionments where two or more specifically insured items are involved in loss, it is possible arbitrarily to treat the blanket policy so as to avoid or minimize the operation of the coinsurance clause in these cases: but since there is a well established rule (the Cromie rule, *supra*) for cases involving loss on only one of the specifically insured items, it is impossible to avoid apportioning two payments to the blanket policy in these cases, and the aggregate so apportioned is often above the coinsurance limit of liability, and the excess the insured simply loses outright, even though his whole insurance was equal to his whole value. Perhaps nothing can better illustrate the absurdity of the present situation than this discrepancy, which manifestly makes it to the insured's interest, if he has one policy on each of two buildings and one blanketing both, all subject to coinsurance provisions, and a loss on only one building, to force the appearance of a loss, however small, on the other also, since only thus can he collect his whole loss.

[1] *Phœnix Ins. Co.* v. *Erie & W. Transp. Co.*, 117 U. S. 312, 323, 6 S. Ct. 750, 29 L. Ed. 873.

liability on all his risks.[1] The character of the risk is supposed to be the same in the contract of original insurance and in the contract of reinsurance; but it is said that, though the contract of reinsurance may involve a less hazard, it must not involve a greater.[2] While this is true, it not infrequently happens, however, that, for a time, the amount of the policy of reinsurance will be greater than the amount of the original insurance, where the latter has been reduced by indorsement on account of a diminution in the property; but the amount of liability under the policy of reinsurance must always be limited by the amount of liability under the straight insurance, and can never exceed it, since the contract, in its nature, is essentially one of indemnity.[3]

The statute of frauds is not applicable to the contract of reinsurance, inasmuch as it is not a collateral agreement of guaranty, made with a creditor, to answer for the debt of another,[4] nor does it ordinarily constitute a novation in favor of the original insured.[5]

It has been held in Nebraska that it is *ultra vires* for mutual fire insurance companies organized under the laws of that state to transact a reinsurance business.[6]

Inasmuch as the usual contract of reinsurance obligates the reinsuring company to await, and be governed by, the terms of adjustment of loss as made between the original insurer and the original insured, it is held that the provisions regarding proofs of loss,[7] appraisal, and the contract limitation of time within which to sue,[8]

[1] *Ins. Co. of N. A.* v. *Hibernia Ins. Co.*, 140 U. S. 565, 11 S. Ct. 909, 35 L. Ed. 517; *Johannes* v. *Phœnix Ins. Co.*, 66 Wis. 50, 27 N. W. 414. The possible liability of the original insurer creates his insurable interest in reinsurance, *Berry* v. *Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. R. 548. Such insurable interest, in the absence of bad faith, need not exist at the time the contract of reinsurance is made, if then contemplated and acquired thereafter, and before loss, *Sun Fire Office* v. *Merz*, 64 N. J. L. 301, 45 Atl. 785; *Boston* v. *Globe Fire Ins. Co.*, 174 Mass. 229, 54 N. E. 543.

[2] *London Assur. Corp.* v. *Thompson*, 170 N. Y. 94, 62 N. E. 1066. If the policy of reinsurance is lost its contents must be proved, for there is no presumption that the risk described is the same, *Ins. Co.* v. *Telfair*, 45 App. Div. (N. Y.) 564, 61 N. Y. Supp. 322.

[3] *Illinois Mut. Fire Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362, 16 Am. Rep. 620. Terms of the two policies need not be identical, *Mil. Mech. Ins. Co.* v. *Palatine Ins. Co.*, 128 Cal. 71, 60 Pac. 518.

[4] *Commercial Mut. Ins. Co.* v. *Union Mut. Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636; *Bartlett* v. *Firemen's Fund Ins. Co.*, 77 Iowa, 155, 41 N. W. 601. *Contra*, *Egan* v. *Ins. Co.*, 27 La. Ann. 368.

[5] *Barnes* v. *Heckla Ins. Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. R. 438.

[6] *Allison* v. *Fidelity Mut. Fire Ins. Co.* (Neb., 1908), 116 N. W. 274.

[7] *Consolidated Real Estate Co.* v. *Cashow*, 41 Md. 59. *Held*, sufficient to transmit the proofs of original assured, *N. Y. Bowery Ins. Co.* v. *N. Y. Ins. Co.*, 17 Wend. (N. Y.) 359.

[8] *Jackson* v. *St. Paul F. & M. Ins. Co.*, 99 N. Y. 124, 1 N. E. 539; *Alker* v. *Rhoades*, 73 App. Div. 158, 76 N. Y. Supp. 808; *Ins. Co.* v. *Telfair*, 27 Misc. (N. Y.) 247; *Home Ins. Co.* v. *Victoria, etc., Ins. Co.* (1907), App. Cas. 59.

are not applicable; but the ordinary rules relating to material misrepresentation,[1] or concealment,[2] by the original insurer may be invoked by the reinsuring company. In the absence of affirmative misrepresentation made to itself, the reinsurer must not complain though the representations of fact contained in the original application, correct when made, have ceased to be true, since in that event he is insuring a valid contract as it stands.[3]

The original insured cannot bring suit against the reinsurer unless the contract of reinsurance expressly stipulates that he may do so, or such be the intent of the arrangement, for without such intent no privity of contract exists between them.[4] If, however, the policy of reinsurance is made expressly for the benefit of the original insured, the latter may, at least in most jurisdictions,[5] pursue his remedy upon either policy,[6] or both, but can have only one satisfaction.[7] Any defense which is available to the original insurer may always be raised by the reinsuring company, for it is only the liability of the former that is reinsured.[8] But if, before having recourse to the reinsurer, the first insurer pays or adjusts its loss, or compromises it so as to fix its amount, this amount will control its right of recovery against the reinsurer, for the contract of reinsurance is one of indemnity only, and furthermore it is usually

And see *Manufact. F. & M. Ins. Co.* v. *Western Assur. Co.*, 145 Mass. 419, 14 N. E. 632; *Eagle Ins. Co.* v. *Lafayette Ins. Co.*, 9 Ind. 446.

[1] *Louisiana Mut. Ins. Co.* v. *New Orleans Ins. Co.*, 13 La. Ann. 246.

[2] *New York Bowery Ins. Co.* v. *New York Ins. Co.*, 17 Wend. (N. Y.) 359. And see *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 1 S. Ct. 582, 27 L. Ed. 337.

[3] *Cahen* v. *Ins. Co.*, 69 N. Y. 300; *Jackson* v. *Ins. Co.*, 99 N. Y. 124, 1 N. E. 539.

[4] *Strong* v. *Phœnix Ins. Co.*, 62 Mo. 289, 21 Am. Rep. 417; *Carrington* v. *Commercial Ins. Co.*, 1 Bosw. (N. Y.) 152; *Travelers' Ins. Co.* v. *California Ins. Co.*, 1 N. D. 151, 45 N. W. 703; *Goodrich's Appeal*, 109 Pa. St. 523, 2 Atl. 209; *Ruohs* v. *Traders' Ins. Co.*, 111 Tenn. 405, 78 S. W. 85; *Nelson* v. *Empress Ass. Corp.* (1905), 2 K. B. 281.

[5] But see *Wood* v. *Moriarty*, 15 R. I. 522, 9 Atl. 427.

[6] *Glen* v. *Hope Mut. Life Ins. Co.*, 56 N. Y. 379; *Fischer* v. *Hope Mut. Life Ins. Co.*, 69 N. Y. 161.

[7] *Whitney* v. *Am. Ins. Co.*, 127 Cal. 464, 59 Pac. 897; *Barnes* v. *Heckla Ins. Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. R. 438. And see *Fischer* v. *Hope Mut. Life Ins. Co.*, 69 N. Y. 161. Where one company with the assent of its policyholders absorbs another by reinsurance the latter becomes directly responsible to the policyholders by reason of the nature of the transaction, *People's Assur. Fund* v. *Boesse*, 92 Ky. 290, 17 S. W. 630; *Travelers' Ins. Co.* v. *California Ins. Co.*, 1 N. D. 151, 45 N. W. 703; *Johannes* v. *Phœnix Ins. Co.*, 66 Wis. 50, 27 N. W. 414. And see *Whitney* v. *Am. Ins. Co.*, 127 Cal. 464, 59 Pac. 897; *Shoaf* v. *Palatine Ins. Co.*, 127 N. C. 308, 37 S. E. 451; *Fire Ins. Asso.* v. *Canada F. & M. Ins. Co.*, 2 Ont. 481, 495.

[8] *N. Y. State Marine Ins. Co.* v. *Protection Ins. Co.*, 1 Story, 458; *Eagle Ins. Co.* v. *Lafayette Ins. Co.*, 9 Ind. 443. A reinsurer is not concluded by an improper payment by the original insurer, *Chippendale* v. *Holt* (1895), 65 L. J. Q. B. 104. "Other insurance" in a policy of reinsurance means other reinsurance, *Mut. Safety Ins. Co.* v. *Hone*, 2 Comst. (N. Y.) 235.

made expressly subject to adjustments concluded by the original insurer.[1]

The contract of reinsurance, as has been observed, . . an insurance of liability for loss, and consequently, as soon as the liability of the first insurer has actually accrued, it may bring suit against the reinsurer before an actual payment of the loss.[2] And so also the reinsurer may be obliged to pay the original insurer the amount of its liability, although the latter may have become insolvent, and although it may ultimately be unable to pay its indebtedness to the original insured.[3] The usual practice is for the original insurer, if sued by the original insured, to give the reinsuring company opportunity to come in and defend the suit at the expense of the latter. If the reinsuring company declines to do this, it will be liable for the reasonable costs of the suit, incurred by the original insurer.[4]

§ 320. The Usual Reinsurance Rider.—The most frequent instance of reinsurance occurs where, for its own anticipated profit, or for the convenience of its customer, a company takes a larger line on a risk than it wishes to carry unaided. It then reinsures the whole or a part of its liability with one or more companies at the same or nearly the same rate of premium. Such a contract of reinsurance frequently consists of the standard form of policy with the usual reinsurance rider pasted upon it, including in the rider a *pro rata* phrase of its own, and also unrestricted permission for other reinsurance.[5] To the rider as thus described, a retainer clause is occasionally added, the object of which is to prevent the original

[1] *Illinois Mut. Fire Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362, 16 Am. R. 620; *Insurance Co.* v. *Insurance Co.*, 38 Ohio St. 11, 43 Am. Rep. 413. And see *Consolidated Real Est. & Fire Ins. Co.*, v. *Cashow*, 41 Md. 59. A judgment in favor of the owner of the property against the original company binds the reinsurer in any proceeding of which it had notice, *Commercial Union Assur. Co.* v. *Am. Central Ins. Co.*, 68 Cal. 430, 9 Pac. 712; *Strong* v. *Ins. Co.*, 62 Mo. 289, 21 Am. Rep. 417. The reinsurer has a right to protect its interests in such litigation, *Gantt* v. *Am. Cent. Ins. Co.*, 68 Mo. 503; *Cass Co.* v. *Mercantile Ins. Co.*, 188 Mo. 1, 86 S. W. 237.

[2] *Mutual Safety Ins. Co.* v. *Hone*, 2 Comst. (N. Y.) 235; *Gantt* v. *Amer. Cent. Ins. Co.*, 68 Mo. 503; *Ex parte Western Ins. Co.* (1892), 2 Ch. 423.

[3] *Blackstone* v. *Alemannia F. Ins. Co.*, 56 N. Y. 104; *Hunt* v. *New Hampshire Ins. Co.*, 68 N. H. 305, 38 Atl. 145 (proceeds here, however, were held for sole benefit of original insured, and not as part of general assets of insolvent original insurer); *Allemannia Fire Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326.

[4] *N. Y. State Mar. Ins. Co.* v. *Protection Ins. Co.*, 1 Story, 458; *Hastie* v. *De Peyster*, 3 Caines (N. Y.), 190. The reinsuring company is not liable for the costs of a suit of which it has no notice, *Faneuil Hall Ins. Co.* v. *L. & L. & G. Ins. Co.*, 153 Mass. 63, 26 N. E. 244, 10 L. R. A. 423; *Penn. Ins. Co.* v. *Telfair*, 27 Misc. 247, 57 N. Y. Supp. 780.

[5] For form of a rider see Appendix, ch. II.

insurer from fully reinsuring its liability, and to compel it to retain a net share of liability.

Before any *pro rata* phrase was introduced into the reinsurance rider, it was held that the reinsuring company was obliged to pay the loss in full up to the face of the policy of reinsurance and could not call upon any excess of original insurance to relieve it by contribution.[1]

This decision naturally was unsatisfactory to underwriters and the question was one between underwriters only. Therefore a new clause was adopted which with some variations in its phraseology was in general use for about half a century, the purpose of this second form of clause being to compel the original insurer to contribute to the loss equitably with the reinsurer on the basis of any excess of original insurance over reinsurance, taking the amount of both sets of insurance as they subsisted at the time of the fire. But in 1905 the highest court in New York, overruling the decision of Hamilton Odell, Esq., referee in the earlier trial of the same case, construed this clause as meaning that the original amount of straight insurance, though since diminished (or by parity of reasoning increased), and though the policy contain no retainer clause, must be made the basis of the apportionment or contribution with the reinsurance.[2] This construction, never intended by under-

[1] *Mutual Safety Ins. Co.* v. *Hone*, 2 Comst. (N. Y.) 235. Thus under the ancient form of reinsurance involved in the *Hone* case if the owner of goods insured them for $10,000 with company A and A reinsured for $5,000 with company B, and a loss of say $5,000 or less occurred, B would have to pay the whole loss; though both companies, if solvent, were practically on the risk for the same net liability, $5,000, and were earning the same amount of net premium or profit, and therefore equitably ought to divide the loss equally.

[2] *Home Ins. Co.* and *Phœnix Ins. Co.* v. *Continental Ins. Co.*, 180 N. Y. 389, 73 N. E. 65 (Judge Edward Bartlett dissenting). In the last case, the court based its ruling largely upon the fact that the rider was intended to do away with the injustice disclosed by the *Hone* case, but, it is submitted, the only way to accomplish that desirable result is to take for apportionment the amounts of insurance and reinsurance as subsisting at the time of the loss. This conclusion is made convincingly clear by assuming that in the *Home Ins. Co.* case the original policy instead of being diminished in amount during its term had been increased, say doubled, because of an accession of goods in the warehouse. By the doctrine seemingly adopted by the Court of Appeals, the straight insurer, though then obtaining half the net premium or profits at the time of the fire, would have borne no net liability at all for any loss not exceeding the amount of reinsurance. Again, suppose the straight insurance at first to be $10,000 reinsured with B for $5,000, without a retainer clause, the straight policy is increased to $15,000 and then reinsured with C for $5,000, without retainer clause. A loss of $6,000 occurs. Under that rider as construed by the Court of Appeals B must pay $3,000, C, though on for the same amount and at same premium pays only $2,000; and A with more premium than either pays only $1,000; but these results cannot be reconciled with the standard *pro rata* clause contained in the body of each policy. Again, suppose the

writers who framed the clause, and at variance with the meaning which they had universally put upon it for many years,[1] as was shown by undisputed testimony from numerous eminent experts, made desirable the adoption of a revised form which is given in the Appendix.[2] This form was adopted and promulgated in May, 1906, by the National Board of Fire Underwriters as the standard form approved and recommended by it;[3] but its use is not compulsory, as in the case of a statutory policy. This revised form in the absence of the retainer clause takes as the basis for apportionment the amounts of the original insurance and reinsurance in force at the time of loss.[4]

Like the other, this later rider is framed upon the theory that the reinsuring company may safely trust to the good faith of the original company and must submissively follow where the convenience of business reasonably requires. Thus the later rider has the provision, in substance like the preceding, "subject to the same risks, privileges, conditions and indorsements (except changes of location), assignments, changes of interest or of rate, valuations and modes of settlement."[5]

§ 321. Special Contracts of Reinsurance.—A company sometimes has all its risks reinsured by another company or other companies as a convenient method of retiring from business,[6] or all risks within

straight policy to be $1,000,000 on contents of a warehouse, all reinsured in one hundred policies of $10,000 each, without retainer clauses. The goods are diminished by $50,000 in value, and the straight insurance reduced by like amount. Under the same rider A may not now proceed in New York, in accordance with the general and convenient custom practiced for fifty years, to cancel five policies of reinsurance, but must canvass the market and arrange, if he can, a reduction *pro rata* with one hundred companies.

[1] See dissenting opinion of Justice Bartlett.

[2] See Appendix, ch. II.

[3] It was prepared by counsel for the plaintiffs in conference with counsel for defendant in the litigation which necessitated it, *Home Ins. Co.* v. *Continental Ins. Co.*, 180 N. Y. 389, 73 N. E. 65.

[4] This is also the rule under the regular *pro rata* clause of the standard policies, *Lattan* v. *Royal Ins. Co.*, 45 N J. L. 453; *Hand* v. *Ins. Co.*, 57 N. Y. 41.

[5] *Imperial Ins. Co.* v. *Home Ins. Co.*, 68 Fed. 698, 30 U. S. App. 409, 15 C. C. A. 609 (as to coinsurance clause); *Ins. Co.* v. *Associated Manufact. Ins. Co.*, 70 App. Div. 69, 74 N. Y. Supp. 1038, aff'd 174 N. Y. 541, 66 A. E. 1110 (bound by adjustment); *Manufacturers' Ins. Co.* v. *Western Assur. Co.*, 145 Mass. 419, 14 N. E. 632 (reinsurer is bound by indorsement of change of interest); *Faneuil Hall Ins. Co.* v. *L. & L. & G. Ins. Co.*, 153 Mass. 63, 26 N. E. 244. But the original company should not allow a substantial increase of risk without assent of reinsuring company, *St. Nicholas Ins. Co.* v. *Merchants' Ins. Co.*, 83 N. Y. 604. And see *Lower Rhine & W. Ins. Assoc.* v. *Sedgewick*, 1 Q. B. 179 (1899.)

[6] *Ruohs* v. *Traders' F. Ins. Co.*, 111 Tenn. 405, 78 S. W. 85; *Olsen* v. *California Ins. Co.*, 11 Tex. Civ. App. 371, 32 S. W. 446. So also in case of life insurance, *Brown* v. *Mut. R. L. Assn.*, 224 Ill. 576.

certain dates,[1] or all in a certain locality.[2] In such a case the special provisions of the particular contract govern.[3]

In modern times reinsurance is also conducted to a large extent under running contracts, terminable perhaps on six months' notice in writing by either company and known as "treaties."[4] The abrogation of the regular cancellation clause of the standard policy is in order, because the standard policy itself provides, "Liability for reinsurance shall be as specifically agreed hereon," which sanctions unlimited right of variation from the usual conditions.

§ 322. **Subrogation.**—*Subrogation of rights to the extent of payment shall be assigned to the company.*

The common-law right of subrogation has already been considered. It grows out of the doctrine of indemnity, and also finds an equitable basis in the consideration that the person who caused the loss or who is primarily liable ought to be made ultimately responsible for the damage sustained.[5]

The insured in the first instance has his option between two forms of remedy. If he pursues his remedy against the wrongdoer and recovers compensation, the insurance company will escape.[6] But

[1] *Sun Ins. Co.* v. *Merz*, 64 N. J. L. 301, 45 Atl. 785.

[2] *London & L. F. Ins. Co.* v. *Lycoming F. Ins. Co.*, 105 Pa. St. 424; *Johannes* v. *Phœnix Ins. Co.*, 66 Wis. 50, 27 N. W. 414.

[3] Proofs of loss may be served upon the reinsuring company when it absorbs the business and assumes all liabilities of the other company, *Whitney* v. *Am. Ins. Co.*, 127 Cal. 464, 59 Pac. 897.

[4] Special features of a reinsurance treaty are often in substance as follows, the original insurer or reinsured company being here called "A," the company reinsuring it, "B:" 1. B is to be preferred to other reinsurance companies in the cessions of reinsurance made from time to time by A; 2. The amount on any one risk to be ceded by A to B is restricted and also must not exceed the amount retained for itself by A; 3. All cessions by A are obligatory on B and without right of cancellation by five days' notice; 4. Items of original policy, for example building and contents, are reinsured *pro rata* with the straight insurance; 5. Liability of B relates back if A's risk has not been running more than fourteen days, otherwise runs from date of inscription; 6. A transmits to B the particulars of risks ceded by means of a bordereau rendered to B, say daily or weekly; 7. Reinsurance follows stipulations and rate of premium of original policy; 8. Cancellation or reduction of a cession ensues only when there is like indorsement on original policy; 9. B pays to A a small percentage by way of compensation; 10. A renders to B monthly accounts current showing premiums, commissions, return premiums and losses; 11. A has sole right of settling losses, but any differences between A and B are settled by arbitration.

[5] See § 52, *supra*.

[6] *Chi., B. & Q. R. Co.* v. *Emmons*, 42 Ill. App. 138; *Kennedy Bros.* v. *State Ins. Co.*, 119 Iowa, 29, 91 N. W. 831. If he collects his insurance concealing the fact of recovery from the railroad company for the same loss, it is a fraud and the insurance company can recover back its payment, *Chickasaw Co. Ins. Co.* v. *Weller*, 98 Iowa, 731, 68 N. W. 443; but a settlement with the railroad company is not conclusive as to the amount of loss, *Home Ins. Co.* v. *Atch., etc., R. Co.*, 4 Kan. App. 60, 46 Pac. 179.

if he chooses first to enforce his claim against the insurance company, the latter is entitled, by way of subrogation, to have recourse over against the party primarily responsible.[1] Inasmuch as the insurance company, after making payment, is entitled to the right of subrogation, the insured, as before shown, will not be permitted after loss to defeat that right by releasing the wrongdoer or compromising with him to the prejudice of the insurance company without the consent of the latter.[2]

The provision of the policy requiring the insured to make a formal assignment *pro tanto* of any rights that he may have against the person or corporation causing the fire, enables the insurance company without any question to institute action in its own name against the party primarily liable.[3] Insurance companies, however, having regard to the prejudice which juries are apt to exhibit towards corporations, sometimes make an arrangement with the insured whereby it is agreed that a suit shall be brought in the name of the insured against the wrongdoer for the whole amount of damage sustained, and that the proceeds of the suit and expenses shall be apportioned between the insured and the insurers under some stipulated arrangement. Sometimes the insurance money is paid, or in large part advanced, under the form of a "loan,"[4] before the suit, and sometimes payment is not made until after its termination. In such a case the insurance company does not take any assignment. So also where the loss exceeds the insurance the companies and the assured may properly make agreement to sue for joint benefit.[5] The party primarily liable who is sued for causing the loss cannot make a defense out of the payment of the insurance money to the insured by the insurance company, since the policy is *res inter alios acta*.[6]

[1] The wise course for the insured to adopt ordinarily is to recover his insurance moneys in the first instance before becoming party to any suit against the wrongdoer.

[2] *Bloomingdale* v. *Columbia Ins. Co.*, 84 N. Y. Supp. 572; *Sims* v. *Mut. Ins. Co.*, 101 Wis. 586, 77 N. W. 908, and cases in § 57.

[3] *King* v. *Victoria Ins. Co.*, L. R. P. C. (1896), A. C. 250. And see § 58, *supra*. The company under this clause may require assignment as a condition of payment, *Niagara Ins. Co.* v. *Fidelity Co.*, 123 Pa. St. 516, 16 Atl. 790. But no assignment is necessary to perfect the right of the company, *Hamburg-Bremen Fire I. Co.* v. *Atlanta Coast L. R. Co.*, 132 N. C. 75, 43 S. E. 548. The right is not a mere equity, but a legal right, *Stoughton* v. *Mfrs.' Nat. Gas Co.*, 165 Pa. St. 428, 30 Atl. 1001.

[4] *Deming* v. *Storage Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518 (held to be a payment).

[5] *Chicago, etc., R. Co.* v. *Pullman Car. Co.*, 139 U. S. 79, 11 S. Ct. 490. See § 58, *supra*.

[6] *Missouri, K. & T. R. Co.* v. *Fuller*, 72 Fed. 467, 18 C. C. A. 641, 36 U. S. App. 456; *Regan* v. *R. R. Co.*, 60 Conn. 124, 22 Atl. 503; *Weber* v. *Morris & Essex R. R. Co.*, 35 N. J. Law, 409, 10 Am. Rep. 253; *Tex. & Pac. R. Co.* v. *Levi*, 59 Tex. 676; *Harding* v. *Town-*

§ 323. Subrogation—Tortious Fires.—It not infrequently happens that the fire which causes the loss to the property of an insured person is negligently started by a common carrier, or other person, on premises more or less distant from the property of the insured. The insurers, upon paying the loss, thereupon become subrogated to any rights of the insured against the wrongdoer.

The prosecution of these rights often involves the difficult question, in respect to the spread of the fire, how far the damages caused thereby are to be attributed to the negligence of the wrongdoer as a proximate cause. The proximate cause is to be determined not so much by any relationship of propinquity in time or space, as by the intimacy of causal connection between the negligent act and the resulting consequences. It is natural for fire, especially if started amid inflammable material, to spread, and the dangerous character of this element presents no excuse for imprudence in its use. Though the number of sufferers from a conflagration may be many, and the extent of the damage great, this in itself offers no reason for shifting the burden of loss from those who are guilty to those who are innocent, provided the results are naturally to be expected. The extent of proximate loss ought not to be bounded by limits of ownership, nor confined within arbitrary and intangible lines.[1]

In *Ryan* v. *N. Y. Central R. R. Co.*,[2] however, it was held that where a house in a populous city takes fire through the negligence of the owner or his servant, and the flames destroy a neighboring building one hundred and thirty feet distant, the owner of the first building is not liable to the owner of the second building for the damage sustained.

So far as the *Ryan* case stands for the proposition that where the facts are sufficiently plain they present a question of law for the court, its doctrine has been repeatedly approved.[3] But as an exposition of the law, applicable in general to the question of proximate loss by the spread of fire, it is opposed by the current of judicial opinion [4] and has been so far distinguished by the courts of the same

hend, 43 Vt. 536, 5 Am. Rep. 304. and see *Chi., etc., R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 11 S. Ct. 90.

[1] See § 231, *supra*. Whether the extent of the loss, under all the circumstances of the case, is remote or reasonably proximate is often a question for the jury, *Milwaukee, etc., R. R. Co.* v. *Kellogg*, 94 U. S. 469. An extraordinarily violent wind intervening may be a new cause, *East Tenn. R. Co.* v. *Hesters*, 90 Ga. 12; *East Tenn. R. Co.* v. *Hall*, 90 Ga. 17.

[2] 35 N. Y. 210.

[3] *Read* v. *Nichols*, 118 N. Y. 229, 23 N. E. 468.

[4] *The G. R. Booth*, 171 U. S. 450, 458, 19 S. Ct. 9; *Ins. Co.* v. *Boon*, 95 U. S. 117; *Mil. R. R. Co.* v. *Kellogg*, 94 U. S. 469; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. 400, 405, 27 L. R. A. 583; *Perley* v. *Eastern R. R. Co.*, 98 Mass. 418, 96 Am. Dec. 645.

state as to have lost much of its authority.[1] Nevertheless that court, in one case, has again declared the soundness of the doctrine, and has gone so far as to hold that while the spread of fire to the land of the first abutting owner is proximate, beyond that it must be regarded as remote.[2]

§ 324. Subrogation—Negligence of Water Company.—Is a water company liable in tort to the insured citizen and taxpayer for fire loss caused by a negligent insufficiency of water supply, where the supply is expressly contracted for between the municipality and the water company? On this subject of practical importance to the underwriter, authorities differ.[3] The weight of reason as expressed

[1] *Frace* v. *N. Y., etc., R. R.*, 143 N. Y. 182, 38 N. E. 102; *O'Neill* v. *N. Y., D. & W. R. Co.*, 115 N. Y. 579, 22 N. E. 217; *Tanner* v. *N. Y. Central Co.*, 108 N. Y. 623, 15 N. E. 379; *Webb* v. *Rome W. & O. R. R. Co.*, 49 N. Y. 420; *Hine* v. *Cushing*, 53 Hun (N. Y.), 519; *Martin* v. *N. Y., O. & W. R. Co.*, 62 Hun, 181.

[2] *Hoffman* v. *King*, 160 N. Y. 618; *Van Inwegen* v. *Port Jervis, etc., R. R. Co.*, 165 N. Y. 626, 58 N. E. 878. The application of this rule would seem to produce incongruous results, for example, where at one section the intervening strip is a foot wide and at the next section a mile wide. The common carrier under this rule apparently could effectually dispose of claims by inducing some friendly party to buy the adjacent foot of land on either side all along the road. A negligent party is not chargeable with knowledge of the boundary lines of his neighbor's property, and often in fact knows nothing about them, but he is presumed to know that a conflagration is likely to burn, so long as it finds inflammable material in its pathway.

[3] The following cases held the water company responsible to the injured taxpayer, *Guardian Tr. Co.* v. *Fisher*, 200 U. S. 57, 26 S. Ct. 186, aff'g 128 N. C. 375; *Guardian, etc., Co.* v. *Greensboro Water, etc., Co.*, 115 Fed. 184; *Mugge* v. *Tampa, etc., Co.* (Fla., 1906), 42 So. 81 (court prefers reasons to number of authorities); *Graves Co. Water Co.* v. *Ligon*, 112 Ky. 775, 66 S. W. 725 (citing other Kentucky cases); *Gorrell* v. *Greensboro, etc., Co.*, 124 N. C. 328, 32 S. E. 720. The foregoing minority probably have the best of the argument, see Judge Freeman's note to *Britton* v. *Green Bay, etc., Co.*, 29 Am. St. Rep. 856; and Judge Parker's remarks in *Olmsted* v. *Aqueduct*, 46 N. J. L. 495, 501. The following cases, constituting a large majority, hold that the water company is not responsible at the suit of a citizen, since the contract is not made with the individual, but with the municipality, *Town* v. *Ukiah, etc., Co.*, 142 Cal. 173, 75 Pac. 773; *Fowler* v. *Athens, etc., Co.*, 83 Ga. 219, 9 S. E. 673; *Fitch* v. *Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982; *Becker* v. *Keokuk, etc., Co.*, 79 Iowa, 419, 44 N. W. 694; *Mott* v. *Cherryvale, etc., Co.*, 48 Kan. 12, 28 Pac. 989; *Allen, etc., Co.* v. *Shreveport W. Co.*, 113 La. 1091, 37 So. 980; *Wilkinson* v. *Light, etc., Co.*, 78 Miss. 389, 28 So. 877; *Howsmon* v. *Water Co.*, 119 Mo. 304, 24 S. W. 784; *Eaton* v. *Fairbury, etc., Co.*, 37 Neb. 546, 56 N. W. 201 (on the ground that the municipality itself could not be sued); *Ferris* v. *Water Co.*, 16 Nev. 44, 40 Am. Rep. 485; *Wainwright* v. *Queens Co. Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987 (approved in 165 N. Y. 30); *Blunk* v. *Dennison, etc., Co.* (Ohio), 73 N. E. 210 (on the ground that the municipality would not be liable, hence its contractor is not liable); *House* v. *Houston W. Co.*, 88 Tex. 233, 31 S. W. 179; *Nichol* v. *Water Co.*, 53 W. Va. 348; 44 S. E. 290; *Britton* v. *Green Bay, etc., Co.*, 81 Wis. 48, 51 N. W. 84. There is said to be no privity of contract between the water company and the citizen. *Nickerson* v. *Bridgeport Hyd. Co.*, 46 Conn. 24; *Bush.* v. *Artesian, etc., Co.*, 4 Idaho, 618, 43 Pa. St. 69; *McEntee* v. *Kingston W. Co.*, 165 N. Y. 27, 58 N. E. 785; *Smith* v. *Water Co.*, 82 App. Div. 427, 81 N. Y. Supp. 812. If the municipality itself furnishes the

y the United States Supreme and other courts seems to allow such n action. The majority of the courts, as shown by the cases cited n the notes, rule otherwise. If such an action is maintainable at he instance of the insured citizen, his insurer on paying the loss beomes subrogated to the same right.

§ 325. Subrogation—Order of Civil Authority.—Where buildings re justifiably blown up by order of civil authority to check a conagration, can the underwriter, on paying the loss, recover of the unicipality? Evidently not at common law.[1]

§ 326. Limitation of Time to Sue.—*No suit or action shall be susainable until after full compliance by the insured with all the foreoing requirements, nor unless commenced within twelve months next fter the fire.*

A compliance with all the provisions of the contract is thus exressly made a condition precedent. Without this express condiion it has been held that the provisions relating to an ascertainent of the loss, the appraisal clause, for example, are independent nd collateral, and that suit may be brought by the insured upon he policy without complying with their requirements.[2] But obervance of the restrictive limit of twelve months for starting litigaion on the standard policy is thus made a condition precedent to ny right of recovery thereunder; and by the terms of the contract he general statute of limitations is superseded, unless, as in all imilar cases, the insurer has waived his contract privilege.[3] This

vater, it has been held that it cannot e made liable to the citizen for such amage by reason of insufficient water upply, *Springfield Fire Ins. Co.* v. *illage of Keeseville*, 148 N. Y. 46, 42 . E. 405. *Contra*, under different orm of contract, *Watson* v. *Needham*, 61 Mass. 404, 37 N. E. 204. Nor, it is aid, can the municipality itself sue a ater company for such damage to unicipal property, *Town* v. *Ukiah*, *tc., Co.*, 142 Cal. 173, 75 Pac. 773. On he question of privity of contract see *Pond* v. *New Rochelle Water Co.*, 183 N. Y. 330.

[1] *Bowditch* v. *Boston*, 101 U. S. 16; *Dunbar* v. *Alcalde*, 1 Cal. 355; *Russell* v. *Mayor*, 2 Denio (N. Y.), 461; *Lord* v. *Mayor*, 3 Hill (N. Y.), 426; *Mayor* v. *Lord*, 18 Wend. 126; *Stone* v. *Mayor*, 25 Wend. 157. But compare *United States* v. *Russell*, 13 Wall. (U. S.) 623; *Bishop* v. *Mayor*, 7 Ga. 200; *White* v. *City Council*, 2 Hill (S. C.), 571. This was an important question after the San Francisco earthquake of 1906.

[2] *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370, 11 S. Ct. 133; *Reed* v. *Washington Ins. Co.*, 138 Mass. 572.

[3] *Riddiebarger* v. *Hartford Ins. Co.*, 7 Wall. (U. S.) 386, 19 L. Ed. 257; *Chichester* v. *New Hampshire F. I. Co.*, 74 Conn. 510, 51 Atl. 545; *Southern Fire I. Co.* v. *Knight*, 111 Ga. 622, 36 S. E. 821, 78 Am. St. R. 216, 52 L. R. A. 70; *Garretson* v. *Merchants' Ins. Co.*, 114 Iowa, 17, 86 N. W. 32; *Smith* v. *Herd*, 110 Ky. 56, 60 S. W. 841; *Barry Lumber Co.* v. *Citizens' Ins. Co.*, 136 Mich. 42, 98 N. W. 761; *Ward* v. *Fire Ins. Co.*, 82 Miss. 124, 33 So. 841; *Sullivan* v. *Prudential Ins. Co.*, 172 N. Y. 482, 65 N. E. 268; *Appel* v. *Cooper Ins. Co.* (Ohio St.), 80 N. E.

restrictive clause is binding upon an infant insured,[1] and also upon a mortgagee under the mortgagee clause.[2] The contract limitation of twelve months, together with the other provisions of the usual policy, is also, by legal inference, imported into the oral or written binder although the insured has no knowledge of such a limitation;[3] but, it has been held, that an independent promise to pay the amount of an adjusted loss upon consideration of the surrender of the policy will not be governed by the policy limitation.[4]

The one-year limit for beginning action has been held inapplicable to a contract of reinsurance.[5]

§ 327. When the Period Begins to Run.—By the better authority the period of limitation begins to run, under the standard policy, from the date of the fire, as specifically stated.[6] In older forms of

955 (six months clause); *Morrill* v. *N. E. Fire Ins. Co.*, 71 Vt. 281, 44 Atl. 358; *Ryer* v. *Prudential Ins. Co.*, 185 N. Y. 6 (if last day is Sunday, Monday is too late under New York Construction Act). *Contra*, Nebraska where it is held that the one-year limit is void as against public policy, *Omaha Ins. Co.* v. *Drennen*, 56 Neb. 623, 77 N. W. 67; *Grand View Bldg. Ass.* v. *Northern Assur. Co.* (Neb., 1905), 102 N. W. 246. And see, as to South Dakota, *Vesey* v. *Commercial Union Assur. Co.*, 18 S. D. 632, 101 N. W. 1074. Ignorance of the insured is no excuse for nonfulfillment, *De Grove* v. *Met. Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305. Mistake of the insured is no excuse, *Farmers' Mut. F. Ins. Co.* v. *Barr*, 94 Pa. St. 345. In case of technical defeat in the first action certain statutes allow a second suit within twelve months thereafter, *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. (U. S.) 386; *Waydell* v. *Gabrielson*, 72 Fed. 648; *Lancashire Ins. Co.* v. *Stanley*, 70 Ark. 1, 62 S. W. 66; *Wooster* v. *Railroad Co.*, 71 N. Y. 471.

[1] *Mead* v. *Phœnix Ins. Co.*, 68 Kan. 432, 75 Pac. 475, 64 L. R. A. 75; *Suggs* v. *Ins. Co.*, 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847.

[2] *Am. Bldg. & L. Assoc.* v. *Farmers' Ins. Co.*, 11 Wash. 619, 40 Pac. 125. But a mortgagee's default does not bar a timely action by the mortgagor, *Shawnee F. Ins. Co.* v. *Bayah*, 8 Kan. App. 169, 55 Pac. 474. A payment to a mortgagee does not waive the time limitation as against the assured, *King* v. *Watertown Ins. Co.*, 47 Hun, 1.

This clause does not apply to reinsurance, see § 319, *supra*. As to the effect of war, see § 108, *supra*. As to the effect of death of the insured, coupled with delay in appointing representative of his estate, see *Matthews* v. *Am. Cent. Ins. Co.*, 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433. A breach of the limitation is matter of defense. Therefore the plaintiff need not plead performance, *Miller Brewing Co.* v. *Capital Ins. Co.*, 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. R. 529. But if plaintiff relies upon waiver, it is wiser not to plead due performance of all conditions, *Allen* v. *Dutchess Co. Mut. Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530. To do so is perhaps fatal irregularity in some jurisdictions, *Williams* v. *Ins. Co.*, 119 App. Div. (N. Y.) 573 (waiver of one-year limitation must be alleged). See § 154, *supra*. The general rule is that waiver cannot be shown under an allegation of full performance, *Reich* v. *Maryland Cas. Co.*, 54 Misc. (N. Y.) 585.

[3] *De Grove* v. *Metropolitan Ins. Co.*, 61 N. Y. 594; § 82, *supra*.

[4] *Smith* v. *Glens Falls Ins. Co.*, 62 N. Y. 85; *Willoughby* v. *St. Paul German Ins. Co.*, 68 Minn. 373, 71 N. W. 272. A compromise agreement made after loss will not be controlled by the twelve months clause, *Hanover F. Ins Co.* v. *Hatton* (Ky.), 55 S. W. 681.

[5] See § 319, *supra*.

[6] *Allen* v. *Dutchess Co. Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530; *King* v. *Watertown Ins. Co.*, 47 Hun, 1; *Daly* v. *Concordia Ins. Co.*, 16 Colo. 349, 65 Pac. 416; *Chichester* v. *New*

policies, however, in which the word "loss," instead of fire, was used, it was held by many courts that "loss" in that connection meant "liability," and that therefore the specified period ran from the time when the cause of action on the policy accrued to the insured, for instance, often at expiration of sixty days after service of the proofs of loss.[1] By like course of reasoning, even under the wording of the standard form, or similar phraseology, some courts continue to apply the old rule, contending that other clauses of the instrument relating to proofs of loss, appraisal, examination under oath, and so on, a compliance with which sometimes more than exhausts the period of a year, indicate an intention to give to the assured twelve available months after the fire within every part of which his action will be sustainable, since otherwise, by the terms of the instrument in their entirety, he may have no time at all left for starting action after his right of action matures.[2] Indeed the United States Supreme Court, though expressly declining to pass upon the point, said, in reversing the court below, "There are, it is said, adjudged cases that would authorize such a construction of this policy as would give the insured the whole term of twelve months from the date when he could demand, as of right, that his claim for loss be satisfied.[3]

Hampshire Ins. Co., 74 Conn. 510, 51 Atl. 545; *Allemania Ins. Co.* v. *Little*, 0 Ill. App. 431; *State Ins. Co.* v. *Stoffels*, 48 Kan. 205, 29 Pac. 479; *Owen* v. *Ins. Co.*, 87 Ky. 571, 10 S. W. 19; *Egan* v. *Oakland Ins. Co.*, 29 Oreg. 403, 42 Pac. 990; *Hocking* v. *Howard Ins. Co.*, 130 Pa. St. 170, 18 Atl. 614; *Hart* v. *Citizens' Ins. Co.*, 86 Wis. 77, 56 N. W. 332, 21 L. R. A. 745, 0 Am. St. R. 880; *Prevost* v. *Scottish & N. Ins. Co.* (Rap. Jud., Quebec), 4 S. C. 203.

[1] *New Haven S. Co.* v. *Prov. Wash. Ins. Co.*, 159 N. Y. 547, 54 N. E. 1093; *Keen* v. *Niagara Ins. Co.*, 89 N. Y. 15, 42 Am. Rep. 297; *Sun Ins. Co.* v. *Jones*, 54 Ark. 376, 15 S. W. 1034; *Miller* v. *Hartford Ins. Co.*, 70 Iowa, 04, 29 N. W. 411; *Chandler* v. *St. Paul Ins. Co.*, 21 Minn. 85, 18 Am. Rep. 385; *Murdock* v. *Franklin Ins. Co.*, 33 W. Va. 07, 10 S. E. 777, 7 L. R. A. 572.

[2] *Steel* v. *Phœnix Ins. Co.*, 51 Fed. 5, 7 U. S. App. 325, 2 C. C. A. 463 (aff'd, but not necessarily on this point, in 154 U. S. 518); *Friezen* v. *Allemannia Ins. Co.*, 30 Fed. 352; *Lette* v. *Clinton Ins. Co.*, 30 Fed. 668 (but policy limit only six months); *Reade* v. *State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665, 64 Am. St. R. 180; *German Ins. Co.* v. *Davis*, 40 Neb. 700, 59 N. W. 698 (but limit only six months); *Leach* v. *Republic F. Ins. Co.*, 58 N. H. 245; *Sample* v. *Lond. & Lan. Ins. Co.*, 46 S. C. 491, 24 S. E. 334, 47 L. R. A. 696, 57 Am. St. R. 701; *Ins. Co.* v. *Scales*, 101 Tenn. 628, 49 S. W. 743 (but limit only six months); *Hong Sling* v. *Royal Ins. Co.*, 8 Utah, 135, 30 Pac. 307. And see *Rogers* v. *Home Ins. Co.*, 95 Fed. 109, 35 C. C. A. 402. But compare *Chambers* v. *Atlas Ins. Co.*, 51 Conn. 17, 50 Am. Rep. 1; *Brooks* v. *Ga. Home Ins. Co.*, 99 Ga. 116, 24 S. E. 869; *Johnson* v. *Humboldt Ins. Co.*, 91 Ill. 92; *Carraway* v. *Merchants' Ins. Co.*, 26 La. Ann. 298; *Fullam* v. *N. Y. Ins. Co.*, 7 Gray (Mass.), 61; *Rottier* v. *German Ins. Co.*, 84 Minn. 116, 86 N. W. 888; *Grigsby* v. *German Ins. Co.*, 40 Mo. App. 276; *Travelers' Ins. Co.* v. *California Ins. Co.*, 1 N. D. 151, 45 N. W. 704; *McFarland* v. *R. Officials & Employees' Acc. Assn.*, 5 Wyo. 126, 38 Pac. 347, 27 L. R. A. 48, 63 Am. St. R. 29.

[3] *Thompson* v. *Phœnix Ins. Co.*, 136 U. S. 287, 298, 10 S. Ct. 1019 (decided

§ 328. **Commencement of Action.**—Delivery of a summons to the sheriff for service under the New York law is equivalent to beginning an action.[1] But if the summons is set aside, the service of a second summons after the expiration of the twelve months will not avail the insured.[2] If the action, brought to trial, was commenced after the expiration of the period named, the fact that another action was begun within the period will not aid the insured as an excuse for his nonfulfillment.[3] But if a suit in equity for reformation of the policy fails, the complaint may be amended in order to allow continuance of the suit as an action upon the policy.[4]

§ 329. **Construction of Limitation Clause.**—While this limitation clause is to be enforced according to its reasonable intendment, nevertheless, in arriving at its fair meaning, regard must be had to the other provisions of the contract. Thus if a compliance with the appraisal clause prevents the claim of the insured from maturing until after the expiration of twelve months, the time for bringing suit must be considered extended.[5] So also where a Lloyd's policy

on ground of waiver). A provision limiting the insured to a particular forum for his action would be invalid, *Nute* v. *Hamilton Mut. Ins. Co.*, 6 Gray (Mass.), 174.

[1] *Hamilton* v. *Royal Ins. Co.*, 156 N. Y. 327, 50 N. E. 863. So in other states, *Miller Brewing Co.* v. *Capital Ins. Co.*, 111 Iowa, 590, 82 N. W. 1023; *Modern Woodmen* v. *Bauersfeld*, 62 Kan. 340, 62 Pac. 1012; *German Ins. Co.* v. *Wright*, 6 Kan. App. 611, 49 Pac. 704; *Farrell* v. *German-Am. Ins. Co.*, 175 Mass. 340, 56 N. E. 572; *Harvey* v. *Ins. Co.*, 120 Mich. 601, 79 N. W. 898; *Georgia Home Ins. Co.* v. *Holmes*, 75 Miss. 390, 23 So. 183 (no agent within county). With an unofficial process server the rule is said to be otherwise, *Lesure Lumber Co.* v. *Mutual Ins. Co.*, 101 Iowa, 514, 70 N. W. 761. The filing of a *præcipe* for a summons *held*, sufficient service, *Schroeder* v. *Mer. & Mech. Ins. Co.*, 104 Ill. 71. An alias summons, it is said, will relate back to the time of the original, *Everett* v. *Niagara Ins. Co.*, 142 Pa. St. 322, 21 Atl. 817; *Virginia F. & M. Ins. Co.* v. *Vaughan*, 88 Va. 832, 14 S. E. 754.

[2] *State Ins. Co.* v. *Stoffels*, 48 Kan. 205, 29 Pac. 479.

[3] *Sullivan* v. *Prudential Ins. Co.*, 172 N. Y. 482, 65 N. E. 268; *Melson* v. *Phenix Ins. Co.*, 97 Ga. 722, 25 S. E. 189; *McElroy* v. *Ins. Co.*, 48 Kan. 200, 29 Pac. 478; *Ward* v. *Penn. Ins. Co.*, 82 Miss. 124, 33 So. 841. And see *Chichester* v. *New Hampshire Ins. Co.*, 74 Conn. 510, 51 Atl. 545; *Wilhelmi* v. *Des Moines Ins. Co.*, 103 Iowa, 532, 72 N. W. 685. An injunction does not prevent the operation of the limitation clause of the policy, *Wilkinson* v. *First Nat. Ins. Co.*, 72 N. Y. 499. But the insured may gain relief by a seasonable cross-bill in the injunction suit, *North Brit. & M. Ins. Co.* v. *Lathrop*, 70 Fed. 429, 25 U. S. App. 443, 17 C. C. A. 175.

[4] *New York Ice Co.* v. *Northwestern Ins. Co.*, 23 N. Y. 357. And see *Jacobs* v. *St. Paul Ins. Co.*, 86 Iowa, 145, 53 N. W. 101. But it is said that an entirely new cause of action cannot be allowed by amendment after the policy limit of time has expired, *Grier* v. *North. Assur. Co.*, 183 Pa. St. 334, 39 Atl. 10.

[5] *Williams* v. *German-Am. Ins. Co.*, 90 App. Div. 413, 86 N. Y. Supp. 98 (time extended until sixty days after award); *Austen* v. *Niagara Ins. Co.*, 16 App. Div. 86, 45 N. Y. Supp. 106; *Case* v. *Sun Ins. Co.*, 83 Cal. 473; *Harrison* v. *Hartford Ins. Co.*, 112 Iowa, 307, 83 N. W. 820; *Fritz* v. *Brit.-Am. Assur. Co.*, 208 Pa. St. 268, 57 Atl. 573. And see *Rogers* v. *Ætna Ins. Co.*, 95

provides that action shall be brought against one underwriter only, nd that the other underwriters shall abide the event of such action, ctions against the other underwriters need not be brought within he year succeeding the fire.[1]

§ 330. Waiver of Limitation.—The policy provision being in erogation of the general statute of limitation, the courts are not low in holding the company estopped from insisting upon it, where ne promise or conduct of the company has induced the delay.[2]

The Massachusetts clause names as the limit of time for bringing uit two years from the time the loss occurred.[3]

§ 331. Insured Includes Legal Representative.—*Whenever in this olicy the word "insured" occurs it shall be held to include the legal epresentative of the insured and wherever the word "loss" occurs it hall be deemed the equivalent of "loss or damage."*

The policy is not so far a personal contract as to terminate on ne death of the assured. Such a result would be highly inconenient, and is not needful to the protection of the insurer. On ne occurrence of that event the executor or administrator of the ssured has the right to collect the insurance money in case of loss, hether the policy is on real or personal estate.[4]

ed. 103, 35 C. C. A. 396 (where judgent in collision suit was prerequisite claim against defendant); *Martin State Ins. Co.*, 44 N. J. L. 485, 43 m. Rep. 397.

[1] *N. J. Concentrating Works* v. *ckerman*, 6 App. Div. (N. Y.) 540, 9 N. Y. Supp. 585; *Lawrence* v. *hæfer*, 19 Misc. 239, 42 N. Y. Supp. 92. As to reinsurance see § 319, *upra*.

[2] *Thompson* v. *Phœnix Ins. Co.*, 136 . S. 287, 10 S. Ct. 1019, 34 L. Ed. 98; *De Farconnet* v. *Western Ins. Co.*, 0 Fed. 405; *Steel* v. *Phœnix Ins. Co.*, Fed. 715, 2 C. C. A. 463; *Magner* v. *ut. Life Assoc.*, 17 App. Div. 13, f'd 162 N. Y. 657, 57 N. E. 1116; *ireman's Fund Ins. Co.* v. *Western efrig. Co.*, 162 Ill. 322, 44 N. E. 746; *odwin* v. *Merchants' Ins. Co.*, 118 wa, 601, 92 N. W. 894; *Scottish U. N. Ins. Co.* v. *Enslie*, 78 Miss. 157, So. 822; *Phœnix Ins. Co.* v. *Rad ita Hora*, 41 Neb. 21, 59 N. W. 752; *ibbrell* v. *Georgia Home Ins. Co.*, 110 . C. 193, 14 S. E. 783; *Cockran* v. *Lond. Assur. Co.*, 93 Va. 553, 25 S. E. 597. As to effect of setting aside a fund by an insolvent company, see *St. Paul German Ins. Co.*, 58 Minn. 163, 59 N. W. 996. But mere negotiations for an adjustment are no waiver of the limitation, *Vincent* v. *Mut. Res. Fund L. Ass.*, 74 Conn. 684, 51 Atl. 1066; *Carlson* v. *Met. L. Ins. Co.*, 172 Mass. 142, 51 N. E. 525; *Allen* v. *Dutchess Co. Mut. Ins. Co.*, 95 App. Div. 86, 88 N. Y. Supp. 530; *Morrill* v. *Ins. Co.*, 71 Vt. 281, 44 Atl. 358.

[3] For statutes see Appendix, ch. I.

[4] *Lawrence* v. *Niagara Ins. Co.*, 2 App. Div. 267, 37 N. Y. Supp. 811, aff'd 154 N. Y. 752, 49 N. E. 1099; *Wyman* v. *Wyman*, 26 N. Y. 253. As to meaning of the term "legal representative," see *Matthews* v. *Am. Cent. Ins. Co.*, 154 N. Y. 449, 48 N. E. 751; *Alford* v. *Consol. Ins. Co.*, 88 Minn. 478, 93 N. W. 517 (receiver of a corporation); *Metzger* v. *Manchester F. Assur. Co.*, 102 Mich. 334, 63 N. W. 650 ("representative" does not mean "agent").

§ 332. Mutual Companies.—*If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies, or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached or appended hereto.*

The regulations or by-laws of mutual companies often affect the particulars of the contract. These regulations are, in general, binding upon the policyholders, who in mutual companies constitute the members of the company.[1] This direction of the standard policy wisely and equitably provides that such regulations must be disclosed in connection with the contract itself; for instance any special provision relating to the method of paying premium by deposit note, wholly or partly in place of a present cash payment.[2]

This clause does not appear in the Massachusetts policy, but the Massachusetts public statutes and the statutes of other states provide that provisions of the by-laws, or the application which forms a part of the contract, must be set forth in the policy, or that a copy must be attached thereto, and under such statutes, it has been held that a failure to comply precludes a defense based on anything contained in the application.[3]

§ 333. Authority of Agents to Waive Limited to Writing.—*This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.*

The importance of this clause to the insurance companies is illustrated by the frivolous and oftentimes false testimony by which,

[1] *Wilson* v. *Union Mut. F Ins Co*, 77 Vt. 28, 58 Atl. 799. And see § 5, *supra*. As to assessments, see *Meley* v. *Whitaker, Receiver*, 61 N. J. L. 602.

[2] See § 228, *supra*.

[3] *Rauen* v. *Prudential Ins. Co.*, 129 Iowa, 725, 106 N. W 198. But where the company's defense is fraud, a medical witness may use the application, though not incorporated or attached to the policy, to aid his memory, *Holden* v. *Prudential Ins. Co.*, 191 Mass 153.

under the doctrine of waiver and estoppel, the essential conditions of the written policy are subverted. By the prevailing rule the provisions of the clause are not invalid upon their face or contrary to public policy, and are to be enforced, except as facts amounting to a waiver of the clause itself, or to an estoppel against the company, are established.

The meaning and legal effect of the clause have been considered at length under the subject of waiver and estoppel.[1] Within the deliberate opinion of the United States Supreme Court, as before shown, this provision of the contract is reasonably calculated to protect both parties from the uncertainties and perils of oral testimony, and should be applied by the courts according to its terms and in pursuance of its purpose, and should not be evaded.[2] Many of the provisions of the standard fire policies are needful in general to guard the public against fires having their origin in carelessness or fraud. All proper modifications, suited to special instances, can be made by indorsements or riders attached to the statutory form of policy.[3] Nevertheless a majority of the state courts, encroach-

[1] For full discussion see ch. VIII, *supra*.

[2] *Northern Assur. Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213.

[3] Often so attached, as occasion demands, are such permits as the following: For other insurance (§ 252); to remain unoccupied a portion of each year (§§ 271, 272, 273), or to remain unoccupied a portion of each year in charge of a competent person; to use kerosene, oil, or gas stoves; to use steam and electricity for heating, lighting and power; to use benzine or gasoline or other prohibited articles, or occupations, with or without restrictions (§§ 269, 281); to make additions, alterations and repairs (§ 233), or to make ordinary alterations and repairs exclusive of additions or reconstructions; or to cover builder's risk (§ 258); to cover though on leased ground (§ 260); to work in factories over time (§ 255). Besides such permits, other clauses are often added, for example: lightning, mortgagee (§ 290), coinsurance (§ 242), average (§ 242), automatic sprinkler equipment (§ 109); watchman (§ 256); clear space; iron safe; three-fourths value (§ 242); three-fourths loss, etc. The iron-safe clause, requiring a safe, inventory, and set of books, is used mainly in the South; recent cases construing it are appended, *Ætna Ins. Co.* v. *Johnson* (Ga., 1907), 56 S. E. 643 (substantial compliance will suffice); *Ætna Ins. Co.* v. *Blount* (Miss., 1907), 44 So. 162 (assured failed to keep books in safe. Policy avoided); *Coggins* v. *Ætna Ins. Co.* (N. C., 1907), 56 S. E. 506 (policy avoided; no inventory kept as required); *Reynolds* v. *German-Am. Ins. Co.* (Md., 1907), 68 Atl. 262 (policy avoided; inventory not made within 30 days); *McMillan* v. *Ins. Co.* (S. C., 1907), 58 S. E. 1020 (substantial compliance sufficient); *Scottish U. & N. Ins. Co.* v. *Moore*, 36 Tex. Civ. App. 312 (substantial compliance sufficient). Even under a liberal statute there must be a reasonable fulfillment of the iron-safe clause warranty, *Arkansas Ins. Co.* v. *Luther* (Ark., 1908), 109 S. W. 1022; *Arkansas Ins. Co* v. *Stuckey* (Ark., 1907), 106 S. W. 203; *Yates* v. *Thomason* (Ark., 1907), 102 S. W. 1112 (policy avoided); *Arkansas Ins. Co.* v. *McManus* (Ark., 1908), 110 S. W. 797. But the company has been held estopped from insisting upon forfeiture, where the agent issuing the policy knew that there was no safe, *Rudd* v. *Am. Guarantee, etc., Ins. Co.* (Mo. App., 1906), 35 Ins. L. J. 948 Sometimes an earthquake clause is attached to the policy (§ 280). And see

ing apparently upon the prerogative of the legislatures, have largely nullified this clause of the standard policies by applying to it the modern American doctrine of parol waiver.[1]

The Massachusetts policy, and other standard policies like it, have no similar provision. To the similar clause in the Wisconsin policy are added phrases regarding knowledge by the company's agent prior to the inception of the contract, and also regarding his knowledge after loss, which powerfully affect its operation in favor of the assured.[2] The South Dakota policy has the following extraordinary provision, which, so far as conditions affecting the risk prior to the fire are concerned, places the insurer practically at the mercy of unscrupulous claimants: *It shall be the duty of the insurer, in order to avail himself of any provision in this policy rendering it void, to promptly cancel the policy as provided herein upon having or obtaining notice or knowledge of the existence of any facts or circumstances which would, according to the terms of the policy, render it void; otherwise it will be deemed to have waived such provision or provisions voiding the policy. Provided, that, if the grounds for cancellation under the last clause shall be distinctly specified in the written notice, such cancellation may be effected upon twenty-four hours' notice to the insured; and actual notice to, or the knowledge of, any agent of the company as above mentioned shall be deemed notice to, and knowledge of, the company.*

§ 334. Policy not Valid Until Countersigned.—This provision is binding,[3] but in no wise interferes with a closing of the contract by preliminary oral or written binder.[4] The clause often fixes the place where the contract is consummated and the policy delivered, and, in that event, may determine what body of law shall govern as to its validity, construction and discharge.[5]

[1] See §§ 128, 173, 174. And see *German-Am. Ins. Co.* v. *Hyman* (Colo., 1908), 94 Pac. 27; *Dulaney* v. *Fidelity & Cas. Co.* (Md.), 66 Atl. 614.

[2] *Welch* v. *Fire Assn.*, 120 Wis. 456, 98 N. W. 227.

[3] *Badger* v. *Ins. Co.*, 103 Mass. 244.

[4] See §§ 80, 81.

[5] *Orient Ins. Co.* v. *Rudolph*, 69 N. J. Eq. 570, 61 Atl. 26.

Richmond Coal Co. v. *Commercial Union Assur. Co.*, 37 Ins. L. J. 97; *Board of Education* v. *Alliance Ins. Co.*, 159 Fed. 991.

CHAPTER XVI

Life Insurance Policy

§ 335. Life Insurance Policy—Introductory.—The general principles of law governing the fire policy are applicable also to the life policy. It will be well to note, however, that while almost every individual property owner is practically under compulsion to seek the protection of fire insurance, life insurance appears to the public to be more a matter for free choice. Life insurance, therefore, must be made to look attractive and valuable, if it is to win popular favor. The mercantile fire insurance policy usually runs for the term of a year. It is frequently renewed. Each premium is independent and is relatively small; but the life insurance policy may run for a long period, indeed for a lifetime. Its premiums in the aggregate with interest may largely exceed the face of the policy. To pay premiums during the whole span of a life, in return for a contract eventually turning out to be worthless would bring dismay, if not disaster, to those in interest. An apprehension of such a possible result tends to neutralize the effect produced by the most alluring advertisements circulated by life insurance agencies. From such considerations it may easily be inferred that a litigious reputation is not a desirable asset for any life insurance company to possess. Hence in its policy we are not surprised to find the modern "incontestable" clause; and we rightly conclude that the legal practitioner is likely to be engaged in less controversy over the warranties of the usual life policy than over those of the usual fire policy.[1] Notwithstanding the soundness of these premises we must not, in our comprehensive review of the law of life insurance, ignore provisions which are peculiar to the policy of life insurance.

In New York the legislature has made obligatory, except as applied to industrial insurance, four standard forms of life insurance contracts, comparatively simple in their terms.[2] It will be profitable,

[1] The life insurance policies of assessment companies have given rise to much litigation.

[2] Ins. L., sec. 101. The insurance superintendent may allow the use of other forms, and has already modified the statutory forms. Standard life insurance policies have been adopted by the legislatures of several other states.

however, in treating of this subject, to follow clause by clause one of the older and more complex forms of policy[1] still in general use, which will at the same time present the law points involved in the construction of the standard forms.

§ 336. Designation of Beneficiary.—*Payable to the insured, his executors, administrators, or assigns.*

A policy taken out in this form is the property of the insured, is subject to the claims of his creditors, and upon his death is collectible by his executors or administrators like any other personal assets of his estate; unless he has previously assigned it.[2]

§ 337. Other Beneficiaries.—Oftentimes the policy is made payable to others than the insured, who may be designated by such general terms that it is not easy to determine to whom the description is intended to be applicable, under the circumstances as they happen to exist at the time of the decease of the insured.[3] In such cases the

[1] Appendix, ch. II. For definition of life insurance and its nature see *Ritter* v. *Mut. L. Ins. Co.*, 169 U. S. 139, 151, 18 S. Ct. 300. At p. 151 the court says: "Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age the probable duration of life."

[2] § 71, *supra*.

[3] If no beneficiary is sufficiently designated the insurance reverts to the estate of the insured, *Boyden* v. *Massachusetts Masonic L. Assoc.*, 167 Mass. 242, 45 N. E. 735. So, also, if the beneficiary cannot lawfully take, *Mayher* v. *Manhattan L. Ins. Co.*, 87 Tex. 169, 27 S. W. 124. But where there was no person in existence of any class specified, who could take as beneficiary, the Nebraska court held that the fund would revert to the society and would not go to the administrator of the member or to his creditors, *Warner* v. *Modern Woodmen* (67 Neb. 233), 93 N. W. 397 (citing many cases). Sometimes the insurance company protects itself with the following provision: "The production by the company of this policy and a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is an executor or administrator, husband or wife, or relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been satisfied." Payment thus made to anyone so named will furnish the company with a complete defense, *Brooks* v. *Met. Life Ins. Co.* (N. J., 1903), 56 Atl. 168; *Ruoff* v. *John Hancock M. L. Ins. Co.*, 86 App. Div. 447. No one of those thus named for the exercise of the companies' election has an exclusive right of action on the policy. Hence, it has been held, no one alone has an attachable interest in the insurance fund, *Providence Co. S. Bk.* v. *Vadnais* (R. I., 1904), 58 Atl. 454. But any receipt fraudulently obtained by the company may not be conclusive, *McNicholas* v. *Prudential Ins. Co.*, 191 Mass. 304.

words are given a popular rather than a technical signification,[1] and especially where the appointment is gratuitous, parol evidence is freely received to arrive at the real meaning of the insured.[2]

A designation of beneficiaries, however, can be made only from the classes specified and in accordance with statutes and with the charter and by-laws of the company, so far as they may govern the subject.[3] Thus, in a Tennessee case, Offill, a member of the Knights of Honor, had his benefit certificate made payable to his niece, the plaintiff. The constitution and laws of the society provided for three classes of beneficiaries: (1) members of the family; (2) blood relatives; (3) persons dependent on the member. Offill surrendered his certificate and took out another in place of it payable on his death to Miss Corum whom, though she lived with her parents, he had promised to support. But after his decease it appeared that his assistance in fact rendered to her was limited to some music lessons, and the gift of a dress, a pair of shoes, and a watch. The court held that Miss Corum, not being dependent upon the insured, was not entitled to the appointment, and that the proceeds of the insurance belonged to the niece, the prior appointee.[4]

Other courts approach this matter from a different point of view. John M. Irvine, named the plaintiff, who was his sister-in-law,

[1] *Walter* v. *Hensul*, 42 Minn. 204, 44 N. W. 57.

[2] *Griswold* v. *Sawyer*, 125 N. Y. 411, 35 N. Y. St. R. 396, 26 N. E. 464; *Pittel* v. *Fidelity Mut. L. Assn.*, 86 Fed. 255, 30 C. C. A. 21, 52 U. S. App. 638 ("legal representatives" construed in the light of an assignment of policy by the insured himself); *Knights Templars & Masonic M. A. Assn.* v. *Greene*, 79 Fed. 461 (all the circumstances and context may be invoked to determine whether "heirs" includes widow). The rule of construction is analogous to that applied in the case of wills and other gifts, *Mut. Ben. Life Ins. Co.* v. *Bank*, 24 Ky. L. R. 580, 69 S. W. 1; *Duvall* v. *Goodson*, 79 Ky. 224; *Russ* v. *Supreme Council*, 110 La. 588, 34 So. 697.

[3] *Masonic Mut. Ben. Assoc.* v. *Severson*, 71 Conn. 719, 43 Atl. 192 (by-laws in force at time of member's decease may govern); *Norwegian Old People's Home Soc.* v. *Wilson*, 176 Ill. 94, 52 N. E. 41; *Smith* v. *Supreme Tent*, 127 Iowa, 115, 102 N. W. 830 ("relatives"); *Carson* v. *Vicksburg Bank*, 75 Miss. 167, 22 So. 1, 37 L. R. A. 559 (creditors excluded); *Clarke* v. *Swartzenberg*, 162 Mass. 98, 38 N. E. 17 (creditors excluded); *Marsh* v. *Amer. Legion of Honor*, 149 Mass. 515, 21 N. E. 1070; *Britton* v. *Royal Arcanum*, 46 N. J. Eq. 102, 18 Atl. 675; *Sanger* v. *Rothschild*, 123 N. Y. 577, 34 N. Y. St. R. 258, 26 N. E. 3; *Grand Lodge* v. *Iselt* (Tex. Civ. App.), 37 S. W. 377. The policy may reserve to the company the right to appoint the beneficiary from certain classes, *Brooks* v. *Metropolitan Life Ins. Co.*, 70 N. J. L. 36, 56 Atl. 168. The subject of change of beneficiary is considered in §§ 64, 68, 69, *supra*.

[4] *Offill* v. *Supreme Lodge* (Tenn., 1898), 46 S. W. 758. Where one designation of beneficiary fails, a previous valid designation remains in force, *Smith* v. *Boston & M. R. Relief Assn.*, 168 Mass. 213, 46 N. E. 626; *Grand Lodge of Wisconsin of Order of H. S.* v. *Lemke*, 124 Wis. 483, 102 N. W. 911 (survivors). The New York court has decided that a company, by accepting dues, is estopped from contesting a certificate in favor of a "dependent," on the ground that she was not a dependent, *Tramblay* v. *Supreme Council*, 90 App. Div. 39, appeal withdrawn, 179 N. Y. 517.

beneficiary in his certificate of membership in the Knights of Pythias. The association with full knowledge of the relationship, which indeed was disclosed upon the face of the certificate, issued the certificate and received payment of dues thereunder. On the trial, however, it contended that the appointment was not lawful within the meaning of its by-laws. The New York court, reversing the court below, held that the association was estopped from raising this defense.[1]

But although the designation of the beneficiary may be irregular, or may altogether fail, the court will enforce the contract if possible and not allow it to be defeated.[2]

As already shown the general rule is that as soon as the contract is made rights of third party beneficiaries become vested, and cannot be disturbed by a fresh appointment unless such a power is expressly reserved to the insured.[3]

§ 338. Insurance Payable to Heirs or Legal Representatives.—In the case of gratuitous arrangements, the probable intent of the donor, if lawful, must be carried out. As popularly used, the words "heirs" and "heirs at law" and similar phrases usually refer to the distributees or persons who would receive personalty in case of intestacy, and, in the absence of other evidence of intent, such is the signification accepted by the courts in construing the life policy or certificate.[4] Thus it was held that the phrase "lawful heirs" was

[1] *Strange* v. *Supreme Lodge*, 189 N. Y. 346, 82 N. E. 433. See § 130, *supra*. In the same case it was also held that where the first designation is made for value received from the beneficiary, the rights of the beneficiary are vested, and the usual power of making a new appointment, reserved to the insured by the by-laws, no longer exists without consent of the beneficiary; citing *Conselyea* v. *Supreme Council*, 3 App. Div. 464, aff'd 157 N. Y. 719; *Webster* v. *Welch*, 57 App. Div. 558; *Smith* v. *National Ben. Soc.*, 123 N. Y. 85. Compare the Nebraska case in which it was held that though conviction for felony amounted by the by-laws to expulsion from membership, yet collection of assessments with full knowledge of the facts constituted a waiver, *Pringle* v. *Modern Woodmen* (Neb., 1907), 113 N. W. 231.

[2] *Hadley* v. *Odd Fellows*, 173 Mass. 583, 54 N. E. 345; *Clarke* v. *Swartzenberg*, 162 Mass. 98, 38 N. E. 17; *Sargent* v. *Supreme Lodge*, 158 Mass. 557, 33 N. E. 650; *Addison* v. *New Eng. Comml. Travellers' Assoc.*, 144 Mass. 591; *Carson* v. *Vicksburg Bank*, 75 Miss. 167, 22 So. 1, 37 L. R. A. 559. It has been held in New York by a divided court that, where an association issues a certificate in favor of a beneficiary outside the permitted class, only the association can avail itself of the act *ultra vires*. The beneficiaries contemplated by the by-laws were not allowed to recover, by reason of the fact that the association made no objection to those irregularly appointed, *Coulson* v. *Flynn*, 181 N. Y. 62, 73 N. E. 507.

[3] See § 64, *supra*; *Perry* v. *Tweedy* (Ga., 1907), 57 S. E. 782. A right to change beneficiaries, though expressly reserved, does not include power to surrender the policy for cancellation without consent of the beneficiaries, *Holder* v. *Prudential Ins. Co.* (S. C., 1907), 57 S. E. 853.

[4] *Johnson* v. *Knights of Honor*, 53

used in a colloquial sense and included the widow, though technically not one of the heirs at law.[1] And "legal heirs," it is said, includes all the distributees under the statute of distributions.[2]

The phrase "legal representatives" properly means executors or administrators, including also assigns,[3] and such signification will naturally be given to it,[4] but not necessarily, since the purpose of the donor, if lawful, must control. Thus where a policy was made payable to the "legal representatives" of the insured, the court refused to allow the proceeds to fall into the general assets of his estate for the benefit of his creditors, and held that he intended in that instance to designate his wife and children.[5]

Where a policy is payable to wife and children, or other beneficiaries, they all divide the proceeds equally, and not in accordance with the statute of distributions, unless statutes or by-laws so provide.[6]

§ 339. Insurance Payable to Wife.—An "affianced wife" is not "a wife" within the meaning of statutes or of rules of an association.[7]

Ark. 255, 13 S. W. 794, 8 L. R. A. 732; *Mullen* v. *Reed*, 64 Conn. 240, 29 Atl. 478, 24 L. R. A. 664, 42 Am. St. R. 174; *Hubbard* v. *Turner*, 93 Ga. 752, 30 L. R. A. 593, 20 S. E. 640 (money went to brother); *Britton* v. *Supreme Council*, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. R. 376 (money went to mother); *Northwestern M. A. Assoc.* v. *Jones*, 154 Pa. St. 99, 26 Atl. 253, 32 W. N. C. 169 ("heirs" does not mean executor or administrator of estate of insured). It is held in some jurisdictions, however, that the administrator or executor of the insured may collect by suit and distribute to the rightful beneficiaries, *Janda* v. *Union*, 71 App. Div. 150, 75 N. Y. Supp. 654, aff'd 173 N. Y. 617, 66 N. E. 1110; *Bishop* v. *Grand Lodge*, 112 N. Y. 627, 20 N. E. 562; *Clarke* v. *Swartzenberg*, 162 Mass. 98, 38 N. E. 17; *Rose* v. *Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; but see *Schæp* v. *Bankers' Alliance Ins. Co.*, 104 Iowa, 354, 73 N. W. 825; *Iowa State T. M. Assoc.* v. *Moore*, 73 Fed. 750, 34 U. S. App. 670, 19 C. C. A. 562.

[1] *Hannigan* v. *Ingraham*, 55 Hun (N. Y.), 257, 28 N. Y. St. R. 530, 8 N. Y. Supp. 232; *Alexander* v. *Association*, 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161 (all went to widow); *Lyons* v. *Yerex*, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. R. 452 ("heirs at law" includes widow); *Schultz* v. *Ins. Co.*, 59 Minn. 308, 61 N. W. 331; *Leavitt* v. *Dunn*, 56 N. J. L. 309, 28 Atl. 590, 44 Am. St. R. 402 ("heirs" means "widow as well as children"); *contra*, *Gauch* v. *Ins. Co.*, 88 Ill. 251, 30 Am. Rep. 554; *Phillips* v. *Carpenter*, 79 Iowa, 600, 44 N. W. 898.

[2] *Thomas* v. *Covert*, 126 Wis. 593. The term "heirs" includes widow where the widow is one of the next of kin, *Burns* v. *Burns*, 190 N. Y. 211.

[3] *N. Y. Mut. L. Ins. Co.* v. *Armstrong*, 117 U. S. 591, 597, 6 S. Ct. 877, 29 L. Ed. 997.

[4] *Sulz* v. *M. R. F. L. Assoc.*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; *People* v. *Phelps*, 78 Ill. 147. And see *Leonard* v. *Harney*, 173 N. Y. 352, 66 N. E. 2 and *Golder* v. *Chandler*, 87 Me. 63, 32 Atl. 784 (legal representatives held the proceeds in trust for "heirs").

[5] *Murray* v. *Strang*, 28 Ill. App. 608; *Schultz* v. *Citizens' Mut. L. Ins. Co.*, 59 Minn. 308, 61 N. W. 331; *Rose* v. *Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609. And see *Griswold* v. *Sawyer*, 125 N. Y. 411, 35 N. Y. St. R. 396, 26 N. E. 464.

[6] *Bell* v. *Kinneer*, 101 Ky. 271, 40 S. W. 686, 19 Ky. L. Rep. 545; *Small* v. *Jose*, 86 Me. 120, 29 Atl. 976; *Jackman* v. *Nelson*, 147 Mass. 300.

[7] *Palmer* v. *Welch*, 132 Ill. 141, 23 N. E. 412. But an "affianced wife" might come within the class of "dependents," *McCarthy* v. *Supreme Lodge*,

§ 340. Insurance Payable to Children.—The term "children" will not generally be extended to include grandchildren,[1] but if needful to effectuate the apparent intent of the insured, "child" is held to mean an adopted child;[2] and "orphans" is held to mean "children," rather than those only who are bereft of both parents.[3] Children born after the contract are included, unless the children are specifically named;[4] and children subsequently born by a second wife participate equally in the fund.[5] In case of a policy to "my wife Mary and children," a child by a former wife is a beneficiary.[6] To "be paid to his wife M. K. and children," means to *his* children by this wife or others, not M. K.'s children.[7]

§ 341. Insurance Payable to Family, Dependents, Survivors, etc.—"Family" may include persons who are not relatives, if residing with the insured.[8] Here again the intent of the insured must if possible be ascertained.[9] Thus an adult son though not dependent upon or residing with the insured may be included;[10] also stepchildren who have married and left the household of the insured.[11]

153 Mass. 314, 26 N. E. 868, 11 L. R. A. 144, 25 Am. St. R. 637. So a woman, believing herself to be a lawful wife, was held protected within the same class, *Crosby* v. *Ball*, 4 Ont. Law R. 496. It has been held that the insurance company is protected in making payment in good faith to the alleged beneficiary named as wife and need not investigate the validity of the marriage, *Met. Life Ins. Co.* v. *Louisville Trust Co.* (Ky., 1905), 89 S. W. 268. As to mistresses named as beneficiaries, *Independent, etc., Sons of Jacob* v. *Henderson*, 76 Miss. 326, 71 Am. St. R. 532, 24 So. 702 (appointment sustained); *Keener* v. *Grand Lodge*, 38 Mo. App. 543 (appointment not sustained); *Brown* v. *Mansur*, 64 N. H. 39, 5 Atl. 768 (assignment of certificate to mistress for support of child sustained). Second wife held entitled to insurance on death of first wife, *Speegle* v. *Sovereign Camp* (S. C., 1907), 58 S. C. 435.

[1] *Russell* v. *Russell*, 64 Ala. 500; *Small* v. *Jose*, 86 Me. 120, 29 Atl. 976; *U. S. Trust Co.* v. *Mut. Ben. Life Ins. Co.*, 115 N. Y. 152, 24 N. Y. St. R. 1, 21 N. E. 1025; *Winsor* v. *Association*, 13 R. I. 149. But see *Continental Life Ins. Co.* v. *Palmer*, 42 Conn. 60, 19 Am. Rep. 530; *Re Conrad's Estate*, 89 Iowa, 396, 56 N. W. 535; *Duvall* v. *Goodson*, 79 Ky. 224.

[2] *Virgin* v. *Marwick*, 97 Me. 578, 55 Atl. 520; *Martin* v. *Ætna Life Ins. Co.*, 73 Me. 25, and see *Kemp* v. *New York Produce Exchange*, 34 App. Div. 175, 54 N. Y. Supp. 678. Illegitimate children described as "adopted children" allowed to recover, *Hanley* v. *Supreme Tent*, 38 Misc. 161, 77 N. Y. Supp. 246.

[3] *Fischer* v. *Malchow*, 93 Minn. 396, 101 N. W. 602.

[4] *Roquemore* v. *Dent; Dent* v. *Roquemore*, 135 Ala. 292, 33 So. 178, 93 Am. St. R. 33; *Scull* v. *Ætna L. Ins. Co.*, 132 N. C. 30, 43 S. E. 504, 60 L. R. A. 615, 95 Am. St. R. 615; *Thomas* v. *Leake*, 67 Tex. 469, 3 S. W. 703. But see *Conn. Mut. Life Ins. Co.* v. *Baldwin*, 15 R. I. 106, 23 Atl. 105.

[5] *Helmken* v. *Meyer*, 118 Ga. 657, 45 N. E. 450; *Ricker* v. *Ins. Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289.

[6] *McDermott* v. *Centennial Mut. Life Asso.*, 24 Mo. App. 73. If the phrase "our children" is used the rule is different, *Evans* v. *Opperman*, 76 Tex. 293, 13 S. W. 312.

[7] *Koehler* v. *Centennial Mut. Life Ins. Co.*, 66 Iowa, 325.

[8] *Carmichael* v. *Northwestern Mut. Ben. Assoc.*, 51 Mich. 494.

[9] *Folmer's Appeal*, 87 Pa. St. 133.

[10] *Klotz* v. *Klotz*, 15 Ky. L. Rep. 183, 22 S. W. 551.

[11] *Tepper* v. *Supreme Council*, 16 N. J. Eq. 638.

A wife and child were held to be the "immediate family" in place f the father of the insured who had ceased to be properly desig-ıated.[1]

Occasional presents to a beneficiary are not enough to make him "dependent." There must be dependency in a material degree for ssistance or support.[2] A person who is neither a relative of the ısured, nor a member of his household, nor connected with him by ıarriage is not to be regarded as a "survivor," as that term is used ı a certificate or in the rules of an association.[3]

In a Massachusetts case, the household consisted of Wilber, the sured, his wife and her two unmarried sisters. One of the sisters ıd the insured earned the needed funds for the common support hile the wife and the remaining sister cared for the house. Wilber ok out a benefit certificate after the death of his wife, to aid the sters in the event of his own death, making one of them beneficiary the terms of the policy. The court concluded that a jury might ıd from the evidence that the beneficiary was "dependent" upon e assistance of Wilber to support herself and sister in his lifetime the same degree of comfort in which they had theretofore lived, ıd that an obligation to furnish such assistance, although perhaps ot enforceable at law, might have rested upon moral and equitable ounds.[4]

§ 342. Beneficiaries May Sue.—Upon maturity of the policy, third rties appointed therein by the insured as beneficiaries may in most

[1] *Knights of Columbus* v. *Rowe*, 70 nn. 545, 40 Atl. 451. As construing nmediate family" see also *Norwegian c.* v. *Wilson*, 176 Ill. 94, 99, 52 N. E. (married daughter included though iding elsewhere); *Larkin* v. *Knights Columbus*, 188 Mass. 22, 73 N. E.) (widow preferred to designated her). What constitutes member-p in a "family," *Grand Lodge* v. *Kay* (Mich., 1907), 112 N. W. 730; *preme Lodge* v. *Dewey*, 142 Mich. 5, 106 N. W. 140. "A member of immediate family or in default of h family one of his blood rela-ns," construed in *Dalton* v. *Knights Columbus*, 80 Conn. 212, 67 Atl. 510. *Offill* v. *Supreme Lodge* (Tenn., 98), 46 S. W. 758; *Alexander* v. *rker*, 144 Ill. 355, 33 N. E. 183; *Carthy* v. *Supreme Lodge*, 153 Mass. 1, 26 N. E. 866; *Wilbur* v. *Supreme dge*, 192 Mass. 477

[3] *Grand Lodge* v. *Lemke*, 124 Wis. 483, 102 N. W. 911; *Koerts* v. *Grand Lodge*, 119 Wis. 520, 97 N. W. 163.

[4] *Wilber* v. *Supreme Lodge*, 192 Mass. 477, 78 N. E. 445. The same court in an earlier case said: "Trivial or casual, or perhaps wholly charitable assistance, would not create a relation of dependency within the meaning of the statute or by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral, or legal or equitable grounds, and not upon the purely voluntary or charitable impulses or disposition of the member." *McCarthy* v. *New Eng. Order of Protection*, 153 Mass. 314, 318, 26 N. E. 866.

jurisdictions bring action at law in their own name as the real parties in interest to recover the fund.[1]

§ 343. Anticipatory Breach.—By the weight of authority, if the insurer renounces the continuing contract of insurance, upon his part, and unequivocally refuses in advance of its maturity, to perform it, the insured may at his option take the insurer at his word. The insured is then relieved of the duty of further performance on his part, and may maintain an action at law for damages, before the specified date of expiration.[2] For example, where during the life of the policy the association repeatedly repudiated liability for $5,000, the face of the policy, and declared that it would pay only $2,000 on maturity of the policy, the New Jersey Supreme Court sustained a present action at law for damages.[3]

In the leading case cited from the reports of the United States Supreme Court,[4] the contract under consideration, it should be

[1] *McLaughlin* v. *McLaughlin*, 104 Cal. 171, 37 Pac. 865; *Martin* v. *Ætna Ins. Co.*, 73 Me. 25; *Fisher* v. *Donovan*, 57 Neb. 361, 365, 77 N. W. 778 ("the money became absolutely the property of the beneficiaries"); *Carraher* v. *Ins. Co.*, 11 N. Y. St. R. 665; *Gould* v. *Association*, 26 R. I. 142, 58 Atl. 624. See *Lawrence* v. *Fox*, 20 N. Y. 268. The estate of the insured has nothing to do with it, *Taylor* v. *Hair*, 112 Fed. 913; *Rollins* v. *McHatton*, 16 Colo. 203, 27 Pac. 254; *Pinneo* v. *Goodspeed*, 120 Ill. 524, 12 N. E. 196; *McFarland* v. *Creath*, 35 Mo. App. 112; *Hellenberg* v. *Dist. No.* 1, 94 N. Y. 580; *Manley* v. *Manley*, 107 Tenn. 191, 64 S. W. 8; *West* v. *Grand Lodge*, 14 Tex. Civ. App. 471, 479, 37 S. W. 966. In Massachusetts the rule was otherwise, and no one but a party to a contract could sue upon it; but by statute the beneficiary may now sue in that jurisdiction also, *Dean* v. *American Legion*, 156 Mass. 435, 31 N. E. 1.

[2] *Roehm* v. *Horst*, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953 (approving *Hochster* v. *De la Tour*, 2 El. & Bl. 678); *Blamly* v. *Fidelity Mut. L. Ins. Co.*, 143 Fed. 619; *Supreme Council* v. *Daix*, 130 Fed. 101, 64 C. C. A. 435; *Supreme Council* v. *Black*, 123 Fed. 650, 59 C. C. A. 414; *O'Neill* v. *Supreme Council*, 70 N. J. L. 410, 57 Atl. 463; *Mutual Res. Fund L. Assn.* v. *Taylor*, 99 Va. 208, 37 S. E. 854 (value of policy is the measure of damages); *Lee* v. *Mut. Life Assn.*, 97 Va. 160, 33 S. E. 556; *Johnstone* v. *Milling*, L. R. 16 Q. B. D. 460 ("when one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation," Lord Esher at p. 467). See 14 Harv. Law Rev. 432 *et seq.* Likewise an insurance agent wrongfully dismissed may sue at once for damages, *Ætna Life Ins. Co.* v. *Nexsen*, 84 Ind. 347.

[3] *O'Neill* v. *Supreme Council*, 70 N. J. L. 410, 57 Atl. 463.

[4] *Rœhm* v. *Horst*, 178 U. S. 1, *supra*. At page 14 the court cites with approval an insurance case, where the insurer abandoned the contract by his act and a present action for damages was held appropriate.

bserved, was for the sale of hops; but the opinion and views of ie court seem to extend to contracts of insurance as well. In the hree insurance cases cited from the lower federal courts the action the assured in each case was brought to recover the amount of sessments paid upon a policy and interest;[1] but these cases also em to approve the doctrine of the text, and to take the amount premiums paid and interest as an appropriate measure of damges for the breach, if the assured so elect, upon renunciation of e contract by the insurer.[2]

Especially is the rule clear, where the insurer not only repudiates e contract by his declaration that he will not pay in future, but also olates a present obligation under the contract, by refusing to accept premium when due.[3] It would indeed be a harsh doctrine that comlled the insured to struggle on paying premiums all his life or tenring premiums to an unfriendly insurance company, in constant prehension of a lawsuit in place of an immediate cash payment, his family's inheritance upon his own decease.[4] The insurer's fusal to perform his promise, however, must be distinct, unequivol and absolute, and the reliance by the insured upon such renunation must be equally clear to warrant his action for damages fore maturity of the contract.[5] And if with knowledge of the ts the insured elects to continue with the contract, he cannot bsequently exercise a second and inconsistent election to treat it abrogated.[6]

On the other hand, the courts of New York and Massachusetts hold at an attempted reduction of the face of a policy by an unwarnted by-law, or a refusal to accept a premium, will give no present ht of action for damages against the insurer.[7] The New York

Blakely v. *Fidelity Mut. L. Ins. Co.*, Fed. 619; *Supreme Council* v. *ix*, 130 Fed. 101; *Supreme Council* v. *ck*, 123 Fed. 650 (citing many cases). *Supreme Council* v. *Black*, 123 Fed. , 59 C. C. A. 414 (citing *Rœhm* v. *rst*, 178 U S. 1, and other cases); *vcett* v. *Iron Hall*, 64 Conn. 170, 192, Atl. 614, 24 L. R. A. 815; *Union t. Life Ins. Co.* v. *Pottkor*, 33 Ohio 459, 31 Am. Rep. 555; *American Ins. Co.* v. *McAden*, 109 Pa. St. , 1 Atl. 256.

Fischer v. *Hope Ins. Co.*, 69 N. Y. ; Wald's Pollock, Contracts (3d ed.),

See dissenting opinion of Judge tlett in *Kelly* v. *Security Mut. L. Co.*, 186 N. Y. 16, 78 N. E. 584

[5] *Wells* v. *Hartford M. Co.*, 76 Conn. 27, 55 Atl. 599.

[6] *Supreme Council* v. *Lippincott*, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803; *Blakely* v. *Fidelity Mut. L. Ins. Co.*, 143 Fed. 619.

[7] *Porter* v. *Supreme Council*, 183 Mass. 326, 67 N. E. 238 (court does not decide whether a present suit in equity would lie); *Kelly* v. *Security Mut. L. Ins. Co.*, 186 N. Y. 16 (strong dissenting opinion by E. T. Bartlett, J.); *Langan* v. *Supreme Council*, 174 N. Y. 266, 66 N. E. 932. The New York and Massachusetts rule is disapproved in Wald's Pollock, Contracts (3d ed.), 363. Notwithstanding the declaration by the company that it will pay only the amount as reduced

court has decided that the proper remedy for the insured in such a case is a suit in equity to compel the insurer to live up to its contract [1] and to recognize its obligation thereunder. The court in adopting this exceptional view was apparently influenced by the apprehension that present actions for damages for rescission or renunciation in such cases, if sustained, might throw mutual benefit life insurance companies into bankruptcy.[2] In opposition it may be forcibly urged that under the Massachusetts and New York rule, and especially by a succession of illegal acts, a company can easily induce many of the insured to abandon their insurance, rather than to engage in a hostile and unpromising campaign against the company. This unfortunate result has in fact followed to a startling extent.

§ 344. Anticipatory Breach—Remedies Available.—By the prevailing rule, where the insurer renounces the contract prior to date of performance, the policyholder may take the insurer at his word and presently sue for damages, or he may bring an equitable action to preserve the contract, or he may tender the premium and upon maturity of the contract bring action on the policy.[3]

A federal judge says: "On the one hand it is held that where the insurance company wrongfully revokes its policy, and refuses further to be bound by it, the holder may elect whether to enforce the contract or to treat it as rescinded. If he elects to pursue the latter course, his measure of relief is the amount of premiums paid, with interest, and this though he has had the benefit of insurance under the policy from its inception to the time of revocation, and even though such revocation would not operate in law to avoid the policy. . . . On the other hand, it is held by many authorities that, if the assured is in such a state of health that he can secure other insurance of like nature and kind, his measure of damages is the

by the by-law, nevertheless, on maturity of the contract it must pay the full amount, *Porter* v. *Supreme Council*, 183 Mass. 326; *Gaut* v. *American Legion*, 107 Tenn. 603, 64 S. W. 1070. Upon abandonment or renunciation of the contract before maturity, a measure of damages is the amount of premiums or assessments paid, and interest. See cases cited in last section.

[1] *Langan* v. *Supreme Council*, 174 N. Y. 266, 66 N. E. 932.

[2] *Kelly* v. *Security Mut. Life Ins. Co.*, 186 N. Y. 16, 20, 78 N. E. 584.

[3] *Day* v. *Conn. G. Life Ins. Co.*, 45 Conn. 480. But the South Carolina court holds that the amount of the note for the first premium is the measure of damages where the insurer refuses to deliver a policy as agreed, *Prince* v. *State Mut. Ins. Co.* (S. C., 1907), 57 S. E. 766. If the contract is vitiated from its inception by the insurer's fraud, the policyholder can recover back all premiums paid and interest, *Moore* v. *Mut. Res. Life Fund Assn.*, N. Y. App. Div. (Sept., 1907).

difference between the cost of carrying the insurance which he has, for the term stipulated for, and the cost of new insurance at the rate he would then be required to pay for a like term. If, however, he is unable to obtain other insurance, then his measure of damages will be the present value of his policy as of the date of death, less the estimated cost of carrying the same, from the date of cancellation, at his then age." [1]

§ 345. **Application Incorporated.**—*In consideration of the statements and agreements in the application which are hereby made a part of this contract, and warranted to be true, etc.*

This form of words incorporates the statements of fact and stipulations of the application into the contract and makes them express warranties. If the application is made a part of the policy, it is immaterial in which instrument the words "warranted to be true" may be inserted.[2] But in mere matters of opinion good faith only is required.[3] If the warranties of the application are not expressly

[1] *Krebs* v. *Security Trust & Life Ins. Co.*, 156 Fed. 294 (citing many cases; the court also considers the measure of damages in case of insurance with an investment feature added, or when the assured is entitled to accumulations and profits, and concludes that the company in fault must surrender the entire profits and be content to retain only compensation for the risk run, citing *Abell* v. *Penn. Mut. Life Ins. Co.*, 18 W. Va. 400). Where the contract is rescinded for the insurer's fraud, the insurer cannot offset against the amount of premiums paid by the insured the cost to the insurer of carrying the insurance to time of rescission, *Moore* v. *Mut. Res. Fund Life Assn.*, 121 App. Div. (N. Y.) 335.

[2] *Fell* v. *John Hancock Mut. Life Ins. Co.*, 76 Conn. 494, 57 Atl. 175; *Standard Life & Acc. Ins. Co.* v. *Martin*, 133 Ind. 376, 33 N. E. 105; *Clemans* v. *Supreme Assembly*, 131 N. Y. 485, 488, 30 N. E. 496, 16 L. R. A. 33; *Cushman* v. *U. S. Life Ins. Co.*, 63 N. Y. 404; *Schane* v. *Metropolitan Ins. Co.*, 76 App. Div. (N. Y.) 271 (breach of warranty avoids as matter of law; materiality of thing warranted is unimportant); *Hackett* v. *Supreme Council*, 44 App. Div. 524, 60 N. Y. Supp. 806, aff'd 168 N. Y. 588, 60 N. E. 1112 (assured presumed to read application); *Northwestern L. Assur. Soc.*, 23 Ind. App. 121, 53 N. E. 787. As to what reference will incorporate an extrinsic paper and make its statements warranties, see §§ 85, 106. As to rule of construction favorable to assured see *Provident Life Assur. Soc.* v. *Reutlinger*, 58 Ark. 528, 533, 25 S. W. 835; *Brignac* v. *Pacific Mut. L. Ins. Co.*, 112 La. 574, 36 So. 595 ("do you use liquors?"); *Supreme Council* v. *Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. R. 244; *Kattenbach* v. *Omaha L. Assoc.*, 49 Neb. 842, 69 N. W. 135, 70 N. W. 392. As to where third party examined simulated the insured, see *Given* v. *Prudential Ins. Co.*, 44 App. Div. (N. Y.) 549, 60 N. Y. Supp. 959. The application and policy together usually form the contract, *Paquette* v. *Prudential Ins. Co.*, 193 Mass. 215. A statement of fact on the face of the policy does not in life, as in marine, insurance become a warranty unless the contract by stipulation expressly makes it so, *Ellinger* v. *Mut. Life Ins. Co.* (1905), 1 K. B. 31, 35; *Thompson* v. *Weems*, 9 App. Cas. 671, 684.

[3] § 111, *supra; Ames* v. *Manhattan L. Ins. Co.*, 40 App. Div. 465, 58 N. Y. Supp. 244, aff'd 167 N. Y. 584, 60 N. E. 1106 (statement as to obscure disease construed as opinion); especially as applied to answers in medical examination which must often

made a part of the contract, they are held to be extrinsic representations only.[1] So also there is no absolute warranty if the application provides that the statements are true to the best of the applicant's knowledge and belief;[2] but if by the undisputed testimony a warranty has been broken, it matters not that the breach in no wise contributed to the loss, or that the insured acted in good faith. In the absence of statutory relief the insurance is defeated. There is no issue left for the jury.[3]

The study of numerous modern instances will bring us to a clearer comprehension of the doctrine of warranty as applied in the law of life insurance. Thus in a Wisconsin case the decedent, Lœhr, husband of the plaintiff, had warranted the truth and fullness of his answers as written by the representatives of the company, including the statement that the applicant had "never been sick." In fact he had had three attacks of inflammatory rheumatism of a serious character on different occasions within a period of three years. No mention of any of these attacks appeared in the written application, but it was shown on the trial that he had orally stated to the medical examiner and to the agent that he had had grippe and rheumatism a year before the application for the policy. He did not, however, specify inflammatory rheumatism or say anything about three attacks. On appeal the Supreme Court, reversing the court below, held that the policy was avoided for breach of warranty, and that the doctrine of waiver, upon a partial disclosure of the facts orally to the agent, would not apply in aid of the plaintiff.[4]

Another good illustration of the application of an affirmative

be largely matter of opinion, *Jennings* v. *Supreme Council*, 81 App. Div. 76, 81 N. Y. Supp. 90; *Louis* v. *Conn. Mut. L. Ins. Co.*, 58 App. Div. 137, 68 N. Y. Supp. 686, aff'd 172 N. Y. 659, 65 N. E. 1119; *Henn* v. *Met. Life Ins. Co.*, 67 N. J. L. 310, 51 Atl. 689 (disease); *Finn* v. *Met. Life Ins. Co.*, 70 N. J. L. 255, 57 Atl. 438 (pneumonia; but statement as to other application for insurance is matter of fact). So also as to "consumption" and "medical attendance," *Schofield* v. *Met. L. Ins. Co.*, 79 Vt. 161, 64 Atl. 1107.

[1] *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; *Bankers' Life Ins. Co.* v. *Miller*, 100 Md. 1, 59 Atl. 116; *Fitzgerald* v. *Supreme Council*, 39 App. Div. 251, 56 N. Y. Supp. 1005, aff'd 167 N. Y. 568, 60 N. E. 1110; *McVey* v. *Grand Lodge*, 53 N. J. L. 17, 20 Atl. 873; *Am. Popular Life Ins. Co.* v. *Day*, 39 N. J. L. 89, 23 Am. Rep. 198.

[2] See §§ 110, 111, *supra*.

[3] See § 107, *supra*. *Jennings* v. *Supreme Council*, 81 App. Div. (N. Y.) 76, 81 N. Y. Supp. 90; *Lutz* v. *Metropolitan Life Ins. Co.*, 186 Pa. St. 527, 40 Atl. 1104. In most jurisdictions the burden is on the defendant to show falsity of statement, for example, *Spencer* v. *Citizens' Mut. L. Ins. Assn.*, 142 N. Y. 505, 37 N. E. 617; *Supreme Council* v. *Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. R. 244. But see *Sweeney* v. *Met. L. Ins. Co.*, 19 R. I. 171, 36 Atl. 9, 38 L. R. A. 297, 61 Am. St. R. 751.

[4] *Lœhr* v. *Supreme Assembly* (Wis., 1907), 112 N. W. 441. Compare § 173, *supra*.

arranty is furnished in a Michigan report of the same year. Mudge, ne decedent, had warranted that he had "never had the disease insanity." By the undisputed testimony it appeared that he ad previously been insane and had been so adjudged, and that he ad been confined and treated as insane and that, although aware these facts, he had made no allusion to them in his interview with ne examiner. There was evidence, however, tending to show that ne examiner and also the agent had knowledge of the previous in- nity of the applicant. The court decided that the policy was oided, and that the claimant, the widow, could not avail herself the principle of estoppel, inasmuch as the insured must have nown that his answers were not correct.[1]

In a Pennsylvania case, the insured in his application declared, I guarantee that the applicant does not and will not practice any d or vicious habit that tends to the shortening of life." The judge ld that this was a warranty as to the future, and charged the ry that if afterwards the insured practiced the pernicious habit intemperance the policy became void. A verdict was rendered r the defendant and the judgment entered thereon was affirmed n appeal.[2]

But in another Pennsylvania case, while recognizing that a war- nty must be fulfilled, the court, in the course of its interpretation the meaning of the instrument, found a way of escape for the aintiff, by locating the untrue declaration outside the reach of e warranty. In his application the decedent had *declared* "that does not now, nor will he, practice any pernicious habit which viously tends to the shortening of life." The policy provided, f any of the declarations made in the application, upon the faith which this policy is issued, shall be found in any respect untrue, is policy shall be null and void." At the time of the application e applicant was of correct habits; but some years afterwards he came addicted to the immoderate use of intoxicating drinks, sulting in delirium tremens and death. The court deduced from e word "declared" no covenant, promise, or warranty for the ture, but a mere statement of future intention. The declaration to present habits being true, the court concluded that there was breach of warranty, and reversed in favor of the plaintiff.[3]

[1] *Mudge* v. *Supreme Court, etc.* ich., 1907), 112 N. W. 1130 ("good th is essential to an estoppel"). mpare § 173.

[2] *Knight* v. *Mut. Life Ins. Co.*, 9 Weekly Notes Cas. (Pa.) 501.

[3] *Knecht* v. *Mut. Life Ins. Co.*, 90 Pa. St. 118, 35 Am. Rep. 641 (Trunkey, J., dissenting). Compare § 110.

Analogous to the last is a case in Illinois. In response to the interrogatory, "Have you other insurance? If so, name amount and companies," the written statement appeared in the application, "Atlas, $5,000; Star, $10,000; will drop Star July 15, '96." The answers to the interrogatories were by the policy incorporated and warranted to be full and complete. In fact the answer to the interrogatory regarding other insurance was correct so far as it was responsive to the question, but the volunteered statement, regarding the future, "will drop Star," etc., was not true. The court held that the answers were warranties only so far as they were strictly responsive to the questions, and that the additional statement was mere surplusage, an error in which would not avoid the policy.[1]

The rule is well settled that if upon the face of the application it appears that a question is unanswered, or the answer is incomplete, the company, by accepting the application as it is, waives the obvious defect. Mrs. Beck, the beneficiary named in her husband's policy, brought action in a case of this character. Mr. Beck had agreed as follows: "The truthfulness of each statement above made, by whomsoever written, is material to the risk, and is the sole basis of the contract; I hereby warrant each and every statement herein made to be full, complete, and true." The defendant, the life insurance company, contended for a breach of warranty in that the questions were not fully answered. One of the answers was as follows: "I have never had, or been afflicted with, any sickness, disease, ailment, injury, or complaint, except rheumatism, three years ago." Close to the answer was the printed direction, "Duration, whether trivial or otherwise. If rheumatism, state whether muscular, sciatic, or inflammatory." This requirement was not complied with, but there was no fatal breach. If the company wanted a more particular answer it should have insisted upon it.[2]

Likewise the rule is well settled that if the phraseology of the contract in its entirety permits, the court will construe the erroneous statement as representation or matter of opinion rather than strict warranty. Connor answered in the negative each of these questions: "Is the party subject or predisposed to dyspepsia, dysentery, diarrhœa, or any other disease or bodily infirmity?" "Has the party had, or been affected, since childhood, with . . . fits or convulsions?" By the policy he agreed that if the declaration, or any

[1] *Commercial Mut. Acc. Co.* v. *Bates*, 176 Ill. 194, 52 N. E. 49.

[2] *Fidelity Mut. Life Ins. Co.* v. *Beck* (Ark., 1907), 104 S. W. 533. Compare § 113, *supra*.

part thereof, should be found to be in any respect untrue, the policy should be null and void. There was testimony tending to show that from his eighteenth to his twentieth year Connor had had a disorder described as "fits," "convulsions," or "spasms." But the policy purported to be issued "in consideration of the *representations*" made in the application; and in the application the beneficiaries declared that no "material circumstance" had been withheld. Taking the contract in its entirety the court was of opinion that the answer was a representation, and that if the jury found that the answer was substantially true and made in good faith, the plaintiff was entitled to recover.[1]

Many other illustrations of the doctrine of warranty are cited in the following sections of this and the next chapters.

It sometimes happens that the application, though expressly made part of the contract, does not correspond in its terms with the policy. The question then arises, when the action is brought on the contract and not for its reformation, to which part of the contract shall the court give preference. Under such circumstances it is usually held that the policy expresses the later and final intention of the parties.

For example, in a Pennsylvania case, the policy itself was made payable to the insured, his executors, administrators, and assigns; while in the application a different beneficiary was named. The insured had the policy in his possession for twelve years and the premiums thereon were all duly paid. The court adjudged that the

[1] *Alabama Gold Life Ins. Co.* v. *Johnston*, 80 Ala. 467, 2 So. 125, 59 Am. Rep. 816 (symptoms of disease not intended to be material, unless affecting soundness of health, or tending to shorten life). In the last case the court says: "In construing contracts of insurance there are some settled rules of construction, bearing on this subject, which we may briefly formulate as follows: (1) The courts being strongly inclined against forfeitures, will construe all the conditions of the contract, and the obligations imposed, liberally in favor of the assured, and strictly against the insurer. (2) It requires the clearest and most unequivocal language to create a warranty, and every statement or engagement of the assured will be construed to be a representation and not a warranty, if it be at all doubtful in meaning, or the contract contains contradictory provisions relating to the subject, or be otherwise reasonably susceptible of such construction. The court, in other words, will lean against that construction of the contract which will impose upon the assured the burdens of a warranty, and will neither create nor extend a warranty by construction. (3) Even though a warranty, in name or form, be created by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that the answers of the assured, so often merely categorical, will be construed not to be a warranty of immaterial facts, stated in such answers, but rather a warranty of the assured's honest belief in their truth—or, in other words, that they were stated in good faith. The strong inclination of the courts is thus to make these statements, or answers,

proceeds of the policy belonged to the executor of the insured and not to the person specified as beneficiary in the application.[1]

§ 346. **Statutory Provisions.**—As already shown, numerous classes of statutes affect and control the purport and legal meaning of the life insurance policy. Two classes of these statutory provisions, of varied phraseology in different states, may appropriately be recalled in this connection. The one class require in substance that the insured must be furnished with the entire contract, so that at all times he may have the opportunity of knowing just what his obligations are.[2] Within the reach of such statutes, therefore, if the application is part of the contract, it is usually provided that a copy of it must be given to the insured, or incorporated into the policy itself. A failure to comply with the statute requirement precludes a defense based on anything contained in the application.[3] Nevertheless, while such an unattached application is inadmissible in evidence, it may be used by a witness to refresh his memory.[4]

The other class of statutes usually provide in substance that a breach of warranty, unless in a matter material to the risk, or involving bad faith on the part of the insured, shall not avoid the policy.[5]

binding only so far as they are material to the risk, where this can be done without doing violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary." Compare §§ 110, 111.

[1] *Burt* v. *Burt* (Pa., 1907), 67 Atl. 210; *Hutson* v. *Jenson*, 110 Wis. 26; *Hunter* v. *Scott*, 108 N. C. 213. The application, in the first instance, is an offer, *McCully's Admr.* v. *Phœnix, etc., Co.*, 18 W. Va. 782. If the terms of the policy do not tally with the application, the policy amounts to a mere counter-offer, *Stevens* v. *Capital Ins. Co.*, 87 Ia. 283, which requires acceptance in order to become a contract, *Gore* v. *Bankers', etc., Assn.*, 88 Cal. 609. But from long-continued possession of the policy and payment of premiums thereon, such acceptance may be implied, *Bostwick* v. *Mutual Life Ins. Co.*, 116 Wis. 392.

[2] *Holden* v. *Prudential Ins. Co.*, 191 Mass. 153, 157, 77 N. E. 309.

[3] *Rauen* v. *Prudential Ins. Co.*, 129 Ia. 725 (the case is to be considered as if no such paper existed); *Moore* v. *Provident Sav. L. Assur. Soc.*, 97 Ia. 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. R. 411; *Met. L. Ins. Co.* v. *Moore*, 25 Ky. L. R. 1613, 79 S. W. 219; *Manhattan L. Ins. Co.* v. *Albro*, 127 Fed. 281, 62 C. C. A. 213 (paper attached not a true copy because an answer was omitted); *Langdean* v. *John Hancock M. L. Ins. Co.* (Mass., 1907), 80 N. E. 452 (a copy substantially correct satisfies the statute). Though part of application is in evidence of which copy was furnished, the defendant cannot put the other part in evidence of which no copy was attached to the policy, *Paquette* v. *Prudential Ins. Co.*, 193 Mass. 215.

[4] *Holden* v. *Prudential Life Ins. Co.*, 191 Mass. 153, 77 N. E. 309.

[5] N. Y. Ins. L., § 58, combines both provisions in one clause: "Every policy of insurance issued or delivered within the state on or after the first day of Jan., 1907, by any life insurance corporation doing business within the state shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application, or other writings unless the same are endorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the ab-

Under these liberal statutes, however, the interests of the parties are not of necessity turned over to the discretion of a jury, though it may be difficult in practice to draw the line with precision between issues which properly belong to the court and those which should go to the jury.

Thus under such a statute the Texas court decided that answers in the application concerning medical attendance and treatment, though false, would not necessarily avoid the policy, if relating to a trivial and not a serious disease.[1] And likewise, under a similar statute, the Kentucky court held that whether the representations of the applicant regarding his other insurance and his use of intoxicants were substantially, though not literally, true, presented a question for the jury.[2]

In a Massachusetts case, Barker, the insured, warranted in his application that he had no kidney disease. He died of that trouble about three months later. By the statute of that state warranties, if contained in the application, are in effect converted into mere representations, which, to avoid the policy, must be shown to be material to the risk or to have been made in bad faith. On the trial, evidence was produced tending to show that at the date of the application Barker was in sound health, or, if not, that at least he had not intentionally misrepresented, and, furthermore, that any misstatements were not of matters necessarily increasing the risk of loss. The plaintiff's verdict was left undisturbed.[3]

Where an applicant has suffered from a disease so grave in its nature that generally it is recognized as having a tendency to shorten life, and fails to disclose the fact in answer to a question which calls for such information, it may be ruled as matter of law that as the risk is thus increased the policy is void.[4] So also a material misstatement as to age may have the same effect as matter of law.[5] And if, with intent to deceive the insurer, the applicant falsely states that he had

sence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void." And see § 118, *supra*.

[1] *Modern Order* v. *Hallmig* (Tex. Civ. App., 1907), 103 S. W. 474. Otherwise if incorrect answer refers to a serious disease, *Life Ass.* v. *Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. R. 813.

[2] *Met. Life Ins. Co.* v. *Ford* (Ky., 1907), 102 S. W. 876. But certain of such statutes refer only to answers and statements contained in the application, not to a condition in the policy itself, *Barker* v. *Met. Life Ins. Co.*, 188 Mass. 542, 74 N. E. 945 (sound health); *Met. Life Ins. Co.* v. *Howle*, 62 Ohio St. 204.

[3] *Barker* v. *Met. Life Ins. Co.* (Mass., 1908), 84 N. E. 490, citing many cases.

[4] *Kidder* v. *Supreme Commandery*, 192 Mass. 326, 78 N. E. 469; *Brown* v. *Greenfield Life Assn.*, 172 Mass. 498; *Rainger* v. *Boston Mut. L. Assn.*, 167 Mass. 109, 44 N. E. 1088.

[5] *Kidder* v. *Supreme Commandery*, 192 Mass. 326, 78 N. E. 469; *Dolan* v. *Mut. Res. Fund L. Assn.*, 173 Mass 197, 200, 53 N. E. 398.

never used intoxicating liquors to excess, or had never been rejected by any other company, the court will dismiss his action on the policy,[1] notwithstanding the statutory provision.

But, on the other hand, where the insurer in reply to a question calling for the fact has not been informed of a disease which, although serious, may not have a tendency to shorten life, it is for the jury to say whether the risk has been increased,[2] or whether the insured was guilty of bad faith in giving his answer.

And if the statute further provides that no misrepresentation shall be deemed material unless the matter misrepresented shall actually contribute to the event insured against, and whether it so contributed shall be a question for the jury, then the question of avoidance of the policy for false or fraudulent misrepresentations of material facts, is taken from the court and relegated to the jury.[3]

§ 347. Statements as to Health or Freedom from Disease.—Health is a relative term, for probably no one is altogether free from ailments. No general definition of sound health can be given which would accurately apply to all cases, therefore the question of disease or unsound health must often go to the jury.[4] To violate a warranty of good health it must appear that the sickness was one having a tendency to shorten life or permanently impair the health or that it amounted to a vice in the constitution.[5] The Ohio court concludes

[1] *Langdean* v. *John Hancock Mut. L. Ins. Co.* (Mass., 1907), 80 N. E. 452.

[2] *Kidder* v. *Supreme Commandery*, 192 Mass. 326, 78 N. E. 469 (slight ailments confining to bed); *Hogan* v. *Met. L. Ins. Co.*, 164 Mass. 448; *Levie* v. *Met. L. Ins. Co.*, 163 Mass. 117. And see *Penn Mut. L. Ins. Co.* v. *Mech. Sav. Bk.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, aff'd 73 Fed. 653, 19 C. C. A. 316.

[3] *Keller* v. *Home Life Ins. Co.*, 198 Mo. 440 (certificate of medical examiner recommended the risk; two attending physicians testified that they had told the insured prior to his application that he had consumption); *Williams* v. *Ins. Co.*, 189 Mo. 70; *Jenkins* v. *Ins. Co.*, 171 Mo. 375; *Schuermann* v. *Ins. Co.*, 165 Mo. 641; *Aloe* v. *Life Assn.*, 164 Mo. 675; *Jacobs* v. *Life Assn.*, 146 Mo. 523.

[4] *Packard* v. *Met. Ins. Co.*, 72 N. H. 1; 54 Atl. 287; *Dorey* v. *Ins. Co.*, 172 Mass. 234, 51 N. E. 974; *Barnes* v. *Fidelity Mut. L. Assoc.*, 191 Pa. St. 618, 43 Atl. 341, 45 L. R. A. 264; *Billings* v. *Ins. Co.*, 70 Vt. 477, 41 Atl. 516.

[5] *Conn. Mut. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708; *Bancroft* v. *Home Ben. Asso.*, 120 N. Y. 14, 30 N. Y. St. R. 175, 23 N. E. 997; *Grattan* v. *Metropolitan Life Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372, 80 N. Y. 292, 36 Am. Rep. 617 (germs of a lurking hidden disease do not avoid); *Schmitt* v. *Mich. Mut. L. Ins. Co.*, 101 App. Div. (N. Y.) 12 (temporary ailment not "a disease"); *Maine Ben. Assn.* v. *Parks*, 81 Me. 79, 16 Atl. 339, 10 Am. St. R. 240; *Packard* v. *Metropolitan Ins. Co.*, 72 N. H. 1, 54 Atl. 287 ("sound health" is opposed to serious disease or vice in the constitution); *French* v. *Mut. Res. Fund Assn.*, 111 N. C. 391, 16 S. E. 427, 32 Am. St. R. 803 (slight illness no breach); But see *Mut. Life Ins. Co.* v. *Simpson*, 88 Tex. 333, 31 S. W. 501, 28 L. R. A. 765, 53 Am. St. R. 757. Open sores from wound are not a disease, *Home Mut. Life Assn.* v. *Gillespie*, 110 Pa. St. 84, 1 Atl. 340. As to sore on the

that in life insurance "sound health" means that state of health which is free from any disease or ailment that seriously affects the general healthfulness of the system; not a mere indisposition.[1] A federal judge reviews many authorities on this subject, and has this to say: "What is to be understood by 'serious illness'? If any sickness which may terminate in death, then it must embrace almost every distemper in the entire catalogue of diseases. To give such an interpretation to this expression, would, we have no doubt, defeat a recovery in a large majority of the certificates issued by the society. The true construction of the language must be that the applicant has never been so seriously ill as to permanently impair his constitution, and render the risk unusually hazardous."[2]

In answer to the question, "Have you ever had any difficulty with your head or brain?" the applicant said "No;" and the court decided that the question called for a functional or organic derangement, and that periodic headaches though severe did not constitute a ground for forfeiture.[3]

The fact that the applicant was afflicted with dyspepsia six months or more before the application was signed did not make untrue his statement that he was not subject to dyspepsia at the time of the policy.[4]

tongue developing into cancer, compare *Story* v. *United L. & Acc. Ins. Assn.*, 51 Hun, 644, 4 N. Y. Supp. 373, aff'd 125 N. Y. 761, 27 N. E. 408, with *Peck* v. *Wash. Life Ins. Co.*, 91 App. Div. 597, 87 N. Y. Supp. 210. As to whether an idiot or insane person is in sound health, compare *Robinson* v. *Met. Life Ins. Co.*, 1 App. Div. 269, 37 N. Y. Supp. 146, aff'd 157 N. Y. 711, 53 N. E. 1131, with *McNeil* v. *Assn.*, 40 App. Div. 581, 58 N. Y. Supp. 119. There is said to be no presumption that insanity existing in the past continues till the date of application, *Mut. Life Ins. Co.* v. *Wiswell*, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; *Blackstone* v. *Stand. L. & Acc. Ins. Co.*, 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486. As to whether a statement regarding health or disease is to be construed as matter of fact or of opinion see *Providence Sav. Life Assur. Soc.* v. *Pruett*, 141 Ala. 688, 37 So. 700 (disease of liver); *Rupert* v. *Supreme Court*, 94 Minn. 293, 102 N. W. 715 (when only *bona fide* belief and judgment will be required); *Finn* v. *Met. Life Ins. Co.*, 70 N. J. L. 255, 57 Atl. 438. And in determining whether the statement is of fact or opinion it is reasonable to consider whether it relates to matters concerning which the insured could have no certain knowledge and whether good faith in the answer does not satisfy the requirement of the contract, *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447; *Ferguson* v. *Mass. Ben. L. Ins. Co.*, 32 Hun, 306, aff'd 102 N. Y. 647; *Keatley* v. *Travelers' Ins. Co.*, 187 Pa. St. 197, 40 Atl. 808; *March* v. *Met. Life Ins. Co.*, 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. R. 887; *Schwarzbach* v. *Ohio Val. Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227.

[1] *Met. Life Ins. Co.* v. *Howle*, 62 Ohio St. 204 (breach of the warranty avoids policy).

[2] *Keiper* v. *Equitable Life Assur. Soc.*, 159 Fed. 206.

[3] *Higbie* v. *Guardian Mut. Life Ins. Co.*, 53 N. Y. 603.

[4] *World Mut. Life Ins. Co.* v. *Schultz*, 73 Ill. 586 (dyspepsia temporarily connected with an abscess); *Levie* v. *Met. Life Ins. Co.*, 163 Mass. 117, 39 N. E. 792 (as to hernia, question was construed as referring to time of application); *Murphy* v. *Mut. Ben. L. & F.*

A congestion or disorder of the liver is not necessarily a disease of the liver within the meaning of the policy; and in these and similar cases, if the testimony leaves it in doubt whether the disorder is a slight attack or a permanent or serious disease, the question is for the jury.[1] Accordingly, in general, the jury must determine whether a slight attack of pneumonia or sunstroke is a disease;[2] but an attack may be so slight that the court will refuse to send the issue to the jury.[3]

If, however, after applying to the language of the contract a liberal rule of construction in favor of the assured the court perceives that a warranty of "sound health" has been broken, the

Ins. Co., 6 La. Ann. 518 (inflammation of bowels whether chronic disease). Statements refer to time of closing the contract, therefore material changes pending negotiations should be disclosed, *Thompson* v. *Travelers' Ins. Co.*, 13 No. Dak. 444, 101 N. W. 900. See also § 100. Compare the case of statements made for reinstatement of lapsed policy, *Mut. Ben. Life Ins. Co.* v. *Higginbotham*, 95 U. S. 380, 24 L. Ed. 499; *Mulligan* v. *Prudential Ins. Co.*, 76 Conn. 676, 58 Atl. 230; *American Order* v. *Stanley* (Neb.), 97 N. W. 467 (non-disclosure of pregnancy); *Peacock* v. *N. Y. Life Ins. Co.*, 20 N. Y. 293. Good health is consistent with a touch of dyspepsia, *Morrison* v. *Wis. Odd Fellows Mut. Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13. With a slight billious attack, *Mutual Reserve Fund L. Assoc.* v. *Ogletree*, 77 Miss. 7, 14, 25 So. 869. With a mere cold, *Met. Life Ins. Co.* v. *McTague*, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661; *Sieverts* v. *National Ben. Assoc.*, 95 Iowa, 710, 64 N. W. 671; *Northwestern Mut. Life Ins. Co.* v. *Woods*, 54 Kan. 663, 39 Pac. 189. But a warranty of "good health" is not consistent with severe dyspepsia continued for many years, *Jeffrey* v. *United Order*, 97 Me. 176, 53 Atl. 1102; *N. Y. Life Ins. Co.* v. *Flack*, 3 Md. 341, 56 Am. Dec. 742. "Acute gastritis," "acute bronchitis," or grip is not necessarily an illness, *Billings* v. *Met. L. Ins. Co.*, 70 Vt. 477, 41 Atl. 516. Tuberculosis of the brain is a "local disease," *Scoles* v. *Universal Life Ins. Co.*, 42 Cal. 523.

[1] *Cushman* v. *U. S. Life Ins. Co.*, 70 N. Y. 72. So the jury may have to pass on the question of health or disease in case of pharyngitis, *Mut. Ben. Life Ins. Co.* v. *Wise*, 34 Md. 582; or throat disease, *Eisner* v. *Guardian Mut. L. Ins. Co.*, 8 Fed. Cas. 398; gastritis, *Price* v. *Phœnix Mut. Life Ins. Co.*, 17 Minn. 497; bronchitis, *Campbell* v. *New England Mut. Life Ins. Co.*, 98 Mass. 381; *Mausbach* v. *Met. L. Ins. Co.*, 53 How. Pr. (N. Y.) 496; kidney trouble or Bright's disease, *Contl. Life Ins. Co.* v. *Yung*, 113 Ind. 159, 15 N. E. 220, 3 Am. St. R. 630; *Hogan* v. *Met. Life Ins. Co.*, 164 Mass. 448, 41 N. E. 663; *Brown* v. *Met. Life Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. R. 894 (for jury); *Weinstraub* v. *Met. Life Ins. Co.*, 27 Misc. 546, 58 N. Y. Supp. 295 (policy avoided); *Archibald* v. *Mut. Life Ins. Co.*, 38 Wisc. 542 (policy avoided); consumption, *Met. Life Ins. Co.* v. *Mitchell*, 175 Ill. 322, 51 N. E. 637; *Tucker* v. *United L. & Acc. Assn.*, 133 N. Y. 548, 30 N. E. 723; *Vose* v. *Eagle Life & Health Ins. Co.*, 6 Cush. (Mass.) 42; *Woodward* v. *Iowa L. Ins. Co.*, 104 Tenn. 49, 56 S. W. 1020. But see *Murphy* v. *Prudential Ins. Co.*, 205 Pa. St. 444, 55 Atl. 19; gout, *Fowkes* v. *Manchester & L. Life Ins. Co.*, 3 Fost. & F. 440. But a clear case of Bright's disease is not consistent with good health, *Austin* v. *Mut. Res. Fund Life Assn.*, 132 Fed. 555.

[2] *Boos* v. *World Mutual Life Ins. Co.*, 64 N. Y. 236; *Conn. Mutual Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 5 S. Ct. 119; *Knickerbocker Life Ins. Co.* v. *Trefz*, 104 U. S. 197; *Moulor* v. *Ins. Co.*, 101 U. S. 708; *Finn* v. *Met. L. Ins. Co.*, 70 N. J. L. 255, 57 Atl. 438.

[3] *Mutual Ben. Life Ins. Co.* v. *Daviess*, 87 Ky. 541 (vertigo).

action of the beneficiary upon the policy must be dismissed. A policy of the defendant dated February 11, on the life of Adaline Morelle, provided that no obligation was assumed by the company unless at the time when the policy was issued the insured was alive and in sound health. In fact the insured was not at that time in sound health. But the plaintiff showed that an examining physician employed by the defendant company examined the insured on January 30, and on February 4 returned to the company his certificate that he found the insured to be in good health. Judgment was rendered in favor of the insurance company.[1]

Where the testimony is undisputed that the applicant was afflicted with a designated disease or disorder—as, for example, rupture or tonsilitis—his statement to the contrary in the application is a breach of warranty, and, in the absence of statutory provision, it is error to submit the question to the jury.[2]

William Simpson, the deceased husband of the plaintiff, warranted in his application for life insurance that he never was subject to "headache—severe, protracted, or frequent." On the trial, testimony was introduced tending to show that the statement was incorrect. The court charged the jury "that temporary illness of assured in the course of everyday life, brought on by excessive exercise or overwork, is not embraced in said application, but the answers therein have reference to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health." On appeal the Texas Supreme Court held that the charge was erroneous, as applied to the specific question and answer of the application; and the judgment in favor of the plaintiff was reversed and the cause remanded.[3]

In like manner, if the applicant for insurance erroneously answer that she never had "a chronic or persistent cough," and warrant the answer to be true, whether the fact be material or immaterial the policy is avoided.[4]

If the warranty is that the assured has not had spitting of blood, and the testimony shows that this statement is not true, there is no question for the jury,[5] but the inquiry should be regarded as referring

[1] *Gallant* v. *Met. Life Ins. Co.*, 167 Mass. 79.

[2] *Glutting* v. *Met. Life Ins. Co.*, 50 N. J. L. 287; *Ætna Life Ins. Co.* v. *France*, 91 U. S. 510. So also as to heart disease, *Met. Life Ins. Co.* v *Moravec*, 214 Ill. 186, 73 N. E. 415. And consumption, *Schofield* v. *Met. L. Ins. Co.*, 79 Vt. 161, 64 Atl. 1107.

[3] *Mutual Life Ins. Co.* v. *Simpson*, 88 Tex. 333, 31 S. W. 501, 28 L. R. A. 765, 53 Am. St. R. 757.

[4] *Bertrand* v. *Franklin Life Ins. Co.*, 119 La. 423, 44 So. 186.

[5] *Smith* v. *Ætna Life Ins. Co.*, 49 N. Y. 211; *Foot* v. *Ætna Life Ins. Co.*, 4 Daly (N. Y.), 285; *Smith* v. *Northwestern Mut. L. Ins. Co.*, 196 Pa. St.

to some disease as of the respiratory organs and not to the incidental spitting of blood connected with pulling a tooth or biting the tongue.[1]

The insured said in her application that she was in sound health. She died of phthisis nine months after the policy was issued, and was sick three years before her death. The court held that it was error to refuse to instruct the jury in favor of the company.[2]

The answer "never sick," made by a German unfamiliar with our language, was construed to mean that he had never had any of the list of diseases enumerated in the application.[3] But if in reality the warranty is broken, the intent of the insured or his ignorance of the facts is immaterial.[4]

In determining whether a breach has occurred much depends upon the phraseology of the contract. If the statement, for example, is qualified by the words "to the best of my knowledge or belief," to avoid the policy bad faith must be shown, or actual knowledge of the facts constituting breach.[5] And without such qualifying words, where the answer of the applicant is made in good faith and relates to an unknown and obscure disease, or to a long list of diseases, some of them obscure, the courts are disposed to construe the answer as relating to matter of opinion of the applicant rather than to matter of fact.[6]

§ 348. Statements as to Medical Attendance.—Statements as to medical attendance or consultation with physicians if untrue avoid the policy;[7] but the court will construe the language favorably to

314, 46 Atl. 426. But see *Dreier* v. *Continental L. Ins. Co.*, 24 Fed. 670; *Pudritzky* v. *Supreme Lodge*, 76 Mich. 428, 43 N. W. 373.

[1] *Peterson* v. *Des Moines Life Assn.*, 115 Iowa, 668, 87 N. W. 397; *Campbell* v. *New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Singleton* v. *St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321.

[2] *Met. Life Ins. Co.* v. *Dempsey*, 72 Md. 288. A severe attack of typhoid fever avoided the policy as matter of law, where the assured warranted "no serious illness," *Meyers* v. *Woodmen of the World*, 193 Pa. St. 470, 44 Atl. 563. So also of "pulmonary disease," *Sullivan* v. *Met. Life Ins. Co.* (Mont., 1907), 88 Pac. 401 (good faith and immateriality of misstatement no excuse). Pregnancy is consistent with "sound health," *Merriman* v. *Grand Lodge* (Neb., 1906), 110 N. W. 302.

[3] *Knickerbocker Life Ins. Co.* v. *Trefz*, 104 U. S. 197.

[4] *Coöperative Life Assn.* v. *Leflore*, 53 Miss. 1; *Breeze* v. *Met. Life Ins. Co.*, 24 App. Div. 377, 48 N. Y. Supp. 753; *Langstaff* v. *Mut. L. Ins. Co.*, 69 N. J. L. 54, 54 Atl. 518; *Boyle* v. *Northwestern Mut. Relief Assoc.*, 95 Wis. 312, 70 N. W. 351.

[5] *Hann* v. *National Union*, 97 Mich. 513, 56 N. W. 834, 37 Am. St. R. 365; *Mut. Life Ins. Co.* v. *Wager*, 27 Barb. (N. Y.) 354.

[6] *Minnesota Mut. Life Ins. Co.* v. *Link*, 230 Ill. 273, 82 N. W. 637; *Owen* v. *Met. Life Ins. Co.* (N. J., 1907), 74 N. J. Law, 770, 67 Atl. 25; *Blackman* v. *U. S. Cas. Co.* (Tenn., 1907), 103 S. W. 784.

[7] *Brady* v. *United Life Ins. Assn.*, 60 Fed. 729, 9 C. C. A. 252; *Mut. Res. Fund L. Assn.* v. *Cotter*, 72 Ark. 620, 83 S. W. 321 (statement as to last attendance obviously untrue); *Clements* v. *Connecticut Indemnity Co.*, 29 App. Div. 131, 51 N. Y. Supp. 442

he insured if it can do so, and will relieve him if the questions are in nywise ambiguous.[1] Thus if the applicant names a doctor as his ttending physician, this may not avoid the policy, although the phyician is not the usual medical attendant, for the statement may still e true.[2]

In one case the question was, "Name and residence of family hysician?" and the answer was, "Refer to Doctor Mills." The roofs showed that Doctor Mills was not the physician of the insured, ut the court held that upon this ambiguous form of response it was roper to leave the question of forfeiture to the jury.[3]

The North Carolina statute provides: "All statements or descripions in any application for a policy of insurance, or in the policy self, shall be deemed and held representations and not warranties; or shall any representation, unless material or fraudulent, prevent recovery on the policy." Bryant, in applying for his policy, inorrectly warranted that he had not within two years been under ne care of a physician. The Supreme Court on appeal ruled, as natter of law, that the misstatement was material and reversed the udgment recovered by the plaintiff.[4]

§ 349. What Constitutes Medical Attendance or Consultation.—he decisions are not altogether in harmony in defining what medical ttendance and consultation must be disclosed. This depends in a neasure upon the language of the particular interrogatory.

Medical consultation or treatment means a resorting to a physician

ater attendances for weak heart not sclosed); *McGowan* v. *Supreme Court*, 04 Wis. 173, 80 N. W. 603, 107 Wis. 53, 83 N. W. 775 (statement that no nysician was needed for five years as false).

[1] *N. Y. Life Ins. Co.* v. *Baker*, 83 d. 647, 27 C. C. A. 658 (construed refer only to serious illnesses); *ewart* v. *Equitable Mut. L. Assn.*, 0 Iowa, 528, 81 N. W. 782 (question ld ambiguous as to time); *Rupert* v. *upreme Court*, 94 Minn. 293, 102 . W. 715 (answers did not purport be full and complete; policy not oided); *Hale* v. *Life Ind. & Invest. o.*, 65 Minn. 548, 68 N. W. 182 nswer incomplete on its face; if comny wanted more names it should ve asked for them). So also *Fitch* *Am. Popular Life Ins. Co.*, 59 N. Y. 7, 17 Am. Rep. 372 and *Dilleber* v. *ome Life Ins. Co.*, 69 N. Y. 256, 25 m. Rep. 182; *Henn* v. *Mut. Life Ins. Co.*, 67 N. J. L. 310, 51 Atl. 689 (disclosure of one other consultation construed to be enough); *Billings* v. *Met. Life Ins. Co.*, 70 Vt. 477, 41 Atl. 516 (disclosure of one physician construed to be enough).

[2] *Cushman* v. *U. S. Life Ins. Co.*, 70 N. Y. 72.

[3] *Higgins* v. *Phœnix Mut. Life Ins. Co.*, 74 N. Y. 6.

[4] *Bryant* v. *Met. Life Ins. Co.* (N. C., Mch., 1908), 60 S. E. 983 (*Held*, that a misrepresentation need not necessarily contribute to the cause of loss in order to be material; any fact which naturally influences the underwriter in accepting the risk or modifying the rate should be so regarded; also that if the applicant through apprehension as to his health consulted a physician, and engaged him for regular treatment, though not bedridden, he was under his care within the meaning of the policy).

for the purpose of procuring medical aid, but not necessarily for a specific disease; and giving medicine by a physician to relieve suffering is "prescribing medicine" within the meaning of an application.[1] The consultation called for by the application relates to the insured and not to the illness of some other person,[2] and many authorities lay down the rule that a consultation or attendance for slight temporary ailments need not be mentioned by the applicant.[3] Other authorities, however, are not so liberal to the insured, the decision often turning upon the particular phraseology of the question in the application.[4]

The insured stated in his application that he had had no medical attendance within the year. A physician testified that he had attended him and prescribed for him within that time in the presence of certain members of the family, who testified that they had no recollection of it. The court held that the question of breach was for the jury.[5]

[1] *Cobb* v. *Covenant Mutual Benefit Assn.*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. R. 619. But see the rulings in *Mutual Life Ins. Co.* v. *Arhelger*, 4 Ariz. 271, 36 Pac. 895; *White* v. *Prov. Sav. Life Assur. Soc.*, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; *Mut. Res. Fund L. Assn.* v. *Ogletree*, 77 Miss. 7, 25 So. 869 (a guest at the doctor's house); *Gibson* v. *Am. Mut. L. Ins. Co.*, 37 N. Y. 580 (doctor present as friend and neighbor).

[2] *Dilleber* v. *Home Life Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Helwig* v. *Mut. Life Ins. Co.*, 58 Hun, 366, 12 N. Y. Supp. 172; *Billings* v. *Met. L. Ins. Co.*, 70 Vt. 477, 482, 486, 41 Atl. 516.

[3] *Hubbard* v. *Mut. Res. Fund L. Assn.*, 100 Fed. 719, 40 C. C. A. 665; *Franklin Life Ins. Co.* v. *Galligan*, 71 Ark. 295, 100 Am. St. R. 73; *Blumenthal* v. *Berkshire L. Ins. Co.*, 134 Mich. 216, 96 N. W. 17; *Plumb* v. *Penn Mut. Life Ins. Co.*, 108 Mich. 94, 65 N. W. 611; *Tooker* v. *Security Trust Co.*, 26 App. Div. 372, 49 N. Y. Supp. 814, aff'd 165 N. Y. 608, 58 N. E. 1093 (treated for sores on his head); *Crosby* v. *Security Mut. Life Ins. Co.*, 86 App. Div. 89, 83 N. Y. Supp. 140 (slight ailment); *Chinnery* v. *United States Industrial Ins. Co.*, 15 App. Div. 515, 44 N. Y. Supp. 581 (trivial treatment on one occasion in hospital many years before); *Genung* v. *Mut. Life Ins. Co.*, 60 App. Div. 424, 69 N. Y. Supp. 1041 (date when last under physician's care); *Henn* v. *Met. Life Ins. Co.*, 67 N. J. L. 310, 51 Atl. 689; *Woodward* v. *Iowa Life Ins. Co.*, 104 Tenn. 49, 56 S. W. 1020.

[4] *Caruthers* v. *Kansas Mut. L. Ins. Co.*, 108 Fed. 487; *Cobb* v. *Covenant Mut. Ben. Assn.*, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. R. 619; *Conn. Mut. Life Ins. Co.* v. *Young*, 77 Ill. App. 440; *Modern Woodmen* v. *Von Wald*, 6 Kan. App. 231, 238, 49 Pac. 782; *McDermott* v. *Modern Woodmen*, 97 Mo. App. 636, 652 (must disclose medical attendance though for slight ailment); *Met. Life Ins. Co.* v. *McTague*, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661 (any prescribing by a physician though only for a cold, if called for, must be disclosed); *Roche* v. *Supreme Lodge*, 21 App. Div. 599, 47 N. Y. Supp. 774 (judges in reversing stood three to two and held that any consultation must be disclosed whether for serious, trifling, or no disease). *Brock* v. *United Moderns*, 36 Tex. Civ. App. 12, 81 S. W. 340 (in care of physician for granulated eyelids).

[5] *O'Hara* v. *United Brethren Mutual Aid Society*, 134 Pa. St. 417, 19 Atl. 683; *Wall* v. *Royal Society of G. F.*, 179 Pa. St. 355, 36 Atl. 748 (warranted last attendance was "one year ago," in fact there were six occasions since; policy held void); *Plumb* v. *Penn Mut. L. Ins. Co.*, 108 Mich. 94,

In a New Jersey case the applicant warranted: "The following is the name of the physician who last attended me, the date of the attendance, and the name of the complaint for which he attended me: Typhoid fever; January, 1893; Dr. Braymer. I have not been under the care of any physician within two years, unless as stated in previous line, except." The word "except" was printed and nothing was written after it. The application in an earlier clause provided, "wherever nothing is written in the following paragraphs, it is agreed that the warranty is true without exception." The proof was that Dr. Jarrett had previously attended the assured for illness on September 25th, 26th, 28th, and 30th, and October 2d, 3d, 4th, and 5th, and that the ailment which required the doctor's attendance was rheumatism in the shoulder. The court concluded that the facts showed a breach of the warranty that the assured had not been under the care of a physician, and the judgment for plaintiff was reversed.[1]

§ 350. Family Physician or Usual Medical Attendant.—It is not always easy to say who is the family physician or usual medical attendant, or whether there is one; and if the company challenges the truth of the answer, the insured is entitled to the benefit of any doubt.[2] And the question as to the truth of the statement in regard to the medical attendant or usual medical attendant or family physician, if the testimony is ambiguous, must go to the jury.[3] On the other hand, if by the undisputed testimony the answer is untrue, the court must dismiss the complaint.[4]

5 N. W. 611 (a slight variance in time held immaterial); *Providence Sav. L. Assur. Soc.* v. *Reutlinger*, 58 Ark. 528, 32, 25 S. W. 835 (warranted never called a physician); *Sladden* v. *New York L. Ins. Co.*, 86 Fed. 102, 29 C. C. A. 596, 58 U. S. App. 482 (continued attendance for colds should be disposed).

[1] *Fish* v. *Met. Life Ins. Co.*, 73 N. J. L. 619, 64 Atl. 109; and see *Hanrahan* v. *Met. Life Ins. Co.*, 72 N. J. L. 504, 63 Atl. 280.

[2] *Prov. Sav. Life Assur. Soc.* v. *Cannon*, 201 Ill. 260, 66 N. E. 388; *Price* v. *Phœnix Mut. Life Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166 ("family physician" defined); *Reid* v. *Piedmont & A. Life Ins. Co.*, 58 Mo. 421 (issue for jury); *Higgins* v. *Phœnix Mut. Life Ins. Co.*, 74 N. Y. 6; *Monk* v. *Union Mut. Life Ins. Co.*, 6 Robt. (N. Y. Super. Ct.) 455.

[3] *Scoles* v. *Universal Life Ins. Co.*, 42 Cal. 523; *Edington* v. *Mutual Life Ins. Co.*, 67 N. Y. 185; *Gibson* v. *Amer. Mut. L. Ins. Co.*, 37 N. Y. 580; *Smith* v. *Met. Life Ins. Co.*, 183 Pa. St. 504, 38 Atl. 1038; *Huckman* v. *Fernie*, 3 M. & W. 505.

[4] *Phillips* v. *New York Life Ins. Co.*, 9 N. Y. Supp. 839, 31 N. Y. St. R. 636. By statute in some states the attending physician is not allowed to testify to information acquired by him professionally on the occasion of such attendance, *Supreme Lodge* v. *Meyer*, 198 U. S. 520; *Holden* v. *Met. Life Ins. Co.*, 165 N. Y. 13, 58 N. E. 771. But he may testify to the fact of attendance, *Nelson* v. *Nederland Ins. Co.*, 110 Iowa, 600, 81 N. W. 807; *Rhode* v

§ 351. **History of Family and Relatives.**—It is hardly to be expected that the applicant for insurance can carry around on the tip of his tongue full and accurate statistics regarding the ages at death, causes of death, and physical and mental health during life, of his ancestors and relatives, and the courts are reluctant to defeat a policy, because an answer made in good faith to such collateral lines of inquiry turns out to have been erroneous.

While in some cases the binding force of such a warranty has been recognized,[1] other courts have evaded a fatal result in the absence of bad faith and have sustained the policy by construing the statements as representations, or as matters of belief only.[2]

§ 352. **Statements as to Other Insurance.**—Inquiry is often made in the application both as to other subsisting policies of life insurance and as to any rejected or postponed applications. The importance of the warranty is obvious.[3]

Met. Life Ins. Co., 129 Mich. 112, 88 N. W. 400. Only the executor or administrator of the insured can waive the privilege, *Beil* v. *Supreme Lodge*, 80 App. Div. (N. Y.) 609.

[1] *McGowan* v. *Supreme Court*, 104 Wis. 173, 80 N. W. 603; *Johnson* v. *Maine & N. B. Ins. Co.*, 83 Me. 183, 22 Atl. 107 (warranty that brother never had insanity); *Kansas Mut. Life Ins. Co.* v. *Pinson*, 94 Tex. 553, 63 S. W. 531, 64 S. W. 818 (ages of sisters slightly erroneous); *Met. Ins. Co.* v. *Rutherford*, 98 Va. 195, 35 S. E. 361, 35 S. E. 719 (cause of father's death).

[2] *Globe Mut. Life Assn.* v. *Wagner*, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. R. 169 (none of brothers dead); *Fraternal Tribunes* v. *Hanes*, 100 Ill. App. 1 (cause of father's death); *Germania Ins. Co.* v. *Rudwig*, 80 Ky. 223 (ages of father and mother and causes of their death); *New Era Assn.* v. *Mactavish*, 133 Mich. 68, 94 N. W. 599 (cause of sister's death). The rule of construction must always be in favor of insured, *Insurance Co.* v. *Gridley*, 100 U. S. 614, 25 L. Ed. 746 ("no hereditary taint to my knowledge"); *Keefe* v. *Supreme Council*, 52 App. Div. 616, 64 N. Y. Supp. 1012.

[3] *Clapp* v. *Mass. Ben. Assoc.*, 146 Mass. 519; *Edington* v. *Ætna Life Ins. Co.*, 77 N. Y. 564, 100 N. Y. 536, 3 N. E. 315; *London Assurance* v. *Mansel*, 11 L. R., Ch. Div. 363; *Moore* v. *Mut. Res. Fund L. Assn.*, 133 Mich. 526, 95 N. W. 573; *Finn.* v. *Met. L. Ins. Co.*, 70 N. J. L. 255, 57 Atl. 438; *March* v. *Met. L. Ins. Co.*, 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. R. 887. Ignorance on the part of the insured of the prior rejection is immaterial, *Kelly* v. *Life Ins. Clearing Co.*, 113 Ala. 453, 21 So. 361; *Hackett* v. *Supreme Council*, 44 App. Div. 524, 60 N. Y. Supp. 806, aff'd 168 N. Y. 588, 60 N. E. 1112; *Kemp* v. *Good Templars*, 64 Hun, 637, 19 N. Y. Supp. 435, aff'd 135 N. Y. 658, 32 N. E. 648; *Am. Union Life Ins. Co.* v. *Judge*, 191 Pa. St. 484, 43 Atl. 374. Intent in failing to disclose other existing insurance is immaterial, *Leonard* v. *State Mut. L. Assur. Co.*, 24 R. I. 7, 51 Atl. 1049, 96 Am. St. R. 698. Policy may be void for partial and misleading disclosure, *Penn Mut. L. Ins. Co.* v. *Mich. Sav. Bank*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Aloe* v. *Mut. Res. Fund Life Assn.*, 147 Mo. 561, 49 S. W. 553; *Studwell* v. *Mut. Life Assn.*, 61 N. Y. Super. Ct. 287, 19 N. Y. Supp. 709, aff'd 139 N. Y. 615, 35 N. E. 204; *Nat. Life Ins. Co.* v. *Hopkins*, 97 Va. 167, 33 S. E. 539. But see *Ger. Am. Mut. Life Assn.* v. *Farley*, 102 Ga. 720, 29 S. E. 615; *Security Trust Co.* v. *Tarpey*, 182 Ill. 52, 54 N. E. 1041. Policy will not be avoided for omission altogether to make answer, *Phœnix Mut. Life Ins. Co.* v. *Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; *Brown* v.

Where the policy in suit is issued by a regular insurance company, the question arises whether the inquiries relating to other insurance include applications to fraternal societies or beneficiary associations and to certificates issued by them. The decisions on this point are not altogether in harmony and they sometimes turn upon the phraseology of statutes.[1]

§ 353. Statements as to Age.—The rate of premium being based upon the age of the insured, it is quite material that the response to this question should be correct.[2]

The policy was held void where the applicant erroneously warranted his age to be fifty-nine instead of sixty-four.[3] And where the

Greenfield L. Assoc., 172 Mass. 498, 53 N. E. 129; *American Life Ins. Co.* v. *Mahone*, 56 Miss. 180. And in case of ambiguity the rule of construction is favorable to the insured, *Com. Mut. Acc. Co.* v. *Bates*, 176 Ill. 194, 52 N. E. 19; *Robinson* v. *Supreme Commandery*, 77 App. Div. 215, 79 N. Y. Supp. 13, aff'd 177 N. Y. 564, 69 N. E. 1130. As to what amounts to application and rejection, see *Security Mut. Life Ins. Co.* v. *Webb*, 106 Fed. 808, 45 C. C. A. 648, 55 L. R. A. 122, 126 Fed. 835, 61 C. C. A. 383; *Ferris* v. *Life Assur. Co.*, 118 Mich. 485, 76 N. W. 1041; *Edington* v. *Ætna Life Ins. Co.*, 7 N. Y. 564, 100 N. Y. 536, 3 N. E. 415; *Jennings* v. *Supreme Council*, 81 App. Div. 76, 81 N. Y. Supp. 90; *Koenig* v. *U. L. Ins. Assn.*, 16 Misc. 131, 38 N. Y. Supp. 506; *Kan. Mut. L. Ins. Co.* v. *Coalson*, 22 Tex. Civ. App. 64, 54 S. W. 388. The company may not set up a breach which was the result of its own fraud, *Clemans* v. *Supreme Assembly*, 131 N. Y. 485, 30 N. E. 496. But knowledge of the facts by the medical examiner may be no bar if his authority is limited, *Desmond* v. *Supreme Council*, 51 App. Div. 91, 64 N. Y. Supp. 406.

[1] Only other insurance or applications in regular companies is intended to be included by the interrogatory, *Fidelity Mut. L. Assn.* v. *Miller*, 92 Fed. 63, 34 C. C. A. 211; *Penn Mut. Life Ins. Co.* v. *Mech. Sav. Bank*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 3, 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 70; *Newton* v. *Southwestern Mut. L. Assn.*, 116 Iowa, 311, 90 N. W. 3; *Seidenspinner* v. *Met. Life Ins. Co.*, 0 App. Div. 476, 74 N. Y. Supp. 1108, reversed 175 N. Y. 95; *Spitz* v. *Mut. Ben. Life Assn.*, 5 Misc. 245, 25 N. Y. Supp. 469; *Penniston* v. *Union Cent. Life Ins. Co.*, 6 Ohio Dec. 830, 8 Am. Law Rec. 631, 7 Ohio Dec. 678, 4 Wkly. Law. Bul. 935; *Lithgow* v. *Supreme Tent*, 165 Pa. St. 292, 30 Atl. 830; *Equit. Life Ins. Co.* v. *Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. R. 893. *Contra*, membership in a mutual benefit association is other insurance since such associations are insurance companies, *McCallum* v. *N. Y. Mut. Life Ins. Co.*, 55 Hun, 103, 8 N. Y. Supp. 249, aff'd 124 N. Y. 642, 27 N. E. 412; *Kemp* v. *Good Templars*, 19 N. Y. Supp. 435, aff'd 135 N. Y. 658; *Alden* v. *Supreme Tent*, 178 N. Y. 535, 71 N. E. 104 (statement was that he had been rejected by no other "life insurance company or association"). And see *Bruce* v. *Conn. Mut. Life Ins. Co.*, 74 Minn. 310, 77 N. W. 210; *Meyer-Burns* v. *Ins. Co.*, 189 Pa. St. 579, 42 Atl. 297 (statement was that he had been rejected "by no other company").

[2] *Preuster* v. *Supreme Council*, 135 N. Y. 417, 32 N. E. 135.

[3] *Swett* v. *Citizens' Mut. Relief Society*, 78 Me. 541; *Dolan* v. *Mutual Reserve F. L. Assoc.*, 173 Mass. 197, 53 N. E. 398 ("upon a policy for life we think it should be held as matter of law that a material increase of age increases the risk"). But see *Coughlin* v. *Met. L. Ins. Co.*, 189 Mass. 538 (22 years instead of 20 as stated; *held*, a question was presented for the jury under the statute); *Colley* v. *Wilson*, 86 Mo. App. 396. The general rule applies to beneficial societies, *Marcoux* v. *Society of B. of St. John Baptist*, 91

true age was thirty-five and the application represented it to be thirty, it was held to be a fatal variation.[1]

But the warranty, like all others, may be waived, or the company may be estopped from taking advantage of the mistake.[2]

The New York standard policies, as amended by the superintendent of insurance, now provide, "If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age."[3]

§ 354. Statements as to Family Relationship.—The untrue statement of the applicant that he was a widower was held to be fatal to a recovery under a policy.[4] So also the erroneous statement that the lady with whom he had gone through the form of marriage was his wife.[5] So also a breach of the warranty that the insured was a single man, when in reality a married man, forfeited the policy, although the risk was not thereby increased.[6] But the erroneous statement

Me. 250, 39 Atl. 1027; *McCarthy* v. *Catholic Knights*, 102 Tenn. 345, 52 S. W. 142; *Sieverts* v. *National Ben. Assoc.*, 95 Iowa, 710, 64 N. W. 671; *Albert* v. *Mut. L. Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. R. 693; *Cerri* v. *Ancient Order*, 28 Ont. R. 111.

[1] *Ætna Life Ins. Co.* v. *France*, 91 U. S. 510, 23 L. Ed. 401, 94 U. S. 561, 24 L. Ed. 287. Any question of good faith is immaterial in the absence of statutory modification, *Dinan* v. *Supreme Council*, 201 Pa. St. 363, 50 Atl. 999. Or unless applicant says to the best of his knowledge and belief, *O'Connell* v. *Supreme Conclave*, 102 Ga. 143, 28 S. E. 282, 66 Am. St. R. 159. The policy, or statute, often provides for adjustment based on true age, *Singleton* v. *Prudential Ins. Co.*, 11 N. Y. App. Div. 403, 42 N. Y. Supp. 446; *Supreme Council* v. *Boyle*, 10 Ind. App. 301, 37 N. E. 1105.

[2] *O'Brien* v. *Home Ben. Soc.*, 117 N. Y. 310, 22 N. E. 954; *Miller* v. *Phœnix Mut. Life Ins. Co.*, 107 N. Y. 292, 14 N. E. 271; *Gray* v. *National Ben. Assoc.*, 111 Ind. 531, 11 N. E. 477; *Wiberg* v. *Minn. S. R. Assn.*, 73 Minn. 297, 76 N. W. 37. Burden of proof is on company to show false statement as to age, *Ala. G. L. Ins. Co.* v. *Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 So. 561; *Supreme Council* v. *Conklin*, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449; *Valley Mut. L. Assn.* v. *Teewalt*, 79 Va. 421. *Contra*, *Murray* v. *Supreme Lodge*, 74 Conn. 715, 52 Atl. 722. As to method of proving age of decedent, see *Murray* v. *Supreme Lodge*, 74 Conn. 715, 52 Atl. 722 (record of births, etc.); *Meehan* v. *Supreme Council*, 95 App. Div. 142, 88 N. Y. Supp. 821 (baptismal record); *Murray* v. *Supreme Hive Ladies*, 112 Tenn. 664, 80 S. W. 827 (census reports). Entry in family Bible, *So. Life Ins. Co.* v. *Wilkinson*, 53 Ga. 535; *Supreme Council* v. *Conklin*, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449; *U. C. Life Ins. Co.* v. *Pollard*, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. R. 715. Member of family may testify as to apparent age, *Grand Lodge* v. *Bartes*, 69 Neb. 631, 636, 96 N. W. 186; *Hancock* v. *Supreme Council*, 69 N. J. L. 308, 55 Atl. 246. Private record book of soldier, required to be kept, held admissible to prove age of child, *Hunt* v. *Supreme Council*, 64 Mich. 671, 31 N. W. 576, 8 Am. St. R. 855.

[3] Ins. L., § 101.

[4] *United Brethren Mut. Aid Soc.* v. *White*, 100 Pa. St. 12.

[5] *Gaines* v. *Fidelity & Cas. Co.*, 188 N. Y. 411, 81 N. E. 169 (she had a prior husband living).

[3] *Jeffries* v. *Life Ins. Co.*, 22 Wall. 47, 22 L. Ed. 833; but see *Eq. Life Ins. Co.* v. *Paterson*, 41 Ga. 338, 5 Am. Rep. 535; *Storey* v. *Williamsburg M. Mut. B. Assn.*, 95 N. Y. 474. As to

by the applicant that the person named in the policy as beneficiary was a cousin of the applicant, was considered too trivial to vitiate the contract.[1]

§ 355. **Habits.**—The warranty that the applicant is of temperate habits does not mean that he totally abstains from drinking wines or liquors.[2] But the warranty must be true, since a statement of habits is matter of fact, rather than opinion.[3] In case of doubt, however, the question of the correctness of the answer must go to the jury.[4]

The United States Supreme Court expressed the opinion that a

ntrue statement that beneficiary was husband or wife see *Makel* v. *Hancock Mut. Ins. Co.*, 95 App. Div. 241; *Barnes* v. *Fidelity & Cas. Ins. Co.*, 93 App. Div. 524, and compare *Vivar* v. *Supreme Lodge*, 52 N. J. L. 455. As to inquiries regarding relatives see *Davis* v. *Supreme Lodge*, 35 App. Div. 54, 54 N. Y. Supp. 1023, aff'd 165 N. Y. 159, 58 N. E. 891 (died of consumption "so far as I know"); *Fitzgerald* v. *Supreme Council*, 39 App. Div. 251, 56 N. Y. Supp. 1005, aff'd 167 N. Y. 568, 60 N. E. 1110 (difference between warranties and representations explained).

[1] *Britton* v. *Royal Arcanum*, 46 N. J. Eq. 102, 18 Atl. 675.

[2] *Van Valkenburgh* v. *Amer. Popular Life Ins. Co.*, 70 N. Y. 605. See *Mutual L. Ins. Co.* v. *Thomson*, 14 Ky. L. Rep. 800, 22 S. W. 87; *Brignac* v. *Pacific Mut. L. Ins. Co.*, 112 La. 574, 36 So. 595; *Chambers* v. *Northwestern Mut. L. Ins. Co.*, 64 Minn. 495, 67 N. W. 367, 58 Am. St. R. 549 (burden of showing falsity is on defendant).

[3] *Langdeau* v. *John Hancock Mut. L. Ins. Co.* (Mass., 1907), 80 N. E. 452 (intoxicants to excess); *Thomson* v. *Weems*, 9 App. Cas. 686. Statement of habits refers to what time, *Prov. Sav. L. Assur. Soc.* v. *Hadley*, 102 Fed. 356, 43 C. C. A. 25; *Des Moines L. Assn.* v. *Owen*, 16 Colo. App. 60, 63 Pac. 781.

[4] *Meacham* v. *N. Y. State Mut. Ben. Assoc.*, 120 N. Y. 237, 24 N. E. 283; *Pelton* v. *Westchester Fire Ins. Co.*, 77 N. Y. 605; *Mut. L. Ins. Co.* v. *Simpson*, 58 Tex. 333, 31 S. W. 501, 28 L. R. A. 765, 53 Am. St. R. 757; *Northwestern Life Ins. Co.* v. *Muskegon Bank*, 122 U. S. 501, 7 Sup. Ct. 1221, 30 L. Ed. 1100. But see *Pulz* v. *Grand Lodge*, 13 N. Dak. 559, 102 N. W. 165. Warranted not to have been treated for alcoholism, *Moore* v. *Mut. Reserve Fund L. Assn.*, 133 Mich. 526, 95 N. W. 573. Warranted not to have used liquor to excess and if false, policy shall be avoided, *Franklin Life Ins. Co.* v. *American Nat. Bk.*, 74 Ark. 1, 84 S. W. 789. Examine *Rainger* v. *Boston Mut. L. Assoc.*, 167 Mass. 109, 44 N. E. 1088 (material to the risk); *Malicki* v. *Chicago Guar. F. L. Soc.*, 119 Mich. 151, 77 N. W. 690. But see *Sovereign Camp* v. *Burgess* (Miss.), 31 So. 809. As to meaning of "excess" see *Moore* v. *Prudential Ins. Co.*, 92 App. Div. 135, 87 N. Y. Supp. 368. Meaning of the phrase "temperate as to use of liquors," *Holtum* v. *Germania Life Ins. Co.*, 139 Cal. 645, 73 Pac. 591; *Pacific Mut. Life Ins. Co.* v. *Terry* (Tex. Civ. App., 1904), 84 S. W. 656 ("use" means habit, custom). See also as to words "used," and "to excess," *Provident Sav. L. Assur. Soc.* v. *Exchange Bk.*, 126 Fed. 360. Phrase construed, "so intemperate as to impair health" *Janneck* v. *Met. Life Ins. Co.*, 162 N. Y. 574, 57 N. E. 182; *Keefe* v. *Supreme Council*, 52 App. Div. 616, 64 N. Y. Supp. 1012. Use of intoxicants or stimulants, *Endowment Rank Sup. L. K. P.* v. *Townsend*, 36 Tex. Civ. App. 651, 83 S. W. 220; *Northwestern L. Ins. Co.* v. *Bodurtha*, 23 Ind. App. 121, 53 N. E. 787 (1899); *Grand Lodge A. O. U. W.* v. *Belcham*, 145 Ill. 308, 33 N. E. 886; *Supreme Council of R. A.* v. *Brashears*, 89 Md. 624, 43 Atl. 866, 73 Am. St. R. 244. But as to where wrong answers are written by medical examiner see *O'Farrell* v. *Met. Life Ins. Co.*, 44 App. Div. 554, 60 N. Y. Supp. 945, aff'd 168 N. Y. 592, 60 N. E. 1117.

man might have the delirium tremens once, without necessarily violating a warranty relating to temperate habits.[1] But the English court was unwilling to commit itself to this view.[2]

Foley the plaintiff obtained from the defendant a policy on the life of his debtor Badenhop, by which a warranty was given that the insured had always been a man of temperate habits. On the trial the defendant produced much testimony tending to show that Badenhop had been a very intemperate man and had been attended by a physician for delirium tremens On the other hand, several witnesses testified unqualifiedly to his being a man of temperate habits. The trial judge charged the jury among other things that if they found that his habits in the usual, ordinary, and everyday routine of his life were temperate, then such representations were not untrue within the meaning of the policy, although they might find that he had an attack of delirium tremens resulting from an exceptional indulgence in drink prior to the issue of the policy; and that the burden of proof was upon the defendant to show the breach of any warranty in the policy. The United States Supreme Court held that the issue raised was for the jury, and that the charge was not erroneous.[3]

The Maryland statute provides that untrue statements in the application, made in good faith, must relate to some matter material to the risk to avoid the policy. The applicant stated, "That his habit as to the use of intoxicants was one glass of beer a day on an average, and that such had been his habit in the past, and that he had never taken any special treatment for alcoholism." These statements were incorrect. In fact he drank much more than one glass of beer a day on an average and had been treated for alcoholism. The court held as matter of law that the answers related to matter material to the risk, and that the policy was forfeited. The judgment obtained by the plaintiff was reversed.[4]

[1] *Insurance Co.* v. *Foley*, 105 U. S. 350. Compare *Ætna Life Ins. Co.* v. *Davey*, 123 U. S. 739, 8 Sup. Ct. 331, 31 L. Ed. 315; *Ætna Life Ins. Co.* v. *Ward*, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371 (for medical purposes).

[2] *Thomson* v. *Weems*, 9 App. Cas. 686. As to statements regarding use of drugs and narcotics, *Rand* v. *Prov. Sav. L. Assur. Soc.*, 97 Tenn. 291, 37 S. W. 7; *Higbee* v. *Guardian Mut. L. Ins. Co.*, 66 Barb. 462, aff'd 53 N. Y. 603. Statements by the assured respecting his own habits are generally construed as material to the risk, *Standard L. & A. Acc. Ins. Co.* v. *Lauderdale*, 94 Tenn. 642, 30 S. W. 732. But see *Ætna L. Ins. Co.* v. *Rehlaender*, 68 Neb. 284, 94 N. W. 129. They are material under the Kentucky statute. *Provident Sav. Life Assur. Soc.* v. *Dees* (Ky. C. A. 1905), 86 S. W. 523, 27 Ky. L. Rep. 670. See *Union C. L. Ins. Co.* v. *Lee*, 20 Ky. L. Rep. 839, 47 S. W. 614.

[3] *Ins. Co.* v. *Foley*, 105 U. S. 350, 26 L. Ed. 1055.

[4] *Mutual Life Ins. Co.* v. *Mullen* (Md., Mch., 1908), 69 Atl. 385.

§ 356. Statements as to Occupation.—The warranty as to the occu-
ation of the insured is often a most important matter, since some
ccupations are far more hazardous than others. The statements
elating to this subject, if warranted, must be true.[1] Thus a man
ngaged in catching runaway slaves must not describe himself as a
armer;[2] but where the insured represented himself as "a laborer"
was held that the statement was not untrue, though a more apt
escription would have been "inspector;"[3] and where the applicant
arranted that he was a soda-water maker, and was also a soda-
ater seller, it was held that there was no breach of warranty,[4] and,
general, if the words of the answer are equivocal in their meaning
ne issue is for the jury.[5]

[1] *Dwight* v. *Germania L. Ins. Co.*, 03 N. Y. 341, 8 N. E. 654, 57 Am. . 729; *Murphey* v. *Am. Mut. Acc. ssn.*, 90 Wis. 206, 62 N. W. 1057 occupation is very material to the k;" whether applicant was a "car-nter and millwright," *held*, not for ry); *Standard L. & Acc. Ins. Co.* v. *ard*, 65 Ark. 295, 45 S. W. 1065 tatement was "office work only," t in fact the applicant was engaged the cattle business); *Fell* v. *John ancock Mut. Life Ins. Co.*, 76 Conn. 4, 57 Atl. 175 (statement "lock-aker" was untrue, no question left jury); *Ford* v. *U. S. Mut. Acc. Co.*, 8 Mass. 153, 19 N. E. 169, 1 L. R. A. 0 (statement "leather cutter and erchant," in fact applicant was not merchant). But see *Southern L. s. Co.* v. *Booker*, 9 Heisk. (Tenn.) 6, 24 Am. Rep. 344.

[2] *Hartman* v. *Keystone Ins. Co.*, 21 . St. 466. If both the agent and insured know that false statements inserted in the application the licy is void, *Mattson* v. *Modern maritans*, 91 Minn. 434, 98 N. W. 0 ("bartender and painter," in fact applicant was only a bartender).

[3] *Smith* v. *Prudential Ins. Co.*, 10 p. Div. 148, 41 N. Y. Supp. 925 rden of proof on defendant); *Brink Guaranty Mut. Acc. Assn.*, 55 Hun, 5, 7 N. Y. Supp. 847, aff'd 130 N. Y. 5, 29 N. E. 1035 ("livery stable prietor not working"); *Neafie* v. *g. Acc. Ind. Co.*, 55 Hun, 111, 8 Y. Supp. 202 ("iceman proprie-"); *Dailey* v. *Preferred Masonic ut. Acc. Assn.*, 102 Mich. 289, 57 W. 184, 26 L. R. A. 171 ("passenger nductor"). The illegality of an occupation does not *per se* avoid the insurance, *Lord* v. *Dall*, 12 Mass. 115, 7 Am. Dec. 38 (earliest reported life insurance case in U. S.). A bank teller need not disclose his embezzlements since embezzling is not to be called "an occupation," *Penn Mut. L. Ins. Co.* v. *Mech., etc., Trust Co.*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33.

[4] *Grattan* v. *Met. Life Ins. Co.*, 80 N. Y. 292, 36 Am. Rep. 617. As to statements regarding making or selling wine, liquors, etc., see *Hadley* v. *Prov. Sav. L. Assur. Soc.*, 90 Fed. 390, 102 Fed. 857, 43 C. C. A. 25 (policy not avoided); *McGurk* v. *Met. L. Ins. Co.*, 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563 (policy not avoided); *High Court, etc., of Foresters* v. *Schweitzer*, 70 Ill. App. 139, aff'd 171 Ill. 325, 49 N. E. 506 (policy not avoided); *Fid. Mut. L. Ins. Co.* v. *Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197 (policy not avoided if answers are in good faith); *Collins* v. *Met. L. Ins. Co.*, 32 Mont. 329, 80 Pac. 609 ("connected with sale of liquor"); *Holland* v. *Supreme Council*, 54 N. J. L. 490, 25 Atl. 367 ("printer," but applicant really a "bar tender," policy avoided); *Dwight* v. *Germania L. Ins. Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729 (warranty broken, hence policy avoided).

[5] *Kenyon* v. *Knights Templar*, 122 N. Y. 247, 25 N. E. 299 ("not engaged in retailing liquors"). "Occupation" means something more than occasional or casual acts, *Standard L. & Acc. Ins. Co.* v. *Fraser*, 76 Fed. 705, 22 C. C. A. 499; *Guiltinan* v. *Met. L. Ins. Co.*, 69 Vt. 469, 38 Atl. 315. But see *Malicki* v. *Chicago Guar. F. L. Soc.*, 119 Mich. 151, 77 N. W 690.

In the defendant's policy, issued to Walton Dwight, his answers contained in his application were warranted to be true. He had answered "no" to this question: "Is he now, or has he been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors." On the trial it appeared that for three years and up to about a year and a half prior to the application, Dwight had been engaged in keeping a hotel. While he had no bar in connection with the business, and did not sell to outsiders, he kept a wine and liquor room and regularly sold wines and liquors in bottles to guests of the house. The trial judge allowed the jury to find a verdict for the plaintiff. The judgment entered thereon was reversed on appeal by the court of last resort. That court, while conceding that a policy of insurance is subject to construction, where upon the face of the instrument its meaning is doubtful or its language ambiguous or uncertain, held that an express warranty, though involving an immaterial requirement, having been plainly violated by Dwight, his insurance was at an end, and that neither court nor jury had the right to construct, by implication or otherwise, a new contract in place of that made by the parties.[1]

Stevens, the deceased, had been a member of the Modern Woodmen of America. His certificate provided that if he should engage in any prohibited employment, including the occupation of "saloon bartender," his certificate would be forfeited. At first a chore boy working out of doors, later the decedent was engaged to do certain work in a saloon, to attend to the cleaning of the spittoons, the floor, and the bar. He was not regularly employed to wait upon customers, and yet occasionally he would do so when the proprietor was otherwise busy or absent. The court held that these occasional acts of performing the duties of a saloon bartender could not be treated as being an employment in the prohibited occupation under the defendants' code of laws.[2]

§ 357. Statements or Requirements as to Residence and Travel.—Statements in the application as to residence must be true, but the words must be construed favorably to the insured.[3] Similarly, re-

[1] *Dwight* v. *Germania Life Ins. Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729.

[2] *Stevens* v. *Modern Woodmen*, 127 Wis. 606 ("engaging in the employment or occupation prohibited by the conditions of the contract must be held to have reference to the vocation or calling to which an insured devotes himself with some degree of permanancy for hire or profit, and it does not refer to acts which are simply incidentally connected with a regular employment"). And see § 390, *infra*.

[3] *Mobile L. Ins. Co.* v. *Walker*, 58 Ala. 290; *Forbes* v. *Am. Mut. L. Ins.*

rictions contained in the policy relating to residence and traveling ust be complied with.[1]

In this connection the phrase "settled limits of the United States," eans within the boundaries of the Union, and not the portions of e country that are thickly settled.[2] If a permit is given to travel a particular route or to remain in a hazardous region for a particu- r time, the limitation must be strictly observed.[3] Inability to re- rn will be no excuse for a breach of warranty.[4] But the company its representative may waive such requirements of the policy.[5]

The New York standard policies as amended by the superintendent insurance contain the following clause: "Conditions—(The policy ay here provide for restrictions of liability by reason of travel, oc- pation, change of residence and suicide. These restrictions must applicable only to cases where the act of the insured provided ainst occurs within one year after the issuance of the policy.")[6]

§ 358. Statements about Bodily Injuries or Infirmities.—In deter- ning what "injuries or bodily infirmities" must be disclosed in e application and when the issues are for the jury, the rules are nilar to those applicable to statements concerning health.[7] Thus emporary or trivial injury, of which no permanent effects remain, not supposed to be called for by the insurer, and what is serious

, 15 Gray (Mass.), 249, 77 Am. Dec.); *Hann* v. *Nat. Union*, 97 Mich. 513, N. W. 834, 37 Am. St. R. 365; *Fitch* *Am. Pop. L. Ins. Co.*, 59 N. Y. 557, Am. Rep. 372; *Bonner* v. *Conti- tal L. Ins. Co.*, 80 Ohio Dec. 697; *uthern Life Ins. Co.* v. *Booker*, 9 isk. 606, 24 Am. Rep. 344; *Hutchin-* v. *Hartford L. & Acc. Ins. Co.* (Tex. . App., 1897), 39 S. W. 325.

Douglas v. *Knickerbocker L. Ins.* , 83 N. Y. 493 (Wm. M. Tweed aped from sheriff and went outside its prescribed by his policy); *Night- ale* v. *State Mut. Life Ins. Co.*, 5 I. 38.

Casler v. *Conn. Mut. Life Ins. Co.*, N. Y. 427.

Hathaway v. *Trenton Mut. L. & Ins. Co.*, 11 Cush. (Mass.) 448. As he construction of the meaning and ct of permits see *Walsh* v. *Ætna Ins. Co.*, 30 Iowa, 133, 6 Am. Rep. ; *Germania Ins. Co.* v. *Rudwig*, 80 . 223; *Rainsford* v. *Royal Ins. Co.*, N. Y. Super. Ct. 453, aff'd 52 N. Y. ; *Pohalski* v. *Mut. L. Ins. Co.*, 36 Y. Super. Ct. 234; *Welts* v. *Conn. Mut. L. Ins. Co.*, 46 Barb. (N. Y.) 412, aff'd 48 N. Y. 34, 8 Am. Rep. 518.

[4] *Evans* v. *U. S. Life Ins. Co.*, 64 N. Y. 304.

[5] *Bevin* v. *Conn. Mut. Life Ins. Co.*, 23 Conn. 244; *Germania Life Ins. Co.* v. *Koehler*, 168 Ill. 293, 48 N. E. 297; *Mut. Ben. Life Ins. Co.* v. *Martin*, 108 Ky. 11, 55 S. W. 694. But subsequent receipt of premium by the company, without knowledge of forfeiture, will not revive the policy, *Bennecke* v. *Insurance Co.*, 105 U. S. 355. Where an English policy required notice to the directors, and written consent to visit a foreign country, it was held that notice under the policy to an agent of the company was sufficient, where the agent, for several years afterwards, collected the premiums and remitted them to the company, although he had not express authority to waive the contract conditions, *Wing* v. *Harvey*, 5 DeG., M. & G. 265.

[6] Ins. L., § 101.

[7] § 347, *supra*.

enough to demand disclosure may oftentimes present a question of doubt for the jury.[1]

For instance, the omission to recollect a temporary injury to an eye, caused by sand which was thrown into it and inflamed it, was not considered necessarily fatal to the policy where the applicant had answered in the negative the question whether he had ever had any illness, local disease, or injury in any organ.[2]

In another case, an applicant warranted that he had never had any bodily or mental infirmity. As matter of fact he had received a gunshot wound in the back of his head by which the external table of the skull was fractured, and a piece about one-half inch square taken out, on the strength of which also he had received a pension from the government, and the pension had subsequently been increased on account of vertigo and impaired vision which he claimed were a result of the wound. Nevertheless, the court held that the issue of breach of warranty was one for the jury to determine.[3]

[1] *Ins. Co.* v. *Wilkinson*, 13 Wall. (U. S.) 222, 20 L. Ed. 617. Breach of the warranty avoids, see *Ætna Life Ins. Co.* v. *France*, 91 U. S. 510, 23 L. Ed. 401 (hernia); *Stand. L. & Acc. Ins. Co.* v. *Sale*, 121 Fed. 664, 57 C. C. A. 418. Trivial injuries or infirmities undisclosed do not avoid the policy, *Black* v. *Travelers' Ins. Co.*, 121 Fed. 732, 58 C. C. A. 14, 61 L. R. A. 500 (gunshot wound in head); *Mfrs. Acc. Ind. Co.* v. *Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620 (anæmic murmur of heart); *Bernays* v. *U. S. Mut. Acc. Assn.*, 45 Fed. 455 (erysipelas); *Cotton* v. *Fidelity & Cas. Co.*, 41 Fed. 506 (near-sightedness); *Stand. L. & Acc. Ins. Co.* v. *Martin*, 133 Ind. 376, 33 N. E. 105 (injuries to left foot and right leg causing slight limp); *Wilkinson* v. *Conn. Mut. L. Ins. Co.*, 30 Iowa, 119, 6 Am. Rep. 657 (fall from tree); *Tyler* v. *Ideal Ben. Assn.*, 172 Mass. 536, 52 N. E. 1083 (sprained ankle); *Maryland Cas. Co.* v. *Gehrmann*, 96 Md. 634, 54 Atl. 678 (curvature of leg); *Bancroft* v. *Home Ben. Assn.*, 120 N. Y. 14, 30 N. Y. St. R. 175, 23 N. E. 997, 8 L. R. A. 68 (blow on windpipe from fencing causing blood to flow); *Brink* v. *Guaranty Mut. Acc. Assn.*, 55 Hun, 606, 7 N. Y. Supp. 847, aff'd 130 N. Y. 675, 29 N. E. 1035 (unconsciousness from falls from buggy); *Home Mut L. Assn.* v. *Gillespie*, 110 Pa. St. 84, 1 Atl. 340 (wound by shell at Cold Harbor, question for jury); But a stricture is "a local infirmity," and must be disclosed, *Hanna* v. *Mut. L. Assn.*, 11 App. Div. 245, 42 N. Y. Supp. 228. So also as to severe concussion of brain from a fall, *Snyder* v. *Mut. Life Ins. Co.*, 22 Fed. Cas. 740, aff'd 93 U. S. 393, 23 L. Ed. 887. As to what is a surgical operation see *Caruthers* v. *Kan. Mut. Life Ins. Co.*, 108 Fed. 487 (policy not avoided); *Lippincott* v. *Supreme Council*, 64 N. J. L. 309, 45 Atl. 774 (policy avoided).

[2] *Fitch* v. *Amer. Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372.

[3] *Black* v. *Travelers' Ins. Co.*, 121 Fed. 732, 58 C. C. A. 14, 61 L. R. A. 500. And see *Smith* v. *Met. Life Ins. Co.*, 183 Pa. St. 504; *Barnes* v. *Fidelity Mut. Life Assn.*, 191 Pa. St. 618.

CHAPTER XVII

LIFE POLICY—CONCLUDED

§ 359. Payment of Premiums.—*The policy to cease unless pre-iums paid, when due, at the home office, and upon production of re-ipts signed by president or treasurer, and policy not to take effect ıtil first premium actually paid.*

The payment of the premium is of the essence of the contract, ıd, in fact, constitutes all that the company receives on its part, ıd under the usual phraseology of the life insurance policy a failure pay on or before the day or hour [1] stipulated will cause forfeiture a subsisting policy,[2] unless the company is in some way responsi-e for the omission [3] or waives it.[4] Accordingly it will be seen that ınctuality in payment of every premium as from time to time it

[1] *Tibbits* v. *Mutual Ben. L. Ins. Co.* ıd.), 65 N. E. 1033; *Penn Plate Glass* . v. *Ins. Co.*, 189 Pa. St. 255, 42 Atl. 8, 69 Am. St. R. 810.

[2] *Iowa Life Ins. Co.* v. *Lewis*, 187 S. 335, 23 S. Ct. 126; *Klein* v. *Ins.* ., 104 U. S. 88, 26 L. Ed. 662; *ıtual Res. Fund L. Assn.* v. *Mine-rt*, 72 Ark. 630, 83 S. W. 323. If no ur is named insured has for payment til midnight of day named, *Thom-* v. *Ins. Co.*, 4 Pa. Dist. R. 382. If day is clearly specified there will be forfeiture for nonpayment, *Perry* v. *nkers' Life Ins. Co.*, 47 App. Div. 7, 62 N. Y. Supp. 553, aff'd 167 N. Y. 7, 60 N. E. 1118. If place or agent ıamed in the policy the insured must ık out the designated place or agent en making payment of premiums, . *Co.* v. *Davis*, 95 U. S. 425, 24 Ed. 453. The United States Su-me Court says: "Forfeitures are essary and should be fairly en-ced." *Nederland L. Ins. Co.* v. *einert*, 199 U. S. 171, 26 S. Ct. 15.

Lovell v. *Ins. Co.*, 111 U. S. 264, . Ct. 390, 28 L. Ed. 423; *Heinlein* v. *perial Life Ins. Co.*, 101 Mich. 250, N. W. 615, 25 L. R. A. 627, 45 Am. R. 409; *Garner* v. *Ins. Co.*, 110 Y. 266, 18 N. E. 130, 1 L. R. A. 256. ıere beneficiaries had no knowledge of existence of a policy, fraudulently surrendered to the company by the insured before death, the court decided that there was a valid excuse for the nonpayment of premiums, since the company was party to the surrender, *Whitehead* v. *N. Y. Life Ins. Co.*, 102 N. Y. 152. As to effect of insolvency of company upon obligation of insured to pay premiums, see *Burdon* v. *Association*, 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146; *Jones* v. *Life Assn.*, 83 Ky. 75; *Attorney General* v. *Ins. Co.*, 82 N. Y. 336; *Taylor* v. *Ins. Co.*, 9 Daly (N. Y.), 489; *Benton* v. *Ins. Co.*, 34 Scot. L. R. 686.

[4] If company declines to receive tender of premium properly made, the insured need not tender subsequent premiums, *Meyer* v. *Ins. Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Shaw* v. *Ins. Co.*, 69 N. Y. 286; *Kenyon* v. *National Life Ins. Co.*, 39 App. Div. 292, 57 N. Y. Supp. 60; *Nat. Mut. Ins. Co.* v. *Home Ben. Soc.*, 181 Pa. St. 443, 37 Atl. 519, 59 Am. St. R. 666. Repudiation by the company of all liability makes tender of premiums unnecessary, *Hayner* v. *Ins. Co.*, 69 N. Y. 435; *Denison* v. *Masons' Fraternal Acc. Assoc.*, 59 App. Div. (N. Y.) 294, 69 N. Y. Supp. 291; *Tebow* v. *Wash. Life Ins. Co.*, 59 App. Div. 310, 69 N. Y.

becomes due is essential to the continued validity of the insurance.[1] But if the company antedates the policy, the court will, if possible, so construe the contract as to give the insured the benefit of a full year of insurance before being in default for the next annual premium.[2]

As heretofore shown, sickness, paralysis, absence, or other inability to comply with the terms of the contract furnishes no excuse for nonpayment of a premium as stipulated.[3] Nor in the absence of contract or statutory provision would the company be required to give notice of the approaching maturity of a premium or of its election to consider the insurance void for nonpayment of a premium;[4] but where dividends are applicable to reduce the amount due for premiums the burden is upon the insurer, before claiming forfeiture, to give notice of the amount of the balance payable by the insured.[5] The insured, however, cannot claim, as a set-off to the premium, earnings of the company not yet declared as dividends.[6] So, also, if the premium is paid by a note, and the policy provides for forfeiture upon nonpayment of the note, no relief can be granted in case of breach.[7]

Life insurance is forfeited for nonpayment of a premium because the policy so stipulates. If the policy fails to provide that nonpayment of the premium, or premium note, shall terminate or avoid

Supp. 289; *Man. Life Ins. Co.* v. *Smith*, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806.

[1] *Nederland Life Ins. Co.* v. *Meinert*, 199 U. S. 171, 181, 23 S. Ct. 15; *Holly* v. *Metrop. Life Ins. Co.*, 105 N. Y. 437, 11 N. E. 507. If a premium falls due on Sunday payment within the next twenty-four hours is in time, *Hammond* v. *Ins. Co.*, 10 Gray (Mass.), 306, *Leigh* v. *Ins. Co.*, 26 La. Ann. 436. As to holidays see *National Mut. Ben. Assn.* v. *Miller*, 85 Ky. 88, 2 S. W. 900.

[2] *McMaster* v. *N. Y. Life Ins. Co.*, 183 U. S. 25, 22 S. Ct. 10, 46 L. Ed. 64. Compare *Tibbitts* v. *Ins. Co.*, 159 Ind. 671, 65 N. E. 1033.

[3] *School District* v. *Dauchy*, 25 Conn. 530; *Carpenter* v. *Association*, 68 Iowa, 453, 27 N. W. 456, 56 Am. Rep. 855 (sickness and delirium); *Thompson* v. *Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765; *Webb* v. *Ins. Co.*, 63 Md. 217 (absence); *Wheeler* v. *Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594. As to the effect of war as excuse for postponing payment, see *N. Y. Life Ins. Co.* v. *Statham*, 93 U. S. 24, 23 L. Ed. 789; *N. Y. Life Ins. Co.* v. *Davis*, 95 U. S. 425, 24 L. Ed. 453; *Worthington* v. *Ins. Co.*, 41 Conn. 372, 19 Am. Rep. 495; *Dillard* v. *Ins. Co.*, 44 Ga. 119, 9 Am. Rep. 167; *Mut. Ben. Life Ins. Co.* v. *Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741; *Cohen* v. *Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Mut. Ben. Life Ins. Co.* v. *Atwood*, 24 Grat. (Va.) 497, 18 Am. Rep. 652.

[4] *Thompson* v. *Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765; *Attorney General* v. *Ins. Co.*, 93 N. Y. 70. Unless by virtue of a settled custom in past dealing with insured, *N. Y. Life Ins. Co.* v. *Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

[5] *Phœnix Mut. L. Ins. Co.* v. *Doster*, 106 U. S. 30, 27 L. Ed. 65; *Union Cent. Life Ins. Co.* v. *Caldwell*, 68 Ark. 505, 58 S. W. 355; *Meyer* v. *Ins. Co.*, 73 N. Y. 516, 29 Am. Rep. 200.

[6] *Mut. Life Ins. Co.* v. *Girard L. & Trust Co.*, 100 Pa. St. 172.

[7] *Knickerbocker Life Ins. Co.* v. *Pendleton*, 112 U. S. 696, 5 S. Ct. 314; *McIntyre* v. *Ins. Co.*, 52 Mich. 188, 17 N. W. 781.

e insurance, no such result follows.[1] And if a promissory note is cepted by the company in lieu of a cash payment called for by e terms of the policy, nonpayment of the note at maturity will t cause forfeiture in the absence of express provision, although e nonpayment of the cash premium would have had that effect.[2] it a note, itself containing a forfeiture provision, if executed con- mporaneously with the policy, may be construed as constituting rt of the contract, and nonpayment of the note will then cause oidance of the policy.[3] The rule, however, is otherwise where ch a note forms no part of the contract or where such forfeiture use in the note is inconsistent with other clauses in the policy.[4] It has been held that the ostensible scope of authority of a solicit- agent is limited to the receipt of the first premium, and that, if rusted with the delivery of the policy, he is apparently authorized receive payment of the first premium without any special or arate receipt, no matter what the policy says, but not of subse- ent premiums.[5] So also, unless the application contains a limita- n upon his authority to do so, a solicitor intrusted with the duty closing the contract may take a note for the first premium and d his company, though the policy, subsequently delivered, pro- le that it shall not go into effect until the premium is paid in sh.

Kimbro, upon signing his application, gave his note for the first mium to Haynes, local agent for the defendant. The defendant receiving the application decided not to issue the policy in the m applied for, but sent to the agent a different form of policy be submitted to Kimbro. The agent, however, made no men- n of the alteration, but simply notified Kimbro by letter of the eipt of the policy, stating that he would deliver it on the day note became due. Kimbro was ignorant of the company's lination, nor did he know that the policy by its terms was not ctive without prepayment of premium. Meanwhile he was taken k and died before maturity of the note. During his illness his

Mutual L. Ins. Co. v. *Allen*, 212 134, 72 N. E. 200; *Stewart* v. *ion Mut. L. Ins. Co.*, 155 N. Y. 257, N. E. 876, 42 L. R. A. 147.

Penn Mut. Life Ins. Co. v. *Nor- s*, 163 Ind. 379, 72 N. E. 132; *ith* v. *Life Ins. Co.*, 101 Cal. 627, Pac. 113, 40 Am. St. R. 96.

Iowa Life Ins. Co. v. *Lewis*, 187 S. 335, 23 S. Ct. 126, 47 L. Ed. 204; *mpson* v. *Ins. Co.*, 104 U. S. 252; *Manhattan Life Ins. Co.* v. *Myers*, 109 Ky. 372, 59 S. W. 30; *Manhattan L. Ins. Co.* v. *Patterson*, 109 Ky. 624, 53 L. R. A. 378, 95 Am. St. R. 393.

[4] *Dwelling House Ins. Co.* v. *Hardie*, 37 Kan. 674, 16 Pac. 92; *Montgomery* v. *Ins. Co.*, 14 Bush (Ky.), 51; *Mut. Life Ins. Co.* v. *French*, 30 Ohio St. 240, 27 Am. Rep. 443.

[5] *Lauze* v. *N. Y. Life Ins. Co.* (N. H., Nov., 1907), 68 Atl. 31.

wife tendered payment of the premium in cash to the agent and demanded delivery of the policy, which was refused. The court held that the act of Haynes in accepting a note in place of cash, and his representation that the policy was received and was being held for Kimbro were, in legal effect, the act and representation of the insurance company, and that Kimbro accordingly had the right to assume that his application was accepted as proposed and that the contract was closed. The judgment for the plaintiff was affirmed.[1]

If the previous course of dealing between the company and the insured warrant, or if the company accept it,[2] payment may be by check, or other equivalent, instead of cash, though the policy call for cash,[3] and the receipt and retention of the premium at the home office constitute a waiver of any informality in the method of pay-

[1] *Kimbro* v. *N. Y. Life Ins. Co.* (Ia., Sept., 1906), 108 N. W. 861. The court said: "That agent was its representative, not only to receive and forward the application, but was also its representative expressly authorized to complete the negotiations and deliver the policy which the appellant prepared and returned for the applicant's acceptance. He was the only medium through whom the business between the contracting parties was carried on. Within the scope of that employment, his hand was the appellant's hand, his voice was its voice, and his promises and assurances were the promises and assurances of his principal, notwithstanding any undisclosed instructions or limitations existing in his contract of employment." And see § 375, *infra*. The South Carolina court says: "As insurance agents should not, and as a rule do not, deliver over policies without payment of the premiums unless they intend to give credit, the mere fact of delivery without demand of the premium raises a presumption that credit is intended," *Dargan* v. *Equitable Life Assur. Soc.*, 71 S. C. 359; *Cauthen* v. *Hartford Life Ins. Co.* (S. C., 1908), 61 S. E. 478. But where the insured has given a note instead of cash payment of premium, it is held that the solicitor has no implied authority to extend the time of payment of the note, *American Ins. Co.* v. *Hornbarger*, 85 Ark. 337, 108 S. W. 213. If, by a course of dealing, the company has treated an unauthorized agent as authorized to collect renewal premiums, the company will be estopped, though the agent has failed to turn over the premium to it, *State Life Ins. Co.* v. *Murray*, 159 Fed. 408. So also if a society by custom allows assessments to be paid by mail, receipt at the designated post office on the day when due will save from forfeiture though the policy provisions are otherwise, *Vancura* v. *Zapadni Cesko Bratrska Zednota* (Neb., 1907), 111 N. W. 845.

[2] *Mass. Ben. L. Assoc.* v. *Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Michigan Mut. Life Ins. Co.* v. *Bowes*, 42 Mich. 19, 51 N. W. 962.

[3] *Kenyon* v. *Knights Templar & M. Mut. Aid Assoc.*, 122 N. Y. 247, 25 N. E. 299; *Long* v. *Ins. Co.*, 137 Pa. St. 335, 20 Atl. 1014, 21 Am. St. R. 879; *Union Cent. Life Ins. Co.* v. *Duvall*, 20 Ky. L. Rep. 441, 46 S. W. 518 (check of third party); *Knickerbocker Life Ins. Co.* v. *Pendleton*, 112 U. S. 696, 5 S. Ct. 314, 28 L. Ed. 866 (draft on third party); *Fidelity & Cas. Co.* v. *Johnson*, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206 (order on third party). If the course of dealing has been to use the mail, a check mailed apparently in good time will avail to prevent forfeiture though not received or not received in season; but if the check is not paid the premium remains due, though then there is no forfeiture of policy, *Kenyon* v. *Knights Templar*, 122 N. Y. 247, 25 N. E. 299; *Hollowell* v. *Life Ins. Co.*, 126 N. C. 398, 35 S. E. 616. Remitting a worthless check or draft is no payment, *National Life Ins. Co.* v. *Goble*, 51 Neb. 5, 70 N. W. 503.

nent, as well as waiver of all known breaches of the policy.[1] And f the company accept a note or other instrument in payment of he premium its only remedy for collection will be upon the instrunent so accepted in substitution. It cannot claim a forfeiture of he policy on the ground that the premium remains unpaid.[2]

In a case in South Carolina the insured, Hill by name, had given is note for the first premium, and this had been duly accepted by ie agent of the insurance company, and, after its maturity, had een transferred to Doyle, the plaintiff, who brought action upon it gainst Hill. Hill defended on the ground that the policy was voided from the inception of the contract and that therefore there as no consideration for the note. He offered to show that the olicy was void because of a false answer written in the application y the medical examiner, but he admitted that he had given the orrect answer orally to the medical examiner. The court held that ie proffered testimony was not admissible and that the defense as not established, since the company was estopped from setting o forfeiture of the policy.[3]

The New York standard policies as amended by the superintendit of insurance contain the following clause, "A grace of thirty ays subject to an interest charge at the rate of ——— per centum

[1] *John Hancock Ins. Co.* v. *Schlink*, 5 Ill. 284, 51 N. E. 795; *Home Ins.* . v. *Gilman*, 112 Ind. 14, 13 N. E. 2; *Rice* v. *New Eng. Mut. Aid Soc.*, 6 Mass. 248; *McGurk* v. *Met. Life s. Co.*, 56 Conn. 528; *De Frece* v. *utional Life Ins. Co.*, 136 N. Y. 144, N. Y. St. R. 909, 32 N. E. 556 aiver of prompt payment and of forture by a subsequent agreement of parties). But a local agent has no plied authority to take anything but h in payment of premium, *Carter* v. *s. Co.*, 56 Ga. 237; *Raub* v. *N. Y. ie Ins. Co.*, 14 N. Y. St. R. 573; *msecek* v. *Ins. Co.*, 113 Wis. 114, 88 W. 1013, 57 L. R. A. 455, 90 Am. R. 846 (agent cannot offset his t due to the insured). But come *Wooddy* v. *Old Dominion Ins. Co.*, Grat. (Va.) 362, 31 Am. Rep. 739. agent has no implied authority to ive property as payment for preim, *Hoffman* v. *Ins. Co.*, 92 U. S. , 23 L. Ed. 539; *Equitable Life ur. Soc.* v. *Cole*, 13 Tex. Civ. App. 5, 35 S. W. 720. President or secrey or agent if possessing actual aurity may give credit for the premium in place of cash, *Smith* v. *Prov. Sav. Life Assur. Soc.*, 65 Fed. 765, 13 C. C. A. 284; *Dilleber* v. *Knickerbocker Life Ins. Co.*, 76 N. Y. 567; *National Life Ins. Co.* v. *Tweddell*, 22 Ky. Law R. 881, 58 S. W. 699. And may dispense with the receipt called for by the terms of the policy, *McNeilly* v. *Continental L. Ins. Co.*, 66 N. Y. 23. As to waiver see also *Peck* v. *Washington Life Ins. Co.*, 91 App. Div. 597, 87 N. Y. Supp. 210, aff'd 181 N. Y. 585 (authority to waive payment); *Russell* v. *Prudential L. Ins. Co.*, 176 N. Y. 178, 68 N. E. 252 (no authority to waive); *Stewart* v. *Union Mut. L. Ins. Co.*, 155 N. Y. 257, 49 N. E. 876 (authority to waive cash payment); *Hewitt* v. *Am. Union L. Ins. Co.*, 85 App. Div. 279, 83 N. Y. Supp. 232; *Tooker* v. *Security Trust Co.*, 26 App. Div. 372, 49 N. Y. Supp. 814, aff'd 165 N. Y. 608, 58 N. E. 1093 (waiver of cash payment).

[2] *National Ben. Assn.* v. *Jackson*, 114 Ill. 533, 2 N. E. 414.

[3] *Doyle* v. *Hill* (S. C., 1906), 55 S. E. 446.

per annum shall be granted for the payment of every premium after the first year during which time the insurance shall continue in force. If death occur within the days of grace the unpaid portion of the premium for the then current policy year shall be deducted from the amount payable hereunder."[1] But such a provision does not by implication provide also a grace of thirty days for payment of a note given for a past-due premium.[2]

If by a statutory provision, as for example in Massachusetts a grace of "one month" is specified, it will not do for the company to substitute a grace of thirty days, since one month is not necessarily the same as thirty days. The provision being made for the benefit of the insured any departure from it must be as favorable to the insured.[3]

And the policyholder is also entitled to the protection and benefit coming from the provisions described in the next two sections, which are not to be waived or disturbed by inconsistent stipulations in the policy.[4]

§ 360. Statutory Notice of Premiums Due.—In many states it is provided that before claiming forfeiture for nonpayment of premium the insurance company must send a specified notice to the insured, which is intended to operate as a reasonable warning.[5]

[1] Ins. L. § 101.

[2] *Bank of Commerce* v. *N. Y. Life Ins. Co.*, 125 Ga. 552, 54 S. E. 643.

[3] *N. Y. Life Ins. Co.* v. *Hardison* (Mass., 1908), 85 N. E. 410.

[4] *Equitable Life Assur. Soc.* v. *Clements*, 140 U. S. 226, 11 S. Ct. 822, 35 L. Ed. 497.

[5] Appendix, ch. I; N. Y. Ins. L. § 92, given in *Mut. Life Ins. Co.* v. *Phinney*, 178 U. S. 327, 20 S. Ct. 906, 44 L. Ed. 1088. Under the New York statute no notice need be given if the term is less than a year or if the premiums are payable monthly or weekly, *Baldwin* v. *Prov. S. Life Assur. Soc.*, 23 App. Div. 5, 48 N. Y. Supp. 463, aff'd 162 N. Y. 636, 57 N. E. 1103. And if the insured has voluntarily abandoned the insurance he has also abandoned the right to statutory notice, *Mut. Life Ins. Co.* v. *Hill*, 193 U. S. 551, 24 S. Ct. 538. If the company knows that the insured is mentally incapacitated, notice should be sent to the third party beneficiary, if there be one, *Buchanan* v. *Supreme Conclave*, 178 Pa. St. 465, 35 Atl. 873, 34 L. R. A. 436, 56 Am. St. R. 774. But in general notice is to be served only on the insured, *Osborne* v. *Home Life Ins. Co.*, 123 Cal. 610, 56 Pac. 616. If the company has been informed of absolute assignment of the policy, notice should be sent to the assignee, *Brannin* v. *Ins. Co.*, 28 N. J. L. 92. Otherwise it should be sent to the original insured, *Franklin Life Ins. Co.* v. *Am. Nat. Bank*, 74 Ark. 1, 84 S. W. 789. The company need not repeat the notice on maturity of a note taken for premium, *Banholzer* v. *N. Y. Life Ins. Co.*, 74 Minn. 387, 77 N. W. 295; *Conway* v. *Phœnix Mut. L. Ins. Co.*, 140 N. Y. 79, 35 N. E. 420. Days of grace do not affect the proper date of notice, *Trimble* v. *N. Y. Life Ins. Co.*, 20 Wash. 386, 55 Pac. 429. As to what notice constitutes a compliance with the statute, see *Nederland Life Ins. Co.* v. *Meinert*, 199 U. S. 171, 26 S. Ct. 15, disapproving *N. Y. Life Ins. Co.* v. *Dingley*, 93 Fed. 153. And see also *Schad* v. *Security Mut. L. Assoc.*, 11 App. Div. 487, 42 N. Y. Supp. 314, aff'd 155 N. Y. 640, 49 N. E. 1104; *McDougall* v. *Prov. Sav.*

In order to establish forfeiture of the policy for non-payment of e premium the burden is thrown upon the insurer to prove a mpliance with the terms of the statute.[1] The fact that the in- red is financially unable to pay the premium, and can derive no nefit from the notice furnishes the company with no excuse for itting to conform to the statutory requirement.[2]

A foreign company issuing a policy in New York is subject to the w York statute;[3] but a New York company making a contract life insurance in another state is not subject to the New York atute unless the policy so provides.[4]

e Assur. Soc., 135 N. Y. 551, 32 E. 251; *Baxter* v. *Ins. Co.*, 119 N. Y.), 23 N. E. 1048, 7 L. R. A. 293; *lan* v. *Northwestern Mut. Life Ins.* , 113 N. Y. 147, 20 N. E. 827, 10 . St. R. 441; *Carter* v. *Ins. Co.*, 110 Y. 15, 17 N. E. 396. Plaintiff need prove payment of premiums under statute, but the company must d and prove a service of the tutory notice followed by a non- ment of the premium within the iod specified for that purpose, *cher* v. *Met. Life Ins. Co.*, 167 N. Y. , 60 N. E. 431; *Seeley* v. *Manhattan Ins. Co.*, 73 N. H. 339, 55 Atl. 425. of of proper mailing may be enough er the statute, *McConnell* v. *Soci-* 92 Fed. 769, 34 C. C. A. 663. And court will allow an agent of the pany possessing knowledge in a eral way to prove a *prima facie* of mailing the notice though the ous steps involved in mailing are n by several agents, *Wolarsky* v. *Y. Life Ins. Co.*, 120 App. Div. 99, N. Y. Supp. 1047. Where the ount of the premium is variable the len is on the company to prove the ount, *Goodwin* v. *Prov. Sav. L. ur. Soc.*, 97 Iowa, 226, 66 N. W. 157. New York act does not apply to tality assessments, *Merriman* v. *M. B. Assoc.* 138 N. Y. 123, 33 E. 738. It has been held that it is rary to public policy to allow the red to waive the provisions of the ute. Forfeiture in such case is *vires*, *Griffith* v. *Ins. Co.*, 101 Cal. 36 Pac. 113, 40 Am. St. R., 96. see § 130, *supra*. In New York statutory provision does not apply aternal benefit societies, *Bopple* v. *reme Tent*, 18 App. Div. 488. Nor nutual benefit assessment com- es incorporated under L. 1883, ch. 175, *Ronald* v. *M. R. L. F. Assn.*, 132 N. Y. 378. Nor to associations conducting assessment life and accident insurance, *Greenwald* v. *United L. Ins. Ass.*, 18 Misc. (N. Y.) 91.

[1] *Strauss* v. *Union Cent. L. Ins. Co.*, 170 N. Y. 349. The affidavit of mailing must show contents of notice and identify the policy, *McCall* v. *Prudential Ins. Co.*, 98 App. Div. (N. Y.) 225. The notice must be addressed correctly and to the right person, *Equitable L. Assur. So.* v. *Foommhold*, 75 Ill. App. 43; *Nielson* v. *Prov. Sav. L. A. Soc.* (Cal., 1901), 66 Pac. R. 663. Proof must show that postage was prepaid, *Prov. Sav. L. A. Soc.* v. *Nixon*, 73 Fed. 144. Day of mailing is excluded in computing 30 days, *Hicks* v. *Nat. L. Ins. Co.*, 60 Fed. 690. Affidavit of mailing is not conclusive in another state, and proof that the notice was not received has some bearing, *Equitable Life Assur. Soc.* v. *Nixon*, 81 Fed. 796. If addressed and mailed in pursuance of the directions of the statute, the receipt of the notice is immaterial, *McConnell* v. *Prov. Sav. Life A. Soc.*, 92 Fed. 769; *N. Y. Life Ins. Co.* v. *Scott* (Tex. Civ. App.), 57 S. W. 677. The contract in general is to be governed by the statutes of the place where it is made. See § 92, *supra*.

[2] *Equitable Life Assur. Soc.* v. *Perkins* (Ind. App., 1907), 80 N. E. 682.

[3] *Strauss* v. *Union Cent. Life Ins. Co.*, 170 N. Y. 349, 63 N. E. 347.

[4] *Mut. Life Ins. Co.* v. *Cohen*, 179 U. S. 262, 21 S. Ct. 106, 45 L. Ed. 181; *Mut. Life Ins. Co.* v. *Hill*, 193 U. S. 551, 24 S. Ct. 538, 48 L. Ed. 788; *Met. Life Ins. Co.* v. *Bradley*, 98 Tex. 230, 82 S. W. 1031. But see *Nall* v. *Prov. S. L. Assur. Soc.* (Tenn. Ch. App.), 54 S. W. 109 (1899); *Summitt* v. *U. S. Life Ins. Co.*, 123 Iowa, 681, 99 N. W. 563.

§ 361. **Extended or Paid-up Insurance.**—In the absence of statutory provision or express agreement, a policy lapsed for nonpayment of premium has no surrender value,[1] since by forfeiture all rights of the insured under it are terminated; but inasmuch as the premiums during the earlier years are larger than the hazard requires, the lapsed policy has what is called a surrender value which can equitably be made the occasion of concession to the honest but delinquent policyholder. In most instances this benefit is secured to him either by statute [2] or express agreement or both, where the policy lapses for nonpayment of premium. A usual provision in such a case gives him the option to take either an extension of the original amount for such further time as the net reserve will fairly purchase, or paid-up insurance for the original lifetime or other term, but for a commuted or reduced amount, provided at least two or three annual premiums have been paid before default.[3]

It is a condition precedent to the enjoyment of this privilege that the insured make his demand, and if required surrender his policy, within the period specified for so doing.[4] But by the terms of a statute or statutory policy, as in the case of the New York standard policies, although the owner of the policy shall fail to

[1] *Haskell* v. *Society*, 181 Mass. 341, 63 N. E. 899.

[2] See Appendix, ch. I. The method of computing the reserve or surrender value of lapsed or forfeited policies is defined by the New York Ins. L. § 88.

[3] By the New York standard life policies, the options on surrender or lapse, after a policy has been in force three full years, are specified in the policy itself, Ins. L., § 101. As to New York statute, see *Nielsen* v. *Society*, 139 Cal. 332, 73 Pac. 168, 96 Am. St. R. 146. As to Missouri statute, see *Cravens* v. *Ins. Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. R. 628; *Nichols* v. *Ins. Co.*, 176 Mo. 355, 75 S. W. 664, 62 L. R. A. 657. As to rule of construction applied to nonforfeiture statutes, see *Ins. Co.* v. *Dutcher*, 95 U. S. 269, 24 L. Ed. 410 (premium paid by note); *Drury* v. *N. Y. Life Ins. Co.*, 115 Ky. 681, 74 S. W. 663, 61 L. R. A. 714; *Carter* v. *Ins. Co.*, 127 Mass. 153 (endowment policy); *Hazen* v. *Mass. Mut. Life Ins. Co.*, 170 Mass. 254, 49 N. E. 119. Extended insurance referred to in this section is sometimes called "temporary insurance," see *Burridge* v. *N. Y. Life Ins. Co.* (Mo., Feb., 1890), 37 Ins. L. J. 449. On "paid-up insurance" no further premiums are payable.

[4] *Knapp* v. *Homeopathic Mut. L. Ins. Co.*, 117 U. S. 411, 6 S. Ct. 807, 29 L. Ed. 960; *Nielsen* v. *Prov. Sav. L. A. Soc.*, 139 Cal. 332, 73 Pac. 168; *Attorney General* v. *Continental Life Ins. Co.*, 93 N. Y. 70; *Union Cent. Life Ins. Co.* v. *Buxer*, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737; *Universal Life Ins. Co.* v. *Devore*, 88 Va. 778, 14 S. E. 532. But see Kentucky cases: *Equitable Life Assur. Soc.* v. *Bank*, 25 Ky. Law Rep. 839, 75 S. W. 275; *Washington Life Ins. Co.* v. *Miles*, 112 Ky. 743, 66 S. W. 740; *Manhattan Life Ins. Co.* v. *Patterson*, 109 Ky. 624, 60 S. W. 383, 53 L. R. A. 378, 95 Am. St. R. 393; *Mut. Life Ins. Co.* v. *Jarboe*, 102 Ky. 80, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. R. 343. As to loss of policy as an excuse for failure to surrender it to the company, see *Wilcox* v. *Society*, 173 N. Y. 50, 65 N. E. 857, 93 Am. St. R. 579. Time limit for the demand may be waived by the insurer, *Lindenthal* v. *Germania Life Ins. Co.*, 174 N. Y. 76, 66 N. E. 629; *Neilsen* v. *Prov. S. Life A. Soc.*, 139 Cal. 332, 73 Pac. 168, 96 Am. St. R. 146.

xercise the options specified, the insurance must be continued for s benefit as provided for.[1]

The Kentucky court, however, has repeatedly held that though policy provide that surrender of policy and demand for a paid-up olicy must be made within six months of lapse, nevertheless time not of the essence of the contract and that the demand may be ade within a reasonable time.[2]

Sometimes the certificate or policy provides that, in case of lapse r nonpayment of premium, the delinquent may be reinstated on yment of arrears and on furnishing satisfactory proof of good alth. On complying with the conditions named, the applicant is titled to reinstatement.[3] If, however, reinstatement is, by the ms of the policy, made subject to the approval of certain officers, eir duty is discretionary rather than ministerial, and if, in refusing application for reinstatement, their action is not fraudulent or rely arbitrary, the courts cannot interfere.[4]

§ 362. When Premium is a Debt Collectible by Company.—The neral rule applicable to all branches of insurance is, that in the sence of express provision to the contrary, the premium or comnsation of the company becomes due and collectible as soon as e policy is delivered;[5] but the usual provisions of the life policy d the custom of the business relating to payment of first and bsequent annual premiums differ widely from the corresponding ms of the fire and marine policies and the practice of underiters in issuing them. It is the regular thing in this country for e fire or marine insurer to issue his policy without exacting preyment of the premium, and no clause of the usual policy pro-

N. Y. Ins. L. § 101.

Washington L. Ins. Co. v. *Glover* ., 1904), 78 S. W. 146.

Lovick v. *Life Assn.*, 110 N. C. 14 S. E. 506; *Wichman* v. *Met. Ins. Co.*, 120 Mo. App. 51, 96 V. 695.

Butler v. *Grand Lodge*, 146 Cal. ; *Brun* v. *Supreme Council*, 15 Col. . 538; *McLaughlin* v. *Supreme ncil*, 184 Mass. 298; *Lane* v. *Fi-y Mut. Life Ins. Co.* (N. C., 1906), S. E. 854; *Harrington* v. *Keystone n.*, 190 Pa. St. 77 ("conceding, for purpose of argument, that her apation was in time, and that she plied or was ready and willing fully comply with all the terms and conditions of the by-laws above quoted, it does not follow that the committee was bound to reinstate her to membership in the association. While the by-laws empowered them to grant her request, they were not bound nor could they be compelled to do so").

[5] *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, 23 S. Ct. 126 ("payment of the premium can be exacted simultaneously with the delivery of the policy"); *Schimp* v. *Ins. Co.*, 124 Ill. 354, 16 N. E. 229 (entire premium due as soon as risk attaches); *Albert* v. *Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. R. 693 (whole annual premium earned as soon as risk attaches though payable quarterly).

hibits this; but as soon as the policy is delivered the premium for the whole term, whether one, three, or five years, or other period, becomes a debt. This debt for premium of fire insurance is not, however, very frequently made the subject of litigation, since, by promptly invoking the aid of the cancellation clause, the underwriter is enabled to relieve himself from further responsibility before the earned portion of the premium has assumed serious proportions. But in the case of the ordinary life policy, the liability of the company does not attach at all, and no compensation is earned, until the first premium is paid, or until note, or credit, or other substitute, is accepted in its stead. Under such a policy the only result of nonpayment of the first premium is that the contract is not closed.[1]

In like manner when the second premium becomes payable under the regular life policy, if the insured makes default in its payment the insurance terminates *ipso facto*, and no premium is earned or can be recovered by the company thereafter.[2] Upon nonpayment of the premium in such a case the insurance ceases, and the insured on his part has no further claim upon the company except what is conferred by the nonforfeiture clause;[3] but if in place of a present cash payment the company gives credit in any form, then, as soon as the risk attaches, the compensation or premium for the entire year becomes a debt.[4]

Premium notes and assessments are frequently the subject of suit brought at the instance of life insurance companies, and assessment companies generally.

§ 363. **Assessments.**—In mutual associations and beneficiary societies the premiums are often paid in the form of assessments, and it is in order on the happening of a death to call for an assessment with which to meet it, nonpayment of which *ipso facto* usually occasions suspension or forfeiture of all rights on the part of the insured member.[5]

[1] *Northwestern Mut. Life Ins. Co.* v. *Elliott*, 5 Fed. 225; *Cravens* v. *N. Y. Life Ins. Co.*, 148 Mo. 583, 599, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. R. 628.

[2] *Lehman* v. *Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648; *Clark* v. *Schromeyer*, 23 Ind. App. 565, 55 N. E. 785.

[3] *Goodwin* v. *Ins. Co.*, 73 N. Y. 480. Whether the contract theoretically is regarded as an arrangement renewable from year to year during life as in *Worthington* v. *Ins. Co.*, 41 Conn. 372, 19 Am. Rep. 495, or as an arrangement for life conditioned upon the payment of each annual premium as in *N. Y. Life Ins. Co.* v. *Statham*, 93 U. S. 24, 23 L. Ed. 789, the practical result is as stated in the text. So held in *People* v. *Security Life Ins. Co.*, 78 N. Y. 114, 34 Am. Rep. 522 (referring to both the preceding cases).

[4] *Albert* v. *Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. R. 693.

[5] *Butler* v. *Grand Lodge*, 146 Cal. 172, 79 Pac. 861; *Delaney* v. *Kelly*, 103 App. Div. (N. Y.) 412, 92 N. Y. Supp.

Such assessments are practically deferred premiums, levied upon members to meet losses of others occurring during the term of membership, and based, not upon estimated laws of average, but rather upon an amount of ascertained losses.[1] They are a part of the consideration payable by the member to the association in return for the benefit of insurance actually enjoyed by him, the balance of pecuniary consideration often consisting of small fees and dues or stated assessments for expenses. Therefore, by reason and by the great weight of authority, when properly levied, assessments constitute a collectible debt in favor of the association, regardless of whether the member has expressly promised to pay them or whether their nonpayment occasions forfeiture of his rights and insurance.[2]

In most instances an express promise to pay assessments can be deduced either from the statutes, by-laws, application, or certificate applicable to the case.[3] Where, however, no express undertaking by the member to pay assessments can be found, several courts and several standard text-writers have concluded that if forfeiture is prescribed as a penalty for nonpayment of assessments no other result can be inferred; and that, therefore, the association cannot collect the assessment from the delinquent member.[4] But the difficulty with these decisions is that they allow to the defaulting member his own insurance for a period without exacting in return the proper consideration; and their authority is weakened by the course of reasoning adopted in the opinions rendered in their support. For in these, the conclusion seems to be in substance based upon the two proposi-

021; *McNeil* v. *So. Tier Mas. R. Assn.*, 40 App. Div. 581, 58 N. Y. Supp. 119; *Sovereign Camp* v. *Hicks* (Tex. Civ. App., 1904), 84 S. W. 425; *Sterling* v. *Head Camp*, 28 Utah, 505, 80 Pac. 375. Examining physician has no authority to receive payment, *Teeter* v. *United Life Ins. Assoc.*, 159 N. Y. 411, 54 N. E. 72. But payment to wife of secretary was held good by custom, *Anderson* v. *S. C. O. of Chosen Friends*, 135 N. Y. 107, 31 N. E. 1092.

[1] *Supreme Commandery* v. *Ainsworth*, 71 Ala. 436, 443.

[2] *Calkins* v. *Angell*, 123 Mich. 77, 81 N. W. 977; *Ellerbe* v. *Barney*, 119 Mo. 332, 25 S. W. 384, 23 L. R. A. 435; *Re Globe Mut. Benefit Assn.*, 63 Hun, 263, 17 N. Y. Supp. 852, aff'd 135 N. Y. 280, 32 N. E. 122; *Gray* v. *Daly*, 40 App. Div. 41, 57 N. Y. Supp. 527; *Whipple* v. *Ins. Co.*, 20 R. I. 260, 38 Atl. 498. And see *Iowa Life Ins. Co* v. *Lewis*, 187 U. S. 335, 23 S. Ct. 126 (if liability of company attaches reciprocal obligation to pay for it is incurred).

[3] *Gray* v. *Daly*, 40 App. Div. 41, 57 N. Y. Supp. 527; *McDonald* v. *Ross Lewin*, 29 Hun (N. Y.), 87; *Baker* v. *N. Y. State Mut. Ben. Assn.*, 9 N. Y. St. Rep. 653; *New Era Life Assn.* v. *Rossiter*, 132 Pa. St. 314, 19 Atl. 140; *Dettratt* v. *Kestner*, 147 Pa. St. 566, 23 Atl. 889; *Fulton* v. *Stevens*, 99 Wis. 307, 74 N. W. 803.

[4] *Lehman* v. *Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648; *Covenant Mut. L. Assn.* v. *Kentner*, 188 Ill. 431, 58 N. E. 966; *Chicago Mut. L. Indem. Assoc.* v. *Hunt*, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549; *Gibson* v. *Megrew*, 154 Ind. 273, 56 N. E. 674, 48 L. R. A. 362; *Re Protection Life Ins. Co.*, 9 Biss. (U. S.) 188.

tions that the ordinary life policy is unilateral and that the assessment policy should be governed by similar doctrines.

It is true that the regular life policy is in a sense unilateral. The instrument is executed by only one party. It is also true, that where, at the inception of the contract, the assured has paid the entire premium for a year's insurance there is nothing more for him to do during the year.[1] If, on the other hand, the applicant for insurance has failed to make advance payment of the first premium, the regular policy does not attach to the risk. There is no contract. The applicant pays nothing and gets nothing. The insurance company cannot sue for the premium, since no part of it has been earned.[2] These well-established principles, however, furnish no sanction for a rule relieving the insured member in an assessment company from liability for assessment for deferred premium where the liability of the company has already attached, and where the member has been actually receiving the protection of his certificate for at least a portion of the corresponding period.[3]

§ 364. Assessments Must be Lawfully and Properly Levied.—The association can be compelled in equity to levy a mortuary assessment pursuant to its laws, or upon its failure to do so the member may sue for damages.[4] The officials lawfully entrusted with this power cannot delegate it to others.[5] Proper proofs of death must

[1] *N. Y. Life Ins. Co.* v. *Statham*, 93 U. S. 24, 23 L. Ed. 789; *Goodwin* v. *Ins. Co.*, 73 N. Y. 480.

[2] *Cravens* v. *N. Y. Life Ins. Co.*, 148 Mo. 583, 599, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. R. 628; *Northwestern Mut. L. Ins. Co.* v. *Elliott*, 5 Fed. 225.

[3] If any assessment is lawfully made in Massachusetts by a corporation of that state on a contract made there with a New York citizen, suit may be brought in New York to collect it though the company has not qualified to transact business under the New York statutes, *Western Mass. F. Ins. Co.* v. *Hilton*, 42 App. Div. (N. Y.) 52, 58 N. Y. Supp. 996; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 17 S. Ct. 427.

[4] *Lawler* v. *Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113 (there is implied a promise to levy to meet losses); *Covenant Mut. Ben. Assn.* v. *Sears*, 114 Ill. 108, 29 N. E. 480; *O'Brien* v. *Home Ben. Soc.*, 117 N. Y. 310, 22 N. E. 954; *People* v. *Masonic Guild*, 126 N. Y. 615, 27 N. E. 1037; *Jackson* v. *Northwestern Mut. R. Assn.*, 73 Wis. 507, 41 N. W. 708, 2 L. R. A. 786. An assessment is a necessary condition to an action on a premium note, *Savage* v. *Medbury*, 19 N. Y. 32. As to measure of damages where insurer fails to levy assessment, see *Lawler* v. *Murphy*, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113; *Keyser* v. *Mut. R. Fund Assoc.*, 60 App. Div. (N. Y.) 297, 70 N. Y. Supp. 32 (cost of putting risk in sound company is a rule of damages). Assessments how levied in case of the insolvency of the insurer, *Langworthy* v. *Flouring Mills Co.*, 77 Minn. 256, 79 N. W. 974 (may include expenses of winding up); *Whitaker* v. *Meley*, 61 N. J. L. 1, 38 Atl. 840; *Wood* v. *Standard Mut. L. Stock Ins. Co.*, 154 Pa. St. 157, 26 Atl. 103 (reasonable discretion as to amount); *Capital City Mut. Fire Ins. Co.* v. *Boggs*, 172 Pa. St. 91, 33 Atl. 349 (by receiver); *Life Ins. Co.* v. *Fulton*, 101 Wis. 1, 76 N. W. 775. And see *Burdon* v. *Mass. Safety Fund Assn.*, 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146; *Commonwealth Mut. F. Ins. Co.* v. *Wood*, 171 Mass. 484, 51 N. E. 19.

[5] *Garretson* v. *Eq. Mut. L., etc., Assn.*,

irst be received,[1] and the requirements of the charter and by-laws must be observed.[2] The assessment upon a member must not include losses occurring before he became a member;[3] but may include losses occurring during membership, although assessment therefor is not levied until membership has ceased.[4] Illegal assessments need not be paid to avoid forfeiture.[5] It is said that the burden is upon the association to show the legality, regularity, and necessity of the assessment.[6] The member must not be assessed for more than his just proportion of the loss;[7] nor for future prospective losses;[8] unless the statute or by-laws provide for it.[9]

While a reasonable discretion must be left to the directors or other officials levying the assessment, because of contingencies, and in view of the fact that some members may default,[10] yet an assessment or twice the indebtedness was held void.[11]

3 Iowa, 402, 61 N. W. 952; *Fee* v. *Nat. Masonic Acc. Assn.*, 110 Iowa, 71, 81 N. W. 483; *Passenger Conductors' L. I. Co.* v. *Birnbaum*, 116 Pa. St. 565, 11 Atl. 378; *Miles* v. *Mut. F. Assn.*, 108 Wis. 421, 84 N. W. 59.

[1] *Coyle* v. *Ken. Grangers' Mut. Ben. Soc.*, 8 Ky. L. R. 604, 2 S. W. 676.

[2] *Grand Lodge* v. *Bagley*, 164 Ill. 40, 45 N. E. 538; *Mee* v. *Assoc.*, 69 Minn. 210, 72 N. W. 74; *Chapple* v. *Sovereign Camp*, 64 Neb. 55, 89 N. W. 23.

[3] *Capital City Mut. Fire Ins. Co.* v. *Boggs*, 172 Pa. St. 91, 33 Atl. 349.

[4] *Prov. Mut. R. Assn.* v. *Pelissier*, 9 N. H. 606, 45 Atl. 562; *Ionia, etc., Mut. Fire Ins. Co.* v. *Ionia Judge*, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481; *Peake* v. *Yule*, 123 Mich. 672, 82 N. W. 514; but see *Gray* v. *Daly*, 40 App. Div. 41, 57 N. Y. Supp. 527; *Bendel* v. *Revest. F. Assn.*, 2 Pa. Dist. 116; *Fulton* v. *Stevens*, 99 Wis. 307, N. W. 803.

[5] *Benjamin* v. *Mut. R. Fund Assn.*, 6 Cal. 34, 79 Pac. 517.

[6] *Am. Mut. Aid Soc.* v. *Helburn*, 85 Ky. 1, 2 S. W. 495, 7 Am. St. R. 571; *Shea* v. *Mass. Ben. Assn.*, 160 Mass. 9, 35 N. E. 855, 39 Am. St. R. 475; *Pacific Mut. Ins. Co.* v. *Guse*, 49 Mo. 9, 8 Am. Rep. 132 (must show that losses have actually occurred); *Sus. Mut. Fire Ins. Co.* v. *Gackenbach*, 115 Pa. St. 492, 9 Atl. 90 (must follow established rule of levy); *Hartford Ins. Co.* v. *Hyde*, 101 Tenn. 396, 48 S. W. 48 (company must prove regularity). But as to *prima facie* regularity, see *Demings* v. *Supreme Lodge*, 131 N. Y. 522, 30 N. E. 572; *Raegener* v. *Willard*, 44 App. Div. 41, 60 N. Y. Supp. 478; *Anderson* v. *Association*, 171 Ill. 40, 49 N. E. 205. What relief can be had where company levies too large an assessment, *People's Mut. F. Ins. Co.* v. *Groff*, 154 Pa. St. 200, 26 Atl. 63.

[7] *U. S. Mut. Acc. Assn.* v. *Mueller*, 151 Ill. 254, 37 N. E. 882 (incorrect amount named in notice); *Ebert* v. *Assoc.*, 81 Minn. 116, 83 N. W. 506 (must not discriminate between classes, though rate may be changed); *Sands* v. *Graves*, 58 N. Y. 94; *Pratt* v. *Dwelling H. Mut. Co.*, 7 App. Div. 544, 40 N. Y. Supp. 179; *Bangs* v. *Gray*, 12 N. Y. 477. There must be no discrimination, *Shaughnessey* v. *Ins. Co.*, 21 Barb. (N. Y.) 605; *Kœhler* v. *Beeber*, 122 Pa. St. 291, 16 Atl. 354.

[8] *Vandalia Mut. Co. Fire Ins. Co.* v. *Beasley*, 84 Ill. App. 138.

[9] A member is liable for only one assessment to meet a death claim, *People* v. *Assn.*, 126 N. Y. 615, 27 N. E. 1037. A member of an insolvent mutual assessment company cannot set off the company's indebtedness to him against an assessment levied upon him to pay losses, *Stone* v. *N. J. & H. R. R. & Ferry Co.* (N. J., 1907), 66 Atl. 1072.

[10] *Ionia, etc., Mut. Fire Ins. Co.* v. *Ionia Judge*, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481; *Seamans* v. *Millers' Mut. Ins. Co.*, 90 Wis. 490, 63 N. W. 1059.

[11] *Lawler* v. *Murphy*, 58 Conn. 294,

Where an assessment company or association has become liable to make payment upon a certificate, and refuses to levy an assessment to meet the claim, the claimant may bring action at law without first suing in equity to compel the levy of an assessment.[1]

§ 365. **Power to Change Rate of Assessments.**—The nature of the contract in an assessment association is such as naturally to call for a varying rate of assessment. A power to change the rate equitably from time to time will be inferred [2] unless the plain meaning of the contract prohibits; [3] but such change must not be unreasonable, or repugnant to vested rights.[4]

The member often expressly agrees to be bound by future by-laws and regulations by which, in that event, the rate may be changed pursuant to the charter.[5] A change even from assessments to regular premiums may not be in violation of the Constitution of the United States.[6]

§ 366. **Notice of Assessment to Insured.**—Until notice of the amount of a mortuary assessment is duly given to the member, no obligation to pay is imposed upon him.[7] A subsequent by-law,

20 Atl. 457, 8 L. R. A. 113; *Thompson* v. *Piedmont Mut. Ins. Co.* (S. C., 1907), 58 S. E. 341; *Batson* v. *S. C. Mut. Ins. Co.* (S. C., 1907), 58 S. E. 936; *Jackson* v. *Northwestern Mut. Relief Ass.*, 73 Wis. 507, 41 N. W. 708, 2 L. R. A. 786.

[1] *Rosenberger* v. *Ins. Co.*, 87 Pa. St. 207; and see *York Co. Mut. Fire Ins. Co.* v. *Bowden*, 57 Me. 286. So if members liable are knowingly omitted, *Swing* v. *Lumber Co.*, 62 Minn. 169, 64 N. W. 97. Slight errors in amount will not invalidate the assessment, *Thropp* v. *Ins. Co.*, 125 Pa. St. 427, 17 Atl. 473, 11 Am. St. R. 909; *Wardle* v. *Townsend*, 75 Mich. 385, 42 N. W. 956, 4 L. R. A. 511. But an unreasonably excessive amount will avoid the assessment, *People's Eq. Mut. F. Ins. Co.* v. *Babbitt*, 7 Allen (Mass.), 235; *Traders' Mut. F. Ins. Co.* v. *Stone*, 9 Allen (Mass.), 483; *Pencille* v. *State Farmers' Mut. Hail Ins. Co.*, 74 Minn. 67, 76 N. W. 1026, 73 Am. St. R. 326.

[2] *Ebert* v. *Mut. R. Fund L. Assn.*, 81 Minn. 116, 83 N. W. 506; *Messer* v. *Grand Lodge*, 180 Mass. 321, 62 N. E. 252 (adoption of new by-law, valid). But see *Miller* v. *Tuttle* (Kan., 1903), 73 Pac. 88 (void).

[3] *Hogan* v. *Pac. Endowment League*, 99 Cal. 248, 33 Pac. 924; *Covenant Mut. L. Assn.* v. *Tuttle*, 87 Ill. App. 309; *Covenant Mut. L. Assn.* v. *Kentner*, 188 Ill. 431, 58 N. E. 966.

[4] *Strauss* v. *Mut. R. Fund L. Assoc.*, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. R. 699. *Contra, Gaut* v. *Mut. R. Fund L. Assoc.*, 121 Fed. 403.

[5] *Fullenwider* v. *Supreme Council*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. R. 239; *Miller* v. *National Council*, 69 Kan. 234, 76 Pac. 830; *Haydel* v. *Mut. R. F. L. Assn.*, 98 Fed. 200, 104 Fed. 718; *Barbot* v. *Mut. R. F. Assn.*, 100 Ga. 681, 28 S. E. 498; *Crosby* v. *Mut. R. F. Assn.*, 78 N. Y. Supp. 237, 38 Misc. 708; *Seymour* v. *Mut. R. F. Assn.*, 35 N. Y. Supp. 793, 14 Misc. 151; *Mut. R. F. Assn.* v. *Taylor*, 99 Va. 208, 37 S. E. 854; *Sowles* v. *Mut. R. F. Assn.*, 71 Vt. 466, 45 Atl. 1045.

[6] *Wright* v. *Minnesota Mut. L. Ins. Co.*, 193 U. S. 657, 24 S. Ct. 549.

[7] *Wright* v. *Supreme Commandery*, 87 Ga. 426, 13 S. E. 564, 14 L. R. A. 283; *Cronin* v. *Supreme Council*, 199 Ill. 228, 65 N. E. 323, 93 Am. St. R. 127; *Courtney* v. *Assoc.* (Iowa), 53 N. W. 238. But notice of stated dues

rescinding a provision for such notice before forfeiture, would be unreasonable and inoperative.[1]

If the testimony admits of doubt the jury determines whether the notice has been received. If not received there is no forfeiture,[2] unless the contract provides that sending or mailing of the notice is sufficient service.[3]

§ 367. **Suicide.**—*Exemption from liability for suicide.*

Frequently in life policies, and almost invariably in accident policies, there is a provision that the company shall not be liable in case the injuries named are self-inflicted, or, as it is often worded, if the insured dies "by suicide," or "by his own hand or act," or "by self-destruction," or "takes his own life." These have been held to be substantially equivalent forms of expression,[4] and they are valid conditions, binding upon the assured,[5] but the insurer is liable, in spite of such clauses, where death is purely accidental and not the result of an intent to commit self-destruction.[6] The rule of construction just mentioned applies, though the contract exemption from liability is worded "self-destruction, *voluntary or involun-*

need not be given, *Riddick* v. *Farmers' L. Assn.*, 132 N. C. 118, 43 S. E. 544; *Smith* v. *Bown*, 75 Hun, 231, 27 N. Y. Supp. 11. Though a "posting" of the notice may be the regulation, the member may have a right to rely upon a long-continued custom of receiving a mailed notice, *Gunther* v. *New Orleans Cotton Exch.*, 40 La. Ann. 776, 5 So. 65, 2 L. R. A. 118, 8 Am. St. R. 554. As to what is sufficient form of notice, see *Cronin* v. *Supreme Council*, 199 Ill. 228, 65 N. E. 323, *supra* (no stamp or seal); *Assn.* v. *Thompson*, 91 Ill. App. 580 (demanding payment before maturity); *Hansen* v. *Supreme Lodge*, 40 Ill. App. 216 (amount of assessment was through another channel known to member); *Bridges* v. *National Union*, 73 Minn. 486, 76 N. W. 270 (purpose was through another channel known to member). As to sufficiency of notices of assessment, see also *Sands* v. *Graves*, 58 N. Y. 94; *Bodle* v. *Chenango Mut. Ins. Co.*, 2 N. Y. 53, 59; *Bangs* v. *Duckinfield*, 18 N. Y. 592.

[1] *Thibert* v. *Supreme Lodge*, 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. R. 412.

[2] *Courtney* v. *Assn.* (Iowa), 53 N. W. 238; *Garbutt* v. *Assn.*, 84 Iowa, 293, 51 N. W. 148; *McCorkle* v. *Texas Ben. Assoc.*, 71 Tex. 149.

[3] *Modern Woodmen* v. *Tevis*, 117 Fed. 369, 54 C. C. A. 293; *Union Mut. Acc. Assoc.* v. *Miller*, 26 Ill. App. 230; *Yoe* v. *Howard, etc., Ben. Assoc.*, 63 Md. 86 (and sickness no excuse for nonpayment).

[4] *Connecticut Life Ins. Co.* v. *Akens*, 150 U. S. 468, 473, 14 S. Ct. 155, 37 L. Ed. 1148; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740; *Mutual L. Ins. Co.* v. *Wiswell*, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; *Brignac* v. *Pac. Mut. L. Ins. Co.*, 112 La., 574, 36 So. 595, 66 L. R. A. 322.

[5] *Hart* v. *Modern Woodmen of Amer.*,—60 Kan. 678, 57 Pac. 936, 72 Am. St. R. 380; *Robson* v. *United Order of Foresters*, 93 Minn. 24, 100 N. W. 381; *Van Slooten* v. *Fidelity & Cas. Co.*, 78 App. Div. 527, 79 N. Y. Supp. 608. For effect of incontestable clause, see § 378. As to by-law adopting suicide provision after issuance of certificate, see *Tisch* v. *Protected Home Circle*, 72 Ohio St. 233, 74 N. E. 188.

[6] *Knights of Golden Rule* v. *Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Equitable Life Assur. Soc.* v. *Paterson*, 41 Ga. 338, 5 Am. Rep. 535 (overdose of laudanum during intoxication); *Seitzinger* v. *Modern Woodmen*, 204 Ill. 58, 68 N. E. 478.

tary," [1] or where the phraseology is "if the insured die *by his own hand or act.*" [2] In all such cases, to relieve the company from liability it must appear that the insured killed himself by design; otherwise the main purpose of the contract would be seriously impaired.[3] The obvious intent of the insured in taking out insurance is to secure payment in the event of accidental death. It cannot, therefore, readily be presumed that he would have accepted the policy, if for self-destruction, purely accidental, there could be no recovery. The reasonable purpose of the insured must be invoked to aid in the interpretation where the company chooses the language.[4] Accordingly the company is still liable though the insured unintentionally kill himself by the act of his own hand, for instance, while using a gun or other dangerous instrument,[5] or in administering poison to himself; [6] or by the act of his own feet in falling over a precipice; since his unconscious act of killing is not to be regarded as his act at all within the fair meaning of the policy.

On the other hand, the contract of insurance being one of the highest good faith, it is obvious that if the insured take out a policy with the guilty purpose of committing suicide the contract is void *ab initio*, though it contain no suicide clause and no express reference to self-destruction.[7] So also if the beneficiaries intentionally compass the death of the insured after the policy is taken out they can recover nothing upon it,[8] and for the same reason, by the overwhelming weight of authority, both in the decisions and in the text-books, where the policy is payable to the insured or to his estate,

[1] *Knights Templar* v. *Crayton*, 209 Ill. 550, 557, 70 N. E. 1066 (accidental shooting of gun); *Penfold* v. *Universal Life Ins. Co.*, 85 N. Y. 317, 39 Am. Rep. 660 (overdose of poisonous medicine).

[2] *Brignac* v. *Pac. Mut. L. Ins. Co.*, 112 La. 574, 36 So. 595, 66 L. R. A. 322 (taking morphine without intent to kill, no defense); *Courtemanche* v. *Supreme Court*, 136 Mich. 30, 98 N. W. 749, 64 L. R. A. 668 (insured took carbolic acid to frighten his wife); *Clement* v. *Supreme Lodge*, 113 Tenn. 40, 81 S. W. 1249 (took morphine with probable knowledge of fatal result).

[3] *Mauch* v. *Supreme Tribe*, 100 App. Div. 49, 91 N. Y. Supp. 367; *Grand Legion* v. *Korneman*, 10 Kan. App. 577, 63 Pac. 292; *Moore* v. *Northwestern L. Ins. Co.*, 192 Mass. 468, 78 N. E. 488.

[4] *Phillips* v. *Louisiana Eq. Life Ins. Co.*, 26 La. Ann. 404, 21 Am. Rep. 549.

[5] *Gooding* v. *U. S. Life Ins. Co.*, 46 Ill. App. 307.

[6] *Mich. Mut. L. Ins. Co.* v. *Naugle*, 130 Ind. 79, 29 N. E. 393; *Mut. Life Ins. Co.* v. *Wiswell*, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258.

[7] *Parker* v. *Des Moines Life Assoc.*, 108 Iowa, 117, 78 N. W. 826; *Smith* v. *National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616.

[8] *N. Y. Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 6 S. Ct. 877; *Prince of Wales, etc., Assoc.* v. *Palmer*, 25 Beav. 605; *Cleaver* v. *Mut. Reserve Fund L. Assoc.* (1892), 1 Q. B. 147 (Mrs. Maybrick, beneficiary, was convicted of murdering her husband). In such cases there is a resulting trust in favor of the estate of the insured, the donor, *Cleaver* v. *Mut. Res. Fund L. Assoc., supra.; Supreme Lodge* v. *Menkhausen*, 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. R. 239;

though there be no express exemption from liability for suicide, ntentional self-destruction by the insured, if sane, vitiates the con- ract.[1]

Thus in an interesting case in the United States Supreme Court, lthough the insured, one Runk, had warranted and agreed in the pplication, "I will not die by my own act, whether sane or insane," tc., nevertheless as the company had omitted to attach the appli- ation to the policy as provided for by the Pennsylvania statute the varranty could not be considered as part of the contract or admitted n evidence, and therefore the question arose as though the contract ad been altogether silent on the subject of suicide. There was no nding by the jury that the insured had taken out the policy in uit with the purpose of committing suicide. Their only finding was hat Runk was sane when he committed the act. He had misap- ropriated large sums of money belonging to his friends and relatives, nd believed that out of the half million dollars of insurance on his fe which he was carrying his obligations would be paid. The court eld that the death of the assured, if directly and intentionally aused by himself, when in sound mind, was not a risk intended to e covered, or which could legally have been covered by the policies n suit.[2]

chmidt v. *Northern Life Assn.*, 112 wa, 41, 83 N. W. 800, 51 L. R. A. 141, 4 Am. St. R. 323; *N. Y. Life Ins. Co.* . *Davis*, 96 Va. 737, 32 S. E. 475, 44 . R. A. 305.

[1] *Ritter* v. *Mut. Life Ins. Co.*, 169 . S. 139, 18 S. Ct. 300, 42 L. Ed. 693. he conclusion is put upon two grounds, od faith and public policy. An greement to insure intentional self- struction would be void, *Knights emplar* v. *Jarman*, 187 U. S. 197, 23 Ct. 108, approves *Ritter case*; *Mut. ife Ins. Co.* v. *Kelly*, 114 Fed. 268; *upreme Commandery* v. *Ainsworth*, 71 la. 436, 46 Am. Rep. 332; *Supreme odge* v. *Kutscher*, 72 Ill. App. 462; *ooney* v. *Ancient Order*, 114 Ky. 950, 2 S. W. 288; *Hatch* v. *Mut. Life Ins.* ., 120 Mass. 550, 552; *Shipman* v. *rotected Home Circle*, 174 N. Y. 398, N. E. 83, 63 L. R. A. 347; *Hall* v. *ut. Res. Fund L. Assoc.*, 19 Pa. uper. Ct. 31 (1902); *Hartman* v. *Key- one Ins. Co.*, 21 Pa. St. 466; *Cleaver* *Mut. Res. Fund L. Assoc.* (1892), Q. B. 147; *Amicable Soc.* v. *Bolland*, Bligh (N. S.), 194, 211; *Moore* v. *oolsey*, 4 Ell. & Bl. 243, 254. And see *Patterson* v. *National Premium Mut. L. I. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. R. 899 (in which the court concludes that the doctrine of the *Ritter case* on the merits "is well-nigh irresistible").

[2] *Ritter* v. *Mut. Life Ins. Co.*, 169 U. S. 139, 18 S. Ct. 300, 42 L. Ed. 693. The court held as follows: "If the assured understood what he was doing, and the consequences of his act or acts, to himself as well as to others—in other words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would, then he is to be regarded as sane. In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the willful act of the assured himself in

Opposed to this rule will be found two or three text-writers, supported by a few *dicta* from opinions of judges in cases where the point was not involved.[1] And the Nebraska court states the general principle of its preference broadly in the following terms: "Suicide will not defeat a recovery upon a contract of life insurance or a mutual benefit certificate, not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms.[2]

If, however, the interest in the policy is vested in third parties as beneficiaries, and the contract was entered into in good faith, the subsequent guilty act of self-destruction by the insured will not vitiate it to the prejudice of the beneficiaries, in the absence of a suicide clause.[3] It is indeed a serious matter to allow an insurance company to retain premiums of a lifetime without making any return, and as between the innocent beneficiaries and the company the contract may well be enforced in such a case in the absence of a suicide clause;[4] but apparently upon grounds of public policy the

setting fire to it, not for the purpose of avoiding a peril of a worse kind but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment."

[1] *Supreme Conclave* v. *Miles*, 92 Md. 613, 628, 48 Atl. 845, 84 Am. St. R. 528; *Robson* v. *United Order*, 93 Minn. 24, 100 N. W. 381; *Morton* v. *Supreme Council*, 100 Mo. App. 76, 73 S. W. 259. Opinion of Judge Collins in *Campbell* v. *Supreme Conclave*, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576 (whether majority of court agreed with Judge Collins or Judge Garretson does not appear).

[2] *Lange* v. *Royal Highlanders* (Neb., 1907), 110 N. W. 1110.

[3] *Supreme Council* v. *Pels*, 110 Ill. App. 409, aff'd 209 Ill. 33, 70 N. E. 697; *Parker* v. *Des Moines Life Assn.*, 108 Iowa, 117, 78 N. W. 826; *Seiler* v. *Economic L. Assn.*, 105 Iowa, 87, 43 L. R. A. 537, 74 N. W. 941; *Supreme Conclave I. O. of H.* v. *Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. R. 528; *Robson* v. *United Order*, 93 Minn. 24, 100 N. W. 381; *Morton* v. *Supreme Council*, 100 Mo. App. 76, 73 S. W. 259; *Campbell* v. *Supreme Conclave*, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576; *Supreme Lodge* v. *Underwood* (Neb.), 92 N. W. 1051; *Darrow* v. *Family Fund Society*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. R. 430; *Fitch* v. *American Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Morris* v. *State Mut. L. Assur. Co.*, 183 Pa. St. 563, 39 Atl. 52, 41 W. N. C. 353; *Patterson* v. *Natural Premium Mut. L. Ins. Co.*, 100 Wis. 118, 42 L. R. A. 253, 75 N. W 980, 69 Am. St. R. 899.

[4] *Campbell* v. *Supreme Conclave*, 66

deral courts extend the implied ground of exception or forfeiture ven to innocent beneficiaries with vested interests, although there e no suicide clause in the policy.[1] While other courts, applying a iterion, not altogether satisfactory, find in the act of suicide, an nplied ground for forfeiting the rights of beneficiaries, provided ly the contract be such that the power of making new appointents is reserved to the insured.[2] As before shown such power is served in the case of most contracts of insurance in beneficiary ssociations.[3] The majority of the courts, however, make no disnction in this regard between beneficiaries designated in the ordiary life policy and beneficiaries designated in the contract of the utual beneficiary association or fraternal society.[4] And the view the majority is doubtless supported by the better reason. Conlerations based upon good faith towards the company and the elfare of the public would seem to apply in very much the same gree to the one class of beneficiaries as to the other. Therere where the company has inserted no suicide clause in its contract e rights of both classes of innocent beneficiaries may well be left ndisturbed by the subsequent suicidal act of the insured over which ey had no control.[5]

The foregoing discussion leads up to the recognized rule, that in

. J. L. 274, and other cases *supra;* ore v. *Woolsey*, 28 Eng. L. & Eq. 5.

Mutual Life Ins. Co. v. *Kelly*, 114 l. 268, 275; *Hopkins* v. *Northtern Life Assur. Co.*, 94 Fed. 729, d 99 Fed. 199, 40 C. C. A. 1. And *Ritter case*, *supra*, 169 U. S. 139, S. Ct. 300.

Mooney v. *Ancient Order*, 114 Ky. 0, 72 S. W. 288; *Shipman* v. *Proted Home Circle*, 174 N. Y. 398, 67 E. 83, 63 L. R. A. 347; *Weber* v. *preme Tent*, 172 N. Y. 490, 65 N. E. 3, 92 Am. St. R. 753. So also the ssachusetts court seems to regard cide by a sane man as a risk which ot covered by the policy, unless the ointment of the beneficiary is irrevble, *Davis* v. *Supreme Council* ass., 1907), 81 N. E. 295.

See § 68, *supra*.

Supreme Conclave v. *Miles*, 92 Md. , 48 Atl. 845, 84 Am. St. R. 528; *son* v. *United Order*, 93 Minn. 24, N. W. 381; *Campbell* v. *Supreme nclave*, 66 N. J. L. 274, 49 Atl. 550, *rrow* v. *Family Fund Society*, 116 Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. R. 430 (without dissent, but overruled by *Shipman case*, *supra*); *Patterson* v. *National Prem. Mut. Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. R. 899 (approving the *Darrow case*). See list of authorities, 4 Cooley, Ins., 3226, 3227. And *Rawson* v. *Mil. Mut. L. Ins. Co.*, 115 Wis. 641, 92 N. W. 378.

[5] *Supreme Conclave* v. *Miles*, 92 Md. 613, 628, 48 Atl. 845, 84 Am. St. R. 528; *Campbell* v. *Supreme Conclave*, 66 N. J. L. 274, 49 Atl. 550; *Darrow* v. *Family Fund Society*, 116 N. Y. 537, 22 N. E. 1093, *supra*. A contingent vesting of rights in favor of a beneficiary and against the insured, the donor, is one thing. A vesting of rights as against the insurance company, where the insured has made no new appointment of beneficiaries, is another thing, *Patterson* v. *National Premium Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. R. 899 (if no new appointment has been made the rights of the beneficiaries are vested).

the absence of the words "sane or insane," in the suicide clause, self-killing by a man while *non compos mentis* will not forfeit his rights, or the rights of other beneficiaries named in his policy, provided the insurance was taken out in good faith,[1] since in that event an intelligent conscious intent, which alone constitutes the essence of the offense, is lacking.[2] In other words, where the contract exemption from liability simply relates to self-destruction or death from suicide, without the additional phrase "sane or insane," the exception will not avail the insurers as a defense, if it appear that the insured was devoid of reason when he took his life, this conclusion being put upon the ground that an act beyond the conscious control of the insured is not to be regarded as his act at all but rather a misfortune befalling him.[3]

By the New York standard form of life insurance any restriction of liability on the part of the company for suicide is applicable only to suicide committed within one year after the issuance of the policy.[4]

§ 368. Degree of Insanity Required to Save the Insurance.—As to the degree of insanity which will operate as an excuse to the insured to prevent the application of a suicide clause not containing the words "sane or insane," two rules in general have been laid down. The English, New York, and Massachusetts courts, and others, have adopted the view that to relieve from the suicide clause on the ground of insanity, the insured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some uncontrollable insane impulse. These courts hold that in order to escape forfeiture, it is not sufficient to show that he was unconscious merely of the *moral obliquity* of the act.[5]

But the United States Supreme Court and many others following its authority have with greater liberality to the assured defined the

[1] *Mut. Life Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. Ed. 236.

[2] *Shipman* v. *Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347. Similarly if insane beneficiary kill the insured the policy is not voided, *Holdom* v. *Ancient Order*, 159 Ill. 619, 43 N. E. 772.

[3] *Conn. Mut. Life Ins. Co.* v. *Akens*, 150 U. S. 468, 14 S. Ct. 155, 37 L. Ed. 1148. The proper meaning of the suicide clause, where the words "sane or insane" do not form a part of it is traced historically at length in May on Ins., ch. XV.

[4] See § 357, *supra*.

[5] *Borradaile* v. *Hunter*, 5 M. & G. 639, 44 E. C. L. 335; *Cooper* v. *Mass. Mut. Life Ins. Co.*, 102 Mass. 227, 3 Am. Rep. 451; *Van Zandt* v. *Mutual Benefit Life Ins. Co.*, 55 N. Y. 169, 14 Am. Rep. 215; *Weed* v. *Mut. Res. Ins. Co.*, 70 N. Y. 561; *Newton* v. *Mut. Ben. Life Ins. Co.*, 76 N. Y. 426, 32 Am. Rep. 335; *Nimick* v. *Ins. Co.*, 3 Brewst. (Pa.) 502; *Hathaway* v. *National Life Ins. Co.*, 48 Vt. 335; and see *Equitable Life Assur. Soc.* v. *Paterson*, 41 Ga. 338, 5 Am. Rep. 535.

rule as follows: "This court on full consideration of the conflicting authorities upon that subject has repeatedly and uniformly held that such a provision, not containing the words 'sane or insane,' does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect." [1] The distinction between these two rules of law is perhaps so metaphysical as to make it of somewhat questionable moment in many instances whether the jury is charged in terms of the one or in terms of the other; [2] but the Federal Supreme Court considers its rule as sounder in principle as well as simpler in application.[3]

§ 369. Suicide and Self-destruction, Sane or Insane, Excepted.—To extend for their benefit the operation of the restriction, the insurers have generally added to the suicide clause the words "sane or insane," and with this addition the exemption covers all cases of intentional self-destruction.[4] Under such an exception the insurers are relieved from responsibility unless the death of the insured is purely accidental.[5] And it matters not whether the policy is pay-

[1] *Acc. Ins. Co.* v. *Crandal*, 120 U. S. 531; *Bigelow* v. *Berkshire L. Ins. Co.*, 93 U. S. 284, 19 Am. Rep. 628, note; *Ritter* v. *Ins. Co.*, 169 U. S. 139, 18 S. Ct. 300, 42 L. Ed. 693; *Mich. Mut. Life Ins. Co.* v. *Naugle*, 130 Ind. 79, 29 N. E. 393; *Royal Arcanum* v. *Pels*, 209 Ill. 33, 70 N. E. 697; *Royal Circle* v. *Achterrath*, 204 Ill. 549, 558, 68 N. E. 492, 33 Ins. L. J. 20, 58 Cent. L. J. 128, 63 L. R. A. 452, 98 Am. St. R. 224; *Grand Lodge I. O. of M. A.* v. *Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. R. 123; *Hart* v. *Modern Woodmen of Amer.*, 60 Kan. 678, 57 Pac. 936, 72 Am. St. R. 380; *Mut. Ben. Life Ins. Co.* v. *Daviess*, 87 Ky. 541, 9 S. W. 312; *Knickerbocker Life Ins. Co.* v. *Peters*, 42 Md. 414; *Blackstone* v. *Ins. Co.*, 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; *Knapp* v. *Order of Pendo*, 36 Wash. 601, 79 Pac. 209. Mr. Justice Hunt says: "If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or desire to escape from the ills of life intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable," *Mut. Life Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. Ed. 236.

[2] *Spruill* v. *Ins. Co.*, 120 N. C. 141, 144, 29 S. E. 39.

[3] *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121, 3 S. Ct. 99, 27 L. Ed. 878.

[4] *Bigelow* v. *Ins. Co.*, 93 U. S. 284 23 L. Ed. 918, in which the court says p. 287, "nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity."

[5] *Moore* v. *Ins. Co.*, 192 Mass. 468, 78 N. E. 488 ("it makes no difference

able to the insured or to his estate or to other designated beneficiaries, as, for instance, creditors. The voluntary suicidal act avoids the policy altogether.[1] But to produce forfeiture of such a policy there must be something more than a mere accident;[2] there must be an intent, though not of necessity a rational intent, to commit the act of self-destruction.[3] Such intent would seem logically to involve at least some consciousness of the physical nature or consequences of the act and this seems to be the prevailing and better doctrine.[4]

Other cases seem to draw the distinction that there can be no recovery where the insured, while insane, commits the act of killing himself, though such act be done unconsciously and without knowledge even of its physical nature and consequence.[5] But of this last rule it is by no means easy to make a satisfactory application. If, for example, a sane man drinks a fatal cup of poison when not knowing that it is poison, the validity of his policy is not disturbed. The unexpected result is a mere accident or misfortune, which is doubtless covered by the policy.[6] If, however, an insane man possessed

what the state of mind was"); *De Gogorza* v. *Knickerbocker Life Ins. Co.*, 65 N. Y. 232; *Sargeant* v. *Ins. Co.*, 189 Pa. St. 341, 41 Atl. 351 (policy void if insured killed himself by his own act, before incontestable period begins).

[1] *Ellinger* v. *Mutual Life Ins. Co.* (1905), 1 K. B. 31.

[2] *Clarke* v. *Equitable Life Assur. Soc.*, 118 Fed. 374, 55 C. C. A. 200; *Dennis* v. *Ins. Co.*, 84 Cal. 570, 24 Pac. 120; *Scarth* v. *Security Mut. Life Ins. Co.*, 75 Iowa, 346, 349 (the exception "never was intended to include death by accident, as by taking poison by mistake, the accidental discharge of a gun or pistol held in the hands of the insured or the like").

[3] *Union Cent. Life Ins. Co.* v. *Hollowell*, 14 Ind. App. 611, 43 N. E. 277 (it need not be a deliberate intent).

[4] *Bigelow* v. *Ins. Co.*, 93 U. S. 286, 23 L. Ed. 918; *Jenkins* v. *National Union*, 118 Ga. 587, 45 S. E. 449; *Supreme Lodge* v. *Gelbke*, 198 Ill. 365, 64 N. E. 1058 (there must be purpose to end life; but it need not be a rational intent); *Hart* v. *Modern Woodmen*, 60 Kan. 678, 57 Pac. 936, 72 Am. St. R. 380; *Supreme Council* v. *Heineman*, 25 Ky. L. Rep. 1604, 78 S. W. 406 (enough mind to know that he was taking his life by poison); *Spruill* v. *Northwestern Mut. L. Ins. Co.*, 120 N. C. 141, 27 S. E. 39 ("there must be a physical intent," whatever that means); *Sabin* v. *Union*, 90 Mich. 177, 51 N. W. 202 (insured hung himself by a rope arranged by himself, intent was presumed); *Streeter* v. *West. Union Mut. Life Ins. Co.*, 65 Mich. 199, 201, 31 N. W. 780, 8 Am. St. R. 883 (intentionally with a pistol); *Sparks* v. *Indemnity Co.*, 61 Mo. App. 109 (intentionally with a razor). But see *Ins. Co.* v. *McConkey*, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308 (the court says: "either unintentionally or when insane," thus intimating that the intent of the insured if insane need not be shown); *Latimer* v. *Sovereign Camp*, 62 S. C. 145, 40 S. E. 155 (court equally divided).

[5] *Seitzinger* v. *Modern Woodmen*, 204 Ill. 58, 68 N. E. 478; *Brower* v. *Supreme Lodge*, 74 Mo. App. 495; *Haynie* v. *Knights Templars*, 139 Mo. 416, 41 S. W. 461; *Tritschler* v. *Keystone Mut. Ben. Assoc.*, 180 Pa. St. 205, 36 Atl. 734; *Keefer* v. *Modern Woodmen*, 203 Pa. St. 129. But see also *Scarth* v. *Security Mut. Life Ins. Co.*, 75 Iowa, 346 (which, however, holds that an accident will not avoid); *Billings* v. *Accident Ins. Co.*, 64 Vt. 78, 24 Atl. 656, 33 Am. St. R. 913, 17 L. R. A. 89.

[6] *Scarth* v. *Security Mut. Life Soc.*, 75 Iowa, 346, 39 N. W. 658; *Brown* v.

f no sufficient mental power to discriminate between what is poison nd what is harmless, or to perceive that his act of drinking on the ne occasion differs from his usual habit, does the same thing, the hraseology of this last rule would seem to require a forfeiture of is insurance.[1] It is to be observed that the exercise of intent is a nental operation, and when the mental powers of the insured are onormally deficient, or seriously disordered, the investigation of his ntent is apt to produce uncertain results. In this last class of cases ertain judges have perhaps laid undue stress upon the practical ifficulty of estimating different degrees of insanity, and consciousess, and have thus been led to adopt a rule which might operate relieve the company from liability in cases of purely accidental eath.

If, however, the destructive act be intended and its character be nown by the insured to be destructive, it is clear that neither an resistible insane impulse,[2] nor ignorance and unconsciousness of e moral aspect of the act will afford any excuse to the insured or her beneficiary, where the suicide clause contains the phrase, sane or insane."[3]

§ 370. Burden of Proof—Suicide, Insanity.—Neither suicide nor sanity will be presumed; therefore if the company sets up the efense of suicide, the burden of proof rests upon it, and if the facts e equally susceptible of either construction, it will be presumed at death was the result of an accident or natural cause and not a wrongful intent.[4] The issue, thus raised, is usually one of fact

an Life Ins. Co. (Tenn.), 57 S. W. 5, 51 L. R. A. 252.

[1] *Seitzinger* v. *Modern Woodmen*, 204 . 58, 68 N. E. 478 (the degree of nity thought to be immaterial. Act killing without intent held to avoid e policy); *Latimer* v. *Sovereign Camp* S. C. 145, 40 S. E. 155 (the comny was expressly liable for accients; court equally divided on necesy of intent); *Billings* v. *Acc. Ins.* ., 64 Vt. 78, 24 Atl. 656, 33 Am. St. 913, 17 L. R. A. 89 (the degree of sanity thought to be immaterial).

[2] *Bigelow* v. *Ins. Co.*, 93 U. S. 286. L. Ed. 918; *Supreme Lodge* v. *lke*, 198 Ill. 365, 64 N. E. 1058; *anhattan Life Ins. Co.* v. *Beard*, 112 v. 455, 66 S. W. 35.

[3] *Bigelow* v. *Ins. Co.*, 93 U. S. 286, L. Ed. 918; *Hart* v. *Modern Woodn*, 60 Kan. 678, 57 Pac. 936, 72 Am. . R. 380; *Mut. Ben. Life Ins. Co.* v. *Daviess*, 87 Ky. 541, 9 S. W. 812; *Streeter* v. *West. Union Mut. Life Ins. Co.*, 65 Mich. 199, 31 N. W. 780, 8 Am. St. R. 883; *Sabin* v. *Union*, 90 Mich. 177, 51 N. W. 202. A policy may expressly exclude accidents from injuries, though unintentionally self-inflicted by the insured while insane, *Blunt* v. *Fidelity & Cas. Co.*, 145 Cal. 268, 78 Pac. 729.

[4] *Home Ben. Assoc.* v. *Sargent*, 142 U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160 (pistol); *Travelers' Ins.* v. *McConkey*, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308; *National Union* v. *Fitzpatrick*, 133 Fed. 694; *Stephenson* v. *Assoc.*, 108 Iowa, 637, 79 N. W. 459; *Carnes* v. *Iowa State, etc., Assn.*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. R. 306; *Furbush* v. *Maryland Cas. Co.*, 133 Mich. 479, 95 N. W. 551; *Laessig* v. *Travelers' Protection Assn.*, 169 Mo. 272, 69 S. W. 469; *Mallory* v. *Travel-*

for the jury;[1] but if the facts point only to one conclusion, it is error to submit the question to the jury.[2] If, on the other hand, the plaintiff relies upon insanity of the insured as the excuse for self-destruction the burden rests upon the plaintiff to establish its existence by a preponderance of evidence.[3] The mere fact of suicide is not sufficient to prove insanity.[4]

lers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410. See also *Knights Temp. & Mas. L. I. Co.* v. *Crayton*, 209 Ill. 550, 70 N. E. 1066; *Rumbold* v. *Supreme Council, R. L.*, 206 Ill. 513, 69 N. E. 590; *Union Casualty & Surety Co.* v. *Goddard*, 25 Ky. Law R. (1903) 1035, 76 S. W. 832. "The love of life is ordinarily a sufficient inducement for its preservation, and, in the absence of proof that death resulted from other than natural causes, suicide will not be presumed," *Hale* v. *Life Ind. & Inv. Co.*, 61 Minn. 516, 519, 63 N. W. 1108, 52 Am. St. R. 616. Intentional self-destruction is contrary to the general conduct of mankind, *Union Cas. & S. Co.* v. *Goddard*, 25 Ky. Law R. 1035, 76 S. W. 832. The company must show that every reasonable hypothesis of accidental death is excluded, *Boynton* v. *Assoc.*, 105 La. 202, 29 So. 490, 52 L. R. A. 687. Upon evenly balanced testimony the law assumes innocence rather than crime, *Walcott* v. *Ins. Co.*, 64 Vt. 221, 228, 24 Atl. 992, 33 Am. St. R. 923. Though suicide is not itself made a crime in America generally, but rather an illegal act, *Shipman* v. *Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; *Grand Lodge* v. *Wieting*, 168 Ill. 408.

[1] *Supreme Lodge* v. *Beck*, 181 U. S. 49, 21 S. Ct. 532, 45 L. Ed. 741; *Tackman* v. *Brotherhood* (Iowa, 1906), 106 N. W. 350 (insured was found hung by bridle from a peg); *Harms* v. *Metropolitan Life Ins. Co.*, 67 App. Div. 139, 73 N. Y. Supp. 513. Opinions of experts and others on the subject of sanity are often received, *Grand Lodge* v. *Wieting*, 168 Ill. 408.

[2] *Supreme Tent* v. *King*, 142 Fed. 678, 73 C. C. A. 678; *Masonic Life Assn.* v. *Pollard* (Ky., 1905), 89 S. W. 219 (shot himself before witnesses); *Moore* v. *Ins. Co.*, 192 Mass. 468, 78 N. E. 488 (shot after writing a good-bye); *Sovereign Camp* v. *Hruby*, 70 Neb. 5, 96 N. W 998; *Seybold* v. *Supreme Tent*, 86 App. Div. 195, 83 N. Y. Supp. 149; *Clemens* v. *Royal Neighbors*, 14 N. Dak. 116, 103 N. W. 402; *Agen* v. *Ins. Co.*, 105 Wis. 217, 80 N. W. 1020, 76 Am. St. R. 905. A letter or other declaration of intent by insured to commit the act is admissible in evidence, if reasonably contemporaneous, *Conn. Mut. Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 295, 12 S. Ct. 909, 36 L. Ed. 706; *Clemens* v. *Royal Neighbors* (N. Dak., 1905), 103 N. W. 402. But the coroner's verdict in this country is not generally admissible, *Ætna Life Ins. Co.* v. *Kaiser*, 115 Ky. 539, 74 S. W. 203; *Wasey* v. *Travelers' Ins. Co.*, 126 Mich. 119, 85 N. W. 459, *Cox* v. *Royal Tribe*, 42 Ore. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. R. 752; *Chambers* v. *Modern W. of A.*, 18 S. Dak. 173, 99 N. W. 1107; *Fey* v. *Ins. Co.*, 120 Wis. 358, 98 N. W. 206. *Contra* at common law and U. S. Courts, *Life Ins. Co.* v. *Vocke*, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65; *Fletcher* v. *Sovereign Camp*, 81 Miss. 249, 32 So. 923; *Sharland* v. *Wash. Life Ins. Co.*, 101 Fed. 206, 41 C. C. A. 307. Declarations of conspirators are admissible, *Conn. Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208. Financial embarrassment or other circumstances making suicide probable may be shown, *Furbush* v. *Maryland Cas. Co.*, 131 Mich. 234, 91 N. W. 135, 100 Am. St. R. 605; *Supreme Conclave* v. *Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. R. 528. Also large amounts of other insurance subsisting, *Elliott* v. *Des Moines Life Assn.*, 163 Mo. 132, 63 S. W. 400.

[3] *Travelers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308; *Meacham* v. *N. Y. State Mutual Benefit Assn.*, 120 N. Y. 237; *McClure* v. *Mutual Life Ins. Co.*, 55 N. Y. 651. So also to prove a certain degree of insanity, *Dickerson* v. *Ins. Co.*, 200 Ill. 270, 65 N. E. 694. Compare *Royal Arcanum* v. *Pels*, 209 Ill. 33, 70 N. E. 697. But see *Schultz* v. *Ins. Co.*, 40 Ohio St. 217, 48 Am. Rep. 676.

[4] *Weed* v. *Mut. Ben. Life Ins. Co.*,

Two late Minnesota cases on the subject of suicide, resting side / side in the reports, are instructive. The Western Life Indemnity ompany, the defendant, insured the life of Kornig by a policy hich provided that there should be no recovery in case of death / suicide, intentional or unintentional, and whether deceased was ne or insane at the time. Kornig who had been living happily and good health was found dead one afternoon from a bullet in his ad, with a pistol in his hand, in a room in Minneapolis, which he d leased from a woman, the principal witness for the insurance mpany. This woman testified that she had gone to the room answer to Kornig's complaint that it was not in order, that with-t a word he shot and wounded her and that she heard no second ot. The accuracy of this narrative was slightly impeached. She nied improper relations with Kornig. The court refused to dis-rb a verdict in favor of the widow.[1]

Zearfoss had a policy from the Switchmen's Union containing a use exonerating the association in case of deliberate suicide. He ed with his family and on good terms. He stopped working as a itchman January 20, and took his pay. Two days later he went a spree to a lodging house near his home, kept by the Fishers, ere he drank and played cards in the saloon at night, and took d occupied a bedroom above. He said he had had a little trouble the family. The next evening about seven o'clock he was found ad in the bedroom, where a bottle with carbolic acid was also covered. The post-mortem examination showed that the de-ased had died from the effects of carbolic acid, but the surgeons tified that there were no burns apparent in his mouth or on his gers. The proprietor of a neighboring drug store identified Zear-s as without much doubt the man who had bought the acid, ough the witness would not swear that he was sure of it. There

N. Y. 561. Colorado and Missouri e adopted statutes that suicide will avail as a defense if the insurance taken out in good faith, *Knights nplars* v. *Jarman*, 187 U. S. 197, 23 t. 108, 47 L. Ed. 139; *McDonald* v. *kers' Life Assoc.*, 154 Mo. 618, 55 W. 999. See *Logan* v. *Fidelity & Co.*, 146 Mo. 114, 47 S. W. 948; *istian* v. *Connecticut Mut. L. Ins.* , 143 Mo. 460, 45 S. W. 268; *mie* v. *Knights Templars' & M. L. Co.*, 139 Mo. 416, 41 S. W. 461; *ional Union* v. *Marlow*, 74 Fed. , 21 C. C. A. 89, 40 U. S. App. 95; *a L. Ins. Co.* v. *Florida*, 69 Fed. 932, 16 C. C. A. 618, 32 U. S. App. 753, 30 L. R. A. 87. See Appendix, ch. I, for statutes.

[1] *Kornig* v. *Western Life Indemnity Co.* (Minn., 1907), 112 N. W. 1039 (when circumstantial evidence is relied on, defendant must establish facts which preclude any reasonable hypothesis of natural or accidental death). And see *Pythias Knights* v. *Beck*, 181 U. S. 49, 21 S. Ct. 532, 45 L. Ed. 741 (head of insured blown off by shot gun. He had gone to neighbor's to induce his own wife to return home. Issue of suicide for jury).

was no evidence tending to show that the insured had been foully dealt with. A verdict in favor of the widow was set aside by the court as unsupported by the evidence, the fair meaning of which was consistent only with an inference of deliberate suicide.[1]

In a New York case the company refused to pay the insurance upon the ground that the insured, Louise L. Buxton, had committed suicide within a year after the policy was issued. Some time prior to her death the insured had an operation at St. Luke's Hospital and thereafter suffered from hemorrhages, but was discharged as cured about two weeks before her death. The evening before her death she came downstairs, appearing greatly excited and with hair somewhat disheveled. The next day she was found dead in her bed with both gas jets turned on but not lighted. There was no evidence tending to show that anyone had entered the room from the time the insured retired until she was found dead, or that the bed was in a position where she could read or that there had been a turning off and on of the gas supply from outside the room. By a divided court the judgment in favor of the plaintiff was reversed.[2]

§ 371. Exception of Death by the Hands of Justice or in Violation of Law.—Accident policies almost universally contain an exception of injuries or death "in consequence of violation of law," or "while engaged in violation of law," or some similar clause; and life policies also not infrequently make an express exception of death by the hands of justice, or in violation of law, or of known violation of law. The decisions of the courts in the interpretation of this exception have often turned upon the particular phraseology of the clause.[3]

Crenshaw's certificate stipulated that, "if death is caused or superinduced at the hands of justice or in violation of or attempt

[1] *Zearfoss* v. *Switchmen's Union* (Minn., 1907), 112 N. W. 1044 ("the ultimate fact is required to be proven by a preponderance of evidence only, and this rule is in no way affected by the subsidiary requirement that defendant must by the evidence exclude every other reasonable theory of accounting for the death"). In the last two cases many recent authorities were cited. And see *Supreme Tent* v. *King*, 142 Fed. 678, 73 C. C. A. 349 (insured sick, depressed, in need of money, was found shot with revolver. When the reasonable inference is irresistible, the court may withdraw the question of suicide from the jury).

[2] *White* v. *Prudential Ins. Co.*, 120 App. Div. 260. The court said: "The law indulges in the presumption that a person will not take his own life, and where the facts and circumstances are as consistent with death from negligence, by accident or homicide, as by suicide, the presumption is against suicide. . . . This is a presumption, however, which yields to evidence tending to show that death was self-inflicted, and where no other reasonable inference may be drawn from the evidence, it is the duty of the court to direct a verdict upon the theory of death by suicide."

[3] See also § 403.

:o violate any criminal law," only a diminished amount would be payable. At the time of attempted or realized criminal relations between Crenshaw and another's wife, the husband, in a burst of indignation over the discovery, shot and killed the insured. The court, in perhaps a border-line decision, refused to find any defense in favor of the insurer, holding that the death was not caused or superinduced in violation, or attempted violation, of law within the meaning of the policy.[1]

It has been held, however, by the Supreme Court of the United States,[2] following the English House of Lords,[3] that even in the absence of any such exemption the rights of the insured, or his assigns, or other representatives, would be forfeited upon his conviction and execution for crime. This conclusion also finds support in the prevailing view regarding the effect of suicide upon the rights of the insured and his estate.[4] And in analogy to the rules respecting suicide, where death at the hands of justice is not expressly excepted in the policy, the vested rights of third parties, innocent beneficiaries designated as payees, would seem to be left undisturbed by the legal sentence and execution of the insured for crime, many courts considering that any question of public policy on the one side is more than offset by the injustice of depriving innocent survivors of their natural means of subsistence, and of leaving with the insurance company both the premiums and the insurance money.[5] This view is further strengthened by the cases, English and American, which infer a resulting trust in favor of the estate of the insured where a designated beneficiary has forfeited his own rights by murdering the insured.[6]

[1] *Supreme Lodge* v. *Crenshaw* (Ga., 1907), 58 S. E. 628. The court said, "It is deducible, from the authorities, that a stipulation of the character now under consideration must be given a reasonable construction, and that the liability of the company is not to be discharged, unless the violation of the law consisted in an act of which the death of the insured was the reasonable and legitimate consequence;" citing *Gœtzman* v. *Conn. Mut. L. Ins. Co.*, 1 Hun (N. Y.), 515, and other cases.

[2] *Burt* v. *Ins. Co.*, 187 U. S. 362, 23 S. Ct. 139, 47 L. Ed. 216 (court refused to admit evidence showing that conviction was unjust, since there can be no valid insurance against a miscarriage of justice. Such insurance might tend to discredit courts and encourage false testimony relating to murder). And see *Collins* v. *Met. Life Ins. Co.*, 27 Pa Super. Ct. 345.

[3] *Amicable Soc.* v. *Bolland*, 4 Bligh (N. S.), 194.

[4] See § 64, *supra*.

[5] *McDonald* v. *Order of Triple Alliance*, 57 Mo. App. 87 (in the absence of express provision the law does not look at the cause of death); *Campbell* v. *Supreme Conclave*, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576; *Fitch* v. *Am. Popular Life Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Moore* v. *Woolsey*, 28 Eng. L. & Eq. 248, 4 El. & Bl. 243. And many cases cited in § 367, *supra*. Compare also *Collins* v. *Met. Life Ins. Co.*, 27 Pa. Super. Ct. 345 (void as to the estate of insured).

[6] See § 64, *supra*.

But the doctrine of the federal courts, which with the Supreme Court is *obiter dictum*, seems to be that death by the hands of justice or by suicide is not a risk assumed by the company, although the policy purport to cover death from any cause, and that therefore the company is relieved of all liability to any class of beneficiaries for death from such a cause, in like manner as though the exception were express.[1] Where, however, such a restrictive clause is inserted in the contract, it will be enforced against all beneficiaries,[2] by every court, in the absence of statutory provision to the contrary.

§ 372. In Violation of Law.—Engaging in assault, robbery, murder and similar crimes of recognized gravity tends largely to increase the risk of death. Such occupations, therefore, may well be made the subject of exception to the insurer's liability. Thus death was held to be "in the known violation of the law" where the insured died within a few hours from wounds inflicted by the husband of a woman upon whom he was committing assault and battery.[3] On the other hand, there are multitudinous laws including criminal, civil, federal, state, and municipal, statutes and ordinances and many of them seem to have no relation to any question of hazard in connection with insurance. Accordingly the question presents itself, what is "a violation of law" within the fair intendment of this clause of the policy?

The Massachusetts court in the leading case of *Cluff* v. *Mutual Ben. Life Ins. Co.*[4] concluded that a similar clause, worded "in known violation of law," referred to known violation of criminal

[1] *Burt* v. *Ins. Co.*, 187 U. S. 362, 23 S. Ct. 139, 47 L. Ed. 216; *Ritter* v. *Mut. Life Ins. Co.*, 169 U. S. 139, 18 S. Ct. 300, 42 L. Ed. 693; *Mut. Life Ins. Co.* v. *Kelly*, 114 Fed. 268. Compare *Lange* v. *Royal Highlanders* (Neb., 1907), 110 N. W. 1110.

[2] *Breasted* v. *Farmers' Loan & Tr. Co.*, 8 N. Y. 299, 59 Am. Dec. 482. Burden of pleading and proving the breach is upon the company, *Jones* v. *Acc. Assoc.*, 92 Iowa, 653, 61 N. W. 485 (visiting house of ill fame and carrying concealed weapons. Policy not avoided); *Matthes* v. *Imperial Acc. Assoc.*, 110 Iowa, 222, 81 N. W. 484.

[3] *Bloom* v. *Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469. See also *Prudential Life Ins. Co.* v. *Higbee*, 22 Ky. L. R. 495, 57 S. W. 614; *Payne* v. *Union Life Guards*, 136 Mich. 416, 99 N. W. 376; *Davis* v. *Modern Woodmen*, 98 Mo. App. 713, 73 S. W. 923. But insured may lawfully defend himself against personal injury, *Overton* v. *St. Louis Mut. Life Ins. Co.*, 39 Mo. 122, 90 Am. Dec. 455. As to exception of injuries from fighting, see *Coles* v. *N. Y. Cas. Co.*, 87 App. Div. 41, 83 N. Y. Supp. 1063; and see § 403.

[4] 13 Allen (Mass.), 308, 99 Mass. 318. And see *Lehman* v. *Great Eastern Cas. & Ind. Co.*, 7 App. Div. 424, 39 N. Y. Supp. 912, aff'd 158 N. Y. 689, 53 N. E. 1127 (crossing railroad track at a place where persons were allowed to cross); *Harper* v. *Phœnix Ins. Co.*, 18 Mo. 109, 19 Mo. 506; *Wolff* v. *Conn. Mut. Life Ins. Co.*, 5 Mo. App. 236; *Brown* v. *Supreme Lodge*, 83 Mo. App. 633.

. The New York court upon the same facts, in an action brought an assignee of Cluff, refused to decide whether violations of ninal law alone were included in the exception, the judges dif- ng in their views.[1] Both courts, however, found material issues act for the jury to pass upon. In this case Cluff, the insured, empted to unhitch and take forcible possession of the horses of ., his debtor, when they were in charge of Cox's son, who was ing them with a wagon. During, or just after, the trespass or ault, the son shot and killed Cluff with a pistol. Bad feeling had viously been engendered between the families which might have influence in leading up to the shooting. The New York court, ersing a judgment obtained by the defendant, held it error to se to allow the jury to decide, whether the shooting was in con- uence of the unlawful act of the insured, and whether the in- ed knew that it was unlawful.

. is not easy to find a logical theory upon which this clause can imited to violations of criminal law. Certainly any violation of that substantially enhances the risk would seem to be contem- ed.[2] A voluntary submission to illegal abortion is clearly a ation of criminal law.[3] But to bring the casualty within the ption there must be some overt unlawful act committed in nection with it. A mere purpose or preparation to violate law ot enough.[4]

373. Suicide not a Crime.—Suicide at common law was a crime,

Bradley v. *Mut. Ben. Life Ins. Co.*, . Y. 422, 6 Am. Rep. 115.

Donboy v. *Acc. Assoc.*, 17 Ind. App. 46 N. E. 363, 60 Am. St. R. 154 ing in streams above tide water); *m* v. *Ins. Co.*, 97 Ind. 478, 49 Am. 469; *Bradley* v. *Ins. Co.*, 45 N. Y. *supra*. Getting pigeons from la seems no violation of Iowa ay law, *Matthes* v. *Imperial Acc.* ., 110 Iowa, 222, 81 N. W. 484. is riding a bicycle to a funeral a tion of the Maine Sunday law, *n* v. *Atlas Acc. Ins. Co.*, 89 Me. 36 Atl. 1048.

Veils v. *New England Mut. Life Co.*, 191 Pa. St. 207, 43 Atl. 126, . R. A. 327, 71 Am. St. R. 763; *h* v. *Ins. Co.*, 120 Mass. 550, 21 Rep. 541.

Pythias Knights v. *Beck*, 181 U. S. 21 S. Ct. 532, 45 L. Ed. 741 (in- l went to house of neighbor to ade or compel his wife to return to him; was refused admission and shot himself while in the water-closet, perhaps accidentally, *held*, no forfeiture); *Smith* v. *Ætna Life Ins. Co.*, 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. R. 153 (insured was making preparations to get off a train in motion); *Johanns* v. *Nat. Acc. Soc.*, 16 App. Div. 104, 45 N. Y. Supp. 117 (attempting to board moving street car, is not standing on platform); *Cornwell* v. *Frat. Acc. Assn.*, 6 N. D. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. R. 601 (starting out to hunt prairie chickens in closed season is not within exception); *Lehman* v. *Great Eastern Cas. & Ind. Co.*, 7 App. Div. 424, 39 N. Y. Supp. 912, aff'd 158 N. Y. 689, 53 N. E. 1127 (statute forbade walking upon or along the track insured was about to step upon it, but there was a crossing there, with acquiescence of railroad company; *held*, no forfeiture).

but is not so defined in the statutes of most of the United States. In those states it is held, generally, that suicide is not a violation of law within the meaning of this clause of the policy.[1]

§ 374. **Death Must be Caused by Unlawful Act.**—To effect forfeiture it is held that there must be some causative and reasonably contemporaneous connection between the violation of law and the ensuing death, or injury.[2]

For example, the policy is not avoided because the insured happens to be engaged illegally in selling lottery tickets at the time when he is stricken with heart disease unconnected with his occupation;[3] and if the insured is accidentally injured by a gun shot from a distance the company is not relieved because by chance he is in the act of violating a law against profane swearing.[4] On the other hand, the insurer was held not liable when the insured met his death because of a collision that occurred during a horse race forbidden by law.[5] And where the insured while retreating was killed by a shot fired in provocation, caused by an affray that had ended, a judgment in favor of the insurer was sustained on the ground that if the acts of the insured were such as to produce in his slayer a high degree of passion, and while he was in such a state he shot and killed the insured, though perhaps unintentionally, the death was the natural consequence of the assault.[6] So also where the insured in trying to escape shortly after committing robbery was shot by a police officer.[7]

[1] *Royal Circle* v. *Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. R. 224; *Kerr* v. *Assoc.*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. R. 631; *Darrow* v. *Family Fund Soc.*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. R. 430 (suicide not a crime); *Shipman* v. *Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347 (but is said to be a wrongful act under N. Y. Pen. Code, § 172); *Patterson* v. *Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. R. 899 (court applied the usual rule, though suicide technically is a crime in that state). Defense of suicide is barred by the incontestable clause, § 382, *infra*.

[2] *Pythias Knights* v. *Beck*, 181 U. S. 49, 21 S. Ct. 532, 45 L. Ed. 741; *Conboy* v. *Acc. Assoc.*, 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. R. 154; *Acc. Ins. Co.* v. *Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. R. 685 (attack upon the wife of another is known violation of law). There must be a causative connection between the unlawful act and the injury, *Jones* v. *U. S. Mut. Acc. Assn.*, 92 Iowa, 692, 61 N. W. 485.

[3] *Bradley* v. *Ins. Co.*, 45 N. Y. 422, *supra*.

[4] *Acc. Ins. Co.* v. *Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. R. 685.

[5] *Travelers' Ins. Co.* v. *Seaver*, 19 Wall. 531, 22 L. Ed. 155 (insured jumped down, became entangled in reins and was dragged against a stone; *held*, all one continuous transaction).

[6] *Murray* v. *N. Y. Life Ins. Co.*, 96 N. Y. 614, 48 Am. Rep. 658.

[7] *Prudential Ins. Co.* v. *Haley*, 91 Ill. App. 363, aff'd 189 Ill. 317, 59 N. E. 545. But see *Griffin* v. *Western Assn.*, 20 Neb. 620, 31 N. W. 122, 57 Am. Rep. 848 (the phrase under consideration was, "die *while* violating any law," *held*, that the insured who was shot after robbing a bank was not *then*

§ 375. Authority of Agents.—*Agents not authorized to make, alter, or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture hereof, or to grant permits, or to receive for cash due for premiums anything but cash.*

The effect of this waiver clause has been heretofore discussed.[1]

If such statements contained in the policy relating to lack of authority on the part of certain agents, and brought actually or constructively to the notice of the insured, are true, the insurer should have the benefit of them. But as shown under the discussion of waiver and estoppel the decisions of the various courts are not in harmony as to the effect of this and similar clauses, largely because the courts differ in their views as to the extent of the actual authority of such agents when acting for their principals.

In a California case Iverson, the insured, warranted that he had never had paralysis. The soliciting agent of the defendant, at the time the application was signed by Iverson, knew that he had had a stroke of paralysis. The officers of the company had no knowledge of this. In the application was a stipulation that only the officers had authority to determine whether the policy should issue, and that no statements of the solicitor should be binding unless presented in writing to the officers. The court held that the issuance of the policy was not a waiver of the forfeiture, that the solicitor's knowledge was not knowledge by the company and that the solicitor had no authority to waive the forfeiture.[2] The court adopted substantially the course of reasoning laid down in the famous federal case, which has heretofore been discussed at length,[3] and which was cited with approval in its opinion together with other cases.

On the other hand, in a later case, the South Carolina court, with the California case before it, takes the opposite view, and concludes that the knowledge of the solicitor, acquired in the course of his work for the company, is imputable to the company, no matter what the policy says. The applicant Rearden made a false answer in his application regarding his fainting fits, but the soliciting agent

engaged in violating law); *Supreme Lodge* v. *Bradley*, 73 Ark. 274, 83 S. W. 1055, 67 L. R. A. 770 (two judges dissenting); *Utter* v. *Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. R. 913. In *Prader* v. *Acc. Assn.*, 95 Iowa, 149, 63 N. W. 601 (illegal Sunday hunting was finished, and company was held liable). Compare *Duran* v. *Ins. Co.*, 63 Vt. 437, 22 Atl. 530, 13 L. R. A. 637, 25 Am. St. R. 773 (insured in returning from hunting on Sunday slipped on frozen ground, *held*, company was not liable).

[1] Ch. VIII, *supra*.

[2] *Iverson* v. *Met. Life Ins. Co.* (Cal., 1907), 91 Pac. 609.

[3] See §§ 173, 174, *supra*.

knew the facts. The application provided that the company should not be bound by knowledge of the solicitor not contained therein. The court held that the company was estopped from setting up the breach of warranty.[1]

An agent employed to collect premiums has in general no apparent power to waive forfeitures, when the policy recites that certain officers alone have that power.[2] And where a policy contains a stipulation that "payments of premiums to be recognized by the company must be entered at the time of payment in the premium receipt book belonging with this policy," one suing on the policy can show payments only by the book or by proving a sufficient reason for the absence of such entry.[3]

But on the other hand the Arkansas court decided, on the evidence before it, that a superintendent of agencies had actual authority to waive forfeitures and to accept past-due premiums, although the policy declared that such a result could be accomplished only by a writing signed by the president or secretary.[4]

Though the policy provide that it shall not take effect until the first premium is paid at the home office or until it is paid in cash, nevertheless, it is held, that by authorizing the soliciting agent to make delivery of the policy the insurance company impliedly empowers him to take a note or give credit for the first premium, provided the application does not negative his authority to do so.[5] But if it is provided in the application that the solicitor has no power to extend the time of payment or that the policy shall not be in force until the first premium is paid in cash, such provision, in most jurisdictions, will prevail in spite of the delivery of the policy by the solicitor.[6]

§ 376. Errors in Age.—*Any error made in understating the age of*

[1] *Rearden* v. *State Mut. Life Ins. Co.* (S. C., 1908), 60 S. E. 1106 (here, however, the solicitor affirmatively advised the applicant that his fainting spells amounted to nothing).

[2] *Cayford* v. *Met. L. Ins. Co.* (Cal. App., 1907), 91 Pac. 266.

[3] *McNicholas* v. *Prudential Ins. Co.*, 191 Mass. 304 (industrial insurance with weekly payments).

[4] *Industrial Mut. Indem. Co.* v. *Thompson* (Ark., 1907), 104 S. W. 200.

[5] *Mutual Res. Life Ins. Co.* v. *Heidel*, 161 Fed. 535 (cases cited); *Lanse* v. *N. Y. Life Ins. Co.* (N. H., 1907), 68 Atl. 31 ("by delivering a policy, it impliedly ratifies the acts of the soliciting agent as to the payments required to entitle the insured to the delivery"); *Kilborn* v. *Prudential Ins. Co.*, 99 Minn. 276, 108 N. W. 861; *Michigan Mut. Life Ins. Co.* v. *Hall*, 60 Ill. App. 159; *N. Y. Life Ins. Co.* v. *Greenlee* (Ind. App., 1908), 84 N. E. 1101.

[6] *Powell* v. *Prudential Ins. Co.* (Ala., 1907), 45 So. 208; *Russel* v. *Prudential Ins. Co.*, 176 N. Y. 178, 68 N. E. 252, 98 Am. St. R. 656 (by a divided court). And see § 359, *supra*.

the insured will be adjusted by paying such amount as the premiums paid would purchase at the table rate.

This provision is more reasonable than a stipulation providing for absolute forfeiture in case of an error in stating the age.[1]

The New York standard policies and others are worded, "if the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.[2]

§ 377. **Assignments.**—*No assignment of this policy shall take effect until written notice thereof shall be given to the company.*

This provision, be it observed, does not prohibit an assignment of the policy,[3] but only relieves the company from the obligation of recognizing it until written notice is served.[4] The assignment without a compliance with the regulations of the company may nevertheless be operative as between the parties to it.[5] It is desirable that the insured should have the opportunity of making free commercial use of his life insurance as available property, for it may often be convenient to secure money, by loan or otherwise, upon it. Unlike the case of a fire policy, as before shown, a life policy was considered assignable at common law.[6] And, by the better opinion, a policy of life insurance may be assigned or made payable to one who has no insurable interest, if the transaction is not a mere cover for a wager.[7] The demands of business quite outweigh the remote possibility that some unscrupulous assignee may succumb to the temptation of murdering or shortening the life of the in-

[1] *Singleton* v. *Prudential Life Ins. Co.*, 11 App. Div. 403, 42 N. Y. Supp. 446. Similar relief is sometimes afforded by statute, *Sieverts* v. *Nat. Ben. Assn.*, 95 Iowa, 710, 64 N. W. 671; *Albert* v. *Mut. Life Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. R. 693. But compare *Sup. Council* v. *Boyle*, 10 Ind. App. 301, 37 N. E. 1105; *Kabok* v. *Phœnix Mut. Life Ins. Co.*, 51 Hun, 639, 4 N. Y. Supp. 718; *Wiberg* v. *Minn. S. Relief Assn.*, 73 Minn. 297, 76 N. W. 37; *Doll* v. *Prudential Ins. Co.*, 21 Pa. Super. Ct. 434.

[2] See § 353, *supra*.

[3] If policy provide that it will be avoided by assignment without consent of company the provision will be enforced, *Merrill* v. *New Eng. Mut. Life Ins. Co.*, 103 Mass. 245, 4 Am. Rep. 548. But Iowa, for example, has statute, *Crocker* v. *Hogin*, 103 Iowa, 243, 72 N. W. 411. The company alone can take advantage of the requirement, *Lee* v. *Murrell*, 9 Ky. L. R. 104. If policy so provide, an assignment is of no force as against the company, *Moise* v. *Mut. Res. Fund Assn.*, 45 La. Ann. 736, 13 So. 170; *Corcoran* v. *Mut. Life Ins. Co.*, 179 Pa. St. 132, 36 Atl. 203.

[4] *Colburn's Appeal*, 74 Conn. 463, 51 Atl. 139, 92 Am. St. R. 231; but compare *Hogue* v. *Minn. Packing & Pro. Co.*, *infra*, 59 Minn. 39, 60 N. W. 812.

[5] *Hewins* v. *Baker*, 161 Mass. 320. 37 N. E. 441; *Hogue* v. *Minn. Packing & Pro. Co.*, 59 Minn. 39, 60 N. W. 812; *Kimball* v. *Lester*, 43 App. Div. 27, 59 N. Y. Supp. 540, aff'd 167 N. Y. 570, 60 N. E. 1113.

[6] See § 63, *supra*.

[7] *N. Y. Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997; *Moore* v. *Chi. Guar. Fund Life Soc.*, 178 Ill. 202, 52 N. E. 882;

sured for the sake of hastening payment of the insurance money.[1] Moreover, there would seem to be room for the operation of any such sinister designs regardless of whether the assignee has an insurable interest. A creditor, for example, may be quite as strongly tempted, as the donee of a gift, to realize a prompt payment of the insurance upon the life of the assignor.[2]

Any one of those named as beneficiaries may in general assign his expectant or contingent interest, and the assignee will take the right to which he was entitled;[3] but a member of a beneficiary society may not assign his certificate to one outside the classes of permitted beneficiaries.[4] It has been held, however, that the society may waive the restriction.[5]

In the absence of restraining statutes a wife has a right to assign her interest in a policy.[6] Many states have passed statutes designed

Davis v. *Brown*, 159 Ind. 644, 65 N. E. 908; *Milner* v. *Bowman*, 119 Ind. 448, 454, 21 N. E. 1094, 5 L. R. A. 95; *Steinback* v. *Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. R. 427; *Schuckmann* v. *Heinrich*, 93 App. Div. 278, aff'd 182 N. Y. 538 (insured transferred to one who did not become his fiancée as he expected); § 41, *supra*. This appears now to be the rule in the courts of New York, Ohio, Massachusetts, Illinois, Michigan, New Jersey, California, Minnesota, Connecticut, Louisiana, Rhode Island, Wisconsin, Nebraska, Tennessee, South Carolina, Mississippi, Maryland, and Indiana. While on grounds of supposed public policy the contrary view is entertained by the courts of the following states: Alabama, Kansas, Kentucky, Missouri, North Carolina, Pennsylvania, Texas, and Virginia, see list of states and decisions given in *Gordon* v. *Ware Nat. Bank*, 132 Fed. 444, 446–448. *Contra*, for example, *Warnock* v. *Davis*, 104 U. S. 775, 26 L. Ed. 924, and *Cheeves* v. *Anders*, 87 Tex. 287, 47 Am. St. R. 107, 28 S. W. 274 (limit of creditors' interest is amount of debt, interest thereon and expense of insurance; balance to go to estate of insured). With the majority must also be classed Georgia, *Steele* v. *Gatlin*, 115 Ga. 929, 42 S. E. 253, 59 L. R. A. 129; *Morris* v. *Banking Co.*, 109 Ga. 12, 34 E. S. 378, 46 L. R. A. 506, and England, *Re Turcan*, L. R. 40 Ch. Div. 5. As to the views of the federal courts, see § 43, *supra*.

[1] *Cator* v. *Mut. Res. Fund Life Ass.*, 78 Md. 72, 26 Atl. 959 (different rule in fire insurance).

[2] In general the validity of an assignment is governed by the law of place where it is made, *Succession of Miller* v. *Man. Life Ins. Co.*, 110 La. 652, 34 So. 723; *Robinson* v. *Hurst*, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. R. 266; *Miller* v. *Campbell*, 140 N. Y. 457, 35 N. E. 651. And see *Conn. Mut. Life Ins. Co.* v. *Westervelt*, 52 Conn. 586; *Spencer* v. *Myers*, 150 N. Y. 269, 44 N. E. 942, 34 L. R. A. 175, 55 Am. St. R. 675.

[3] *Conn. Mut. Life Ins. Co.* v. *Baldwin*, 15 R. I. 106. The insured may assign his contingent interest in an endowment policy, *Pierce* v. *Charter Oak Life Ins. Co.*, 138 Mass. 151; *Miller* v. *Campbell*, 140 N. Y. 457, 35 N. E. 651. See p. 80, note 1, *supra*.

[4] *Brierly* v. *Equitable Aid Union*, 170 Mass. 218, 220, 48 N. E. 1090, 64 Am. St. R. 297; *Supreme Conclave* v. *Dailey*, 61 N. J. Eq. 145, 47 Atl. 277. See §§ 68, 69, *supra*.

[5] *Jarvis* v. *Binkley*, 206 Ill. 541, 69 N. E. 582; *Coleman* v. *Anderson* (Tex. Civ. App.), 82 S. W. 1057. See § 130.

[6] *Phœnix Mut. L. Ins. Co.* v. *Opper*, 75 Conn. 295, 53 Atl. 586; *Mente* v. *Townsend*, 68 Ark. 391, 59 S. W. 41 (to secure debt of her husband); *Herr* v. *Reinœhl*, 209 Pa. St. 483, 58 Atl. 862. Husband may assign his own interest in policy taken out in part for wife, though statute restrain her, *Travelers' Ins. Co.* v. *Healey*, 164 N. Y. 607, 58 N. E. 1093.

to secure to the wife and children of the insured the proceeds of his life insurance payable to them free from claims of creditors.[1] Under such statutes it was held by the courts of New York and Wisconsin that it was the legislative intent to prohibit the wife altogether from assigning her interest;[2] but by subsequent statute in New York the wife may assign her interest with the written consent of the insured.[3] In other jurisdictions it was held that the statutes protecting policies from creditors did not inferentially restrain an assignment by the wife of her interest.[4]

Policies are often pledged or assigned as collateral security for a loan.[5] A mere pledge or deposit of a policy is not of itself an assignment within the meaning of that term as used in the policy.[6]

A transfer of a policy, where not prohibited by its terms, may be valid without any written assignment, either by way of gift,[7] or in return for a valuable consideration,[8] provided the policy be

[1] See § 72, *supra*.

[2] *Eadie* v. *Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Brick* v. *Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259; *Dannhauser* v. *Wallenstein*, 169 N. Y. 199, 62 N. E. 160 (policy payable to husband's "legal representatives" is not for benefit of wife); *Ellison* v. *Straw*, 116 Wis. 207, 92 N. W. 1094.

[3] L. 1896, c. 272, § 22, superseding earlier laws and construed in *Kittel* v. *Domeyer*, 175 N. Y. 205, 67 N. E. 433. See p. 80, note 1, *supra*. As to written consent of husband, see *Anderson* v. *Goldsmidt*, 103 N. Y. 617, 9 N. E. 495; *Spencer* v. *Myers*, 150 N. Y. 269, 44 N. E. 942, 34 L. R. A. 175, 55 Am. St. R. 675 (applies to policies of foreign companies); *Sherman* v. *Allison*, 77 App. Div. 49, 80 N. Y. Supp. 148, aff'd 177 N. Y. 574, 69 N. E. 1131 (husband and wife each executed a separate assignment); *Milhous* v. *Johnson*, 51 Hun, 639, 4 N. Y. Supp. 199. If policy is matured the money due is subject to levy for wife's debt, otherwise not, *Amberg* v. *Manhattan Life Ins. Co.*, 171 N. Y. 314, 63 N. E. 1111.

[4] *Mente* v. *Townsend*, 68 Ark. 391, 59 S. W. 41; *Wirgman* v. *Miller*, 98 Ky. 620, 33 S. W. 937; *Emerick* v. *Coakley*, 35 Md. 188; *Baker* v. *Young*, 47 Mo. 453.

[5] *Mut. Ben. Life Ins. Co.* v. *First Nat. Bank* (Ky., 1902), 69 S. W. 1; *Hurst* v. *Mut. Res. Fund*, 78 Md. 59, 26 Atl. 956; *Hirsch* v. *Mayer*, 165 N. Y. 236. On payment of debt title to policy again vests in assignor without formal reassignment, *Alabama Gold Life Ins. Co.* v. *Garmany*, 74 Ga. 51. But renewal of note will not cancel assignment of collateral, *Kendall* v. *Eq. Life Assur. Soc.*, 171 Mass. 568, 51 N. E. 464; *Corcoran* v. *N. Y. Mut. L. Ins. Co.*, 183 Pa. St. 443, 39 Atl. 50.

[6] *Griffey* v. *N. Y. Cent. Ins. Co.*, 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202. Default by pledgor, *Toplitz* v. *Bauer*, 161 N. Y. 325, 55 N. E. 1059. As to rights of pledgee to realize on policy as collateral see *Dungan* v. *Mut. Ben. Life Ins. Co.*, 46 Md. 469; *Rathborne* v. *Hatch*, 90 App. Div. 161, 85 N. Y. Supp 775; *Palmer* v. *Mut. Life Ins. Co.*, 77 N. Y. Supp. 869, 38 Misc. 318; *Bailey* v. *Am. Deposit & Loan Co.*, 52 App. Div. 402, 65 N. Y. Supp. 330; *Manton* v. *Robinson*, 19 R. I. 405, 37 Atl. 8. Purpose of assignment whether absolute or for collateral may be shown by parol, *Kendall* v. *Equitable Life Assur. Soc.*, 171 Mass. 568, 51 N. E. 464; *Westbury* v. *Simmons*, 57 S. C. 467, 35 S. E. 764.

[7] *Hani* v. *Germania L. Ins. Co.*, 197 Pa. St. 276, 47 Atl. 200, 80 Am. St. R. 819; *Opitz* v. *Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. R. 1004.

[8] *Hewins* v. *Baker*, 161 Mass. 320, 37 N. E. 441. No particular form of words is essential to the validity of an assignment of a policy, *Ormond* v. *Conn. Mut. L. Ins. Co.* (N. C., 1907), 58 S. E. 997.

delivered to the assignee with that intent. Likewise if the assignment or other proper evidence of the transfer is duly delivered to the assignee, it is not essential that the policy itself be delivered to him in order to convey an interest.[1] So also the rights of an assignee may become perfected without an actual delivery either of an assignment or of the policy itself.[2]

Where, with the consent of the insurers, an assignment has been consummated, this amounts to a new contract between the company and the assignee.[3] As to the past, however, the assignee simply steps into the position of the assignor, and can only recover under the policy in case the assignor has not been guilty of any breach.[4]

No one except the company can, in general, make objection to an assignment from the original insured,[5] unless the policy is payable to other beneficiaries, who have a vested interest therein;[6] and after the death of the insured, the interest in the policy becomes a chose in action which can be assigned without consent of the insurers, and without regard to any provision of the policy which may forbid an assignment.[7]

[1] *McDonough* v. *Ætna Life Ins. Co.*, 38 Misc. (N. Y.) 625.

[2] *Richardson* v. *White*, 167 Mass. 58, 44 N. E. 1072 (equitable assignment for money actually advanced); *Janes* v. *Falk*, 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. R. 783 (declaration of trust by executor in favor of the estate). As to when an assignment without consideration or by way of gift becomes complete, see *Colburn's Appeal*, 74 Conn. 463, 51 Atl. 139, 92 Am. St. R. 231; *Weaver* v. *Weaver*, 182 Ill. 287, 55 N. E. 338, 74 Am. St. R. 173; *N. Y. Life Ins. Co.* v. *Flack*, 3 Md. 341, 56 Am. Dec. 742; *Cockrell* v. *Cockrell*, 79 Miss. 569, 31 So. 203; *Kulp* v. *March*, 181 Pa. St. 627, 37 Atl. 913, 59 Am. St. R. 687; *Lord* v. *N. Y. Life Ins. Co.*, 95 Tex. 216, 66 S. W. 290, 56 L. R. A. 596, 93 Am. St. R. 927. Mere promises to give, or statements as to purpose and intent do not establish completed gifts, *Re Webb's Estate*, 49 Cal. 542; *Williams* v. *Chamberlain*, 165 Ill. 210, 46 N. E. 250.

[3] *Fogg* v. *Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 337. The assignee may sue in his own name, *Tremblay* v. *Ins. Co.*, 97 Me. 547, 55 Atl. 509, 94 Am. St. R. 521; *South. Fertilizer Co.* v. *Reames*, 105 N. C. 283, 11 S. E. 467; *Mut. Protection Ins. Co.* v. *Hamilton*, 37 Tenn. 269. *Contra*, *Mut. L. Ins. Co.* v. *Allen*, 113 Ill. App. 89, 96, aff'd 212 Ill. 134, 72 N. E. 200. How suit is to be brought is determined by the law of the forum, *Nederland Life Ins. Co.* v. *Hall*, 84 Fed. 278, 27 C. C. A. 390.

[4] *Leonard* v. *Charter Oak Life Ins. Co.*, 65 Conn. 529, 33 Atl. 511; *Schmidt* v. *Northern Life Assn.*, 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. R. 323; *Smith* v. *National Ben. Soc.*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *McQuillan* v. *Mut. Res. Fund Assn.*, 112 Wis. 665, 87 N. W. 1069, 56 L. R. A. 233, 88 Am. St. R. 986.

[5] *Leinkauf* v. *Calman*, 110 N. Y. 50. A measure of damage to a beneficiary whose vested rights have been invaded is cost of replacing policy in a sound company, *Keyser* v. *Mut. Res. Fund L. Assoc.*, 60 App. Div. (N. Y.) 297, 70 N. Y. Supp. 32. Compare *Mut. L. Ins. Co.* v. *Allen*, 212 Ill. 134, 72 N. E. 200; *Quinn* v. *Supreme Council*, 99 Tenn. 80, 41 S. W. 343. And see *Toplitz* v. *Bauer*, 161 N. Y. 325, 55 N. E. 1059.

[6] *Robinson* v. *Duvall*, 79 Ky. 83, 43 Am. Rep. 208; *Tremblay* v. *Ætna Life Ins. Co.*, 97 Me. 547, 55 Atl. 509, 94 Am. St. R. 521.

[7] *Hall* v. *Dorchester Mut. Fire Ins.*

§ 378. Incontestable Clause.—*This policy, after two years, will be incontestable, except for non-payment of premium.*

To win popular favor the life insurance contract must be made attractive. After the death of the insured it is often difficult for the surviving beneficiary to produce competent testimony with which to meet charges of breach of warranty or fraud, then for the first time advanced by the insurer. The company is very apt to claim in its pleading that a breach of warranty involves also dishonesty on the part of the insured. However groundless and inexcusable the charge, if made and insisted upon, the issue must always be fought out in court before the insurance money can be collected. It is obviously a matter of public policy that widow, children, or dependents should not be deluded with a mere chose in action in place of available means of support upon decease of the breadwinner. Remove all fear of lawsuits and the soliciting agent finds that his business is prosperous. Most of the regular life companies, therefore, advertise and insert in their policies as a conspicuous feature the incontestable clause, and public welfare is clearly on the side of its full enforcement.[1]

This clause is somewhat analogous to a short statute of limitation or repose. By it the company declares in effect, that within the period named it will undertake to make any desired and needful investigation into the circumstances and good faith of the assured, and that if within that period no action has been taken by it to rescind the contract, or according to some policies [2] if no breach has occurred within that period, thereafter the policy shall be paid without litigation.[3]

Co., 111 Mass. 53, 15 Am. Rep. 1; *Mellen* v. *Hamilton Fire Ins. Co.*, 17 N. Y. 609.

[1] Two years is not always named as the period. Some policies name one year; some three, some five. Occasionally one is incontestable from its date. The New York standard life policies provide, "The policy shall here provide that it shall be incontestable, except for non-payment of premiums, either from its date or after one or two years." Some incontestable clauses specify other exceptions besides non-payment of premiums; for instance, misstatements as to age, fraud in procurement, change to forbidden employment, sojourning in forbidden regions, etc. As to representations inducing reinstatement of lapsed policy, the period again runs from date of reinstatement, *Teeter* v. *United L. Ins. Assoc.*, 159 N. Y. 411, 54 N. E. 72. And see *Austin* v. *Mut. Res. Fund Assn.*, 132 Fed. 555.

[2] *Kelley* v. *Mut. Life Ins. Co.*, 109 Fed. 56.

[3] *Wright* v. *Mut. Ben. Life Assn.*, 118 N. Y. 237, 23 N. E. 186, 16 Am. St. R. 749, 6 L. R. A. 731 ("it is in the nature of and serves a similar purpose as statutes of limitation and repose, the wisdom of which is apparent to all reasonable minds); *Bates* v. *United Life Ins. Assn.*, 68 Hun, 144, 52 N. Y. St. R. 86, 22 N. Y. Supp. 626, aff'd 142 N. Y. 677, 37 N. E. 824; *Clements* v. *Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. R. 650. And see *Wheelton* v. *Hardisty*, 8 El. &

Notwithstanding the incontestable clause, however, the claimant must furnish proofs of death as stipulated by the policy, and institute any action on the policy within the period limited, if there be a limit prescribed, since the clause is not aimed at remedies or provisions to be complied with by the claimant after death of the insured.[1] The incontestable clause within its own phraseology usually contemplates payment of premiums as a condition precedent to any right of recovery on the policy,[2] and such a proviso is reasonable, and quite consonant with the liberal purpose of the clause.

§ 379. Same Subject—Policy Procured by Fraud.—By some authorities the contention is made that if the underwriter can show that the policy was procured from him by fraud, he should be relieved from his waiver of defense as contained in the incontestable clause:[3] the argument being that a stipulation induced by fraud should be held inoperative, but this line of reasoning is based upon doubtful premises, and certainly is not available where the incontestable clause is provided by legislative enactment.

The insured, neither in the *Welch case*, 108 Iowa, 224, nor in the *Holden case*, 191 Mass. 153, nor in any other case cited in this and the following section, framed this clause or fraudulently induced the life insurance companies to adopt it. Either by compulsion of statute, or of their own volition and to subserve their own interests, the insurers have inserted the provision in the policy with the manifest purpose of inducing the insured to believe that if the premiums are all paid and the claim presented with due formality, payment of the insurance money will promptly follow upon maturity of the contract without complication or litigation of any sort. The companies preparing the terms of their engagement deliberately concluded to make no exception of fraud, and so far as they are concerned are entitled to the benefit of no such omitted restriction. Courts do not coerce defendants into setting up defenses founded upon allegations of fraud. It is always optional with a defendant

El. 232. Many states have statutes providing for an equitable adjustment, where there has been misstatement of age, Appendix, ch. I.

[1] *Mass. Ben. Life Assur. Soc.* v. *Robinson*, 104 Ga. 256, 30 S. E. 918; *Brady* v. *Ins. Co.*, 168 Pa. St. 645, 32 Atl. 102.

[2] *Schmertz* v. *U. S. Life Ins. Co.*, 118 Fed. 250, 55 C. C. A. 104; *Vetter* v. *Mass. Nat. Life Assn.*, 29 App. Div. 72, 51 N. Y. Supp. 393; *Met. Life Ins. Co.* v. *Walton*, 25 Ohio Cir. Ct. 587. As to misstatements relating to age, see *Brady* v. *Prudential Ins. Co.*, 168 Pa. St. 645, 32 Atl. 102; *Doll* v. *Prudential Ins. Co.*, 21 Pa. Super. Ct. 434.

[3] *Welch* v. *Ins. Co.*, 108 Iowa, 224, 78 N. W. 853, 50 L. R. A. 774 (holding that clause making policy incontestable from its date would not cover fraud). *Contra, Union Cent. Life Ins. Co* v. *Fox*, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. R. 885.

to waive such a defense. Apparently the right of waiver may be exercised prior to the action as well as at the time of pleading. The fraud of the insured in procuring a policy does not vitiate the contract. It merely renders it voidable at the insurer's option, but the right to take advantage of this option may be abandoned by the insurer. Has he abandoned it by the clause in question?

Two pertinent and distinct questions are presented for the determination of the courts in connection with this subject; first, what does the language of the clause fairly mean? second, if it is so worded as to include fraud, is the provision so far opposed to public policy as to be void to that extent? The answer to the first question is clear. Fraud when not among the exceptions is covered.[1] In disposing of the second question, the courts have very generally concurred that the clause is not invalid though intended to cover fraud, and that the company is not excused from payment because of fraud in procuring the policy, or for breach of warranty, intentional or unintentional, provided it seeks no relief until after the expiration of the period of limitation specified in its contract.[2] One court, however, has decided that a suit in chancery for rescission of the contract on the ground of fraud would lie if brought by the company in the lifetime of the assured and within a reasonable time.[3]

In an Illinois case the company claimed that the insured had made false and fraudulent misrepresentations as to his health, inducing it to take the risk, but the policy provided that it should be incontestable after one year if the premiums were duly paid. When the insured died, the policy had been running more than three years and the premiums had been paid. The court held that the company set up no defense, and affirmed judgment for the plaintiff.[4]

[1] *Mutual Res. Fund Life Assn.* v. *Austin*, 142 Fed. 398, 73 C. C. A. 498.

[2] *Wright* v. *Mut. Ben. L. Assn.*, 118 N. Y. 237, 23 N. E. 186, 16 Am. St. R. 749, 6 L. R. A. 731; *Mass. Ben. Life Assn.* v. *Robinson*, 104 Ga. 256, 30 S. E. 919, 42 L. R. A. 261; *Royal Circle* v. *Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. R. 224; *Goodwin* v. *Prudential L. Ins. Co.*, 97 Iowa, 234, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. R. 411; *Murray* v. *State Mut. Life Ins. Co.*, 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; *Clement* v. *Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. R. 650; *Franklin Ins. Co.* v. *Villeneuve*, 25 Tex. Civ. App. 356, 60 S. W. 1014; *Patterson* v. *Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. R. 899; *McQuillan* v. *Mut. Res. Fund L. Assn.*, 112 Wis. 665, 88 N. W. 925, 87 N. W. 1069. It is sufficient for the company to begin suit for relief within the period, *John Hancock Mut. Life Ins. Co.* v. *Houpt*, 113 Fed. 572.

[3] *N. Y. Life Ins. Co.* v. *Weaver*, 114 Ky. 295, 70 S. W. 629. If the clause expressly excepts fraud, the company may then set up actual but not constructive fraud in defense, *Northwestern Mut. Life Ins. Co.* v. *Montgomery*, 116 Ga. 799, 43 S. E. 79; *Kline* v. *Nat. Ben. Assn.*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; *Met. Life Ins. Co.* v. *Walton*, 25 Ohio Cir. Ct. 587.

[4] *Flanigan* v. *Federal Life Ins. Co.* (Ill., Dec., 1907), 83 N. E. 178.

§ 380. Incontestable from Date—Policy Procured by Fraud.—Certain courts, while adhering to the prevailing rule in those cases where the policy gives the insurer a year or other specified period for investigation, have held that, in spite of an incontestable clause the insurer may show in defense that the issuance of the policy was induced by fraud on the part of the insured, in those cases where the clause runs from date of the contract. This conclusion is based on considerations of public policy.[1] It would seem, however, that the weight of public interest rests in the other scale. The insurer makes whatever examination he chooses to make before closing his engagement and commands methods of getting at the material facts with a measure of thoroughness and accuracy. Now and again he may be seriously deceived by an applicant; nevertheless it is more important that millions of honest families should purchase peace of mind and immunity from litigation than that insurers should be given a longer and better opportunity of detecting and taking advantage of occasional fraud which in their own interest they have expressly agreed to ignore.[2]

The opposite rule is not without some reason to support it; but in practice it does not work well, since it largely defeats the main purpose of the incontestable clause, and, despite such a clause, puts it within the power of the insurer to throw every claim, no matter how meritorious, into complicated litigation by a mere allegation of fraud in a pleading. Furthermore, it must be remembered that the almost universal custom is for the insurer to make his investigation of the risk prior to the issuance of the policy, not during the year or years thereafter while the policy is running. It may also be observed that if the fraud complained of amounts to a felony or a misdemeanor, the interests of the public are protected under the penal code.

§ 381. Same Subject—Insurable Interest.—The necessity of an insurable interest is grounded upon considerations of public policy, and in spite of the incontestable clause, therefore, it must appear that the original insured had sufficient insurable interest in the life insured to sustain the contract.[3]

[1] *Welch* v. *Ins. Co.*, 108 Iowa, 224, 78 N. W. 853, 50 L. R. A. 774; *Reagan* v. *Union Mut. Life Ins. Co.*, 189 Mass. 555, 76 N. E. 217; *Holden* v. *Prudential L. Ins. Co.*, 191 Mass. 153. *Contra*, *Union Central L. Ins. Co.* v. *Fox*, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. R. 885.

[2] *Union Central L. Ins. Co.* v. *Fox*, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. R. 885. Statutes authorize incontestability from date, for example, New York standard life policies, Ins. L. § 101.

[3] *Clement* v. *Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am.

§ 382. Same Subject—Suicide.—By the general incontestable clause, according to the prevailing rule, the company is obligated not to set up suicide as a defense and is bound by its stipulation.[1] Whether the Federal Supreme Court will give its approval to this doctrine is rendered uncertain by its recent decisions. Apparently it will not do so.[2] That high court has, indeed, enforced and given wide range to the Missouri statute denying to the companies the defense of suicide;[3] and there is no intimation in the opinion that that statute is void as contravening public policy;[4] but as the court declares "the same words may require a different construction when used in different documents as, for instance, in a contract and a statute."[5]

Accordingly, it is clear that the federal courts will enforce the following provisions of the New York standard policies, as amended by the superintendent of insurance, "(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions must be applicable only to cases where the act of the insured provided against occurs within one year after the issuance of the policy.) Incontestability.—(The policy shall here provide that it shall be incontestable, except for non-payment of premiums either from its date or after one or two years)."

The suicide and incontestable clauses may be so worded that effect can be given to both as harmonious and independent provisions.[6]

St. R. 650 (the assignment was a mere cover for a wager); *Anctil* v. *Ins. Co.* (1899), A. C. 604 (no insurable interest within Canada Code). But see *Wright* v. *Ben. Assn.*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. R. 749.

[1] *Mut. Life Ins. Co.* v. *Kelly*, 114 Fed. 268; *Goodwin* v. *Assurance Assn.*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. R. 411; *Royal Circle* v. *Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. R. 224; *Supreme Court* v. *Updegraff*, 68 Kan. 474, 75 Pac. 477; *Sun Life Ins. Co.* v. *Taylor*, 108 Ky. 408, 56 S. W. 668, 94 Am. St. R. 383; *Mareck* v. *Life Assn.*, 62 Minn. 39, 64 N. W. 68, 54 Am. St. R. 613; *Holland* v. *Chosen Friends*, 54 N. J. L. 490; *Simpson* v. *Ins. Co.*, 115 N. C. 393, 20 S. E. 517; *Mut. Res. Fund L. Assn.* v. *Payne* (Tex. Civ. App.), 32 S. W. 1063; *Patterson* v. *Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. R. 899. But see § 371, *supra*.

[2] *Ritter* v. *Ins. Co.*, 169 U. S. 139, 18 S. Ct. 300, 42 L. Ed. 693 (intentional self-destruction by a sane man not a risk insured against); *Burt* v. *Ins. Co.*, 187 U. S. 362, 23 S. Ct. 139, 47 L. Ed. 216 (death by legal execution for crime not a risk insured against).

[3] *Knights Templars* v. *Jarman*, 187 U. S. 197, 23 S. Ct. 108, 47 L. Ed. 139.

[4] *Supreme Court* v. *Updegraff*, 68 Kan. 474, 75 Pac. 477, 478.

[5] *Knights Templars* v. *Jarman*, 187 U. S. 201, *supra*.

[6] *Starck* v. *Union Cent. Life Ins. Co.*, 134 Pa. St. 45, 19 Atl. 703, 7 L. R. A. 576, 19 Am. St. R. 674; *Childress* v. *Fraternal Union of Am.*, 113 Tenn. 252, 82 S. W. 832 (a smaller amount payable in case of suicide, and clauses held to be independent and both enforceable). So also *Hall* v. *Mut. Res. Fund L. Assn.*, 19 Pa. Super. Ct. 31. But see *Mareck* v. *Mut. Res. Fund Assoc.*, 62 Minn. 39, 64 N. W. 68, 54

§ 383. Same Subject—Death at Hands of Justice.—If the general incontestable clause bars the insurance company from setting up in defense the act of suicide, even when committed by a sane man, it is difficult to discover any sufficient reason for allowing the company to except from its application, the death of the insured by legal sentence and execution for crime. The act of suicide, it may often be shown, is committed with the express purpose of hastening payment of the insurance money; whereas it rarely appears that the insured is actuated by any thought of insurance on his own life when persuaded to commit crime. So far as innocent beneficiaries are concerned the reasons for allowing them to take their insurance money are no stronger in case of suicide than in the case of legal execution; and so far as the insurance company is concerned it shows no equity in its own favor in either case inasmuch as it has expressly contracted by the clause in question to raise no such defense.

When it comes to any question of public policy, it should be observed that whatever rule of construction may be applied by the court, one party or the other to the contract is bound to be benefited pecuniarily by such premature and enforced death of the insured—either the company by a forfeiture of the policy with retention of the premiums already paid; or the beneficiaries by speedier maturity of the policy. Where beneficiaries, as well as insurer, are in no wise responsible for hastening the date of maturity, it is not altogether clear, that in disregard of the express terms of the contract the insurer should be so unexpectedly favored, and the beneficiaries so heavily penalized. Premiums are often paid for many years, and at great sacrifice, a sacrifice felt, perhaps, by all the members of the household. Before leaving the insurance moneys with the company and depriving innocent widows and children of their natural means of support, in violation of the terms of the contract, the courts must be convinced that the general welfare of the community will thereby be promoted. Accordingly it is not surprising that the drift of opinion in the state courts is in the direction of extending the operation of the incontestable clause to the fullest protection of innocent beneficiaries.[1]

Am. St. R. 613; *Simpson* v. *Life Ins. Co.*, 115 N. C. 393, 20 S. E. 517.

[1] *Sun Life Ins. Co.* v. *Taylor*, 108 Ky. 408, 56 S. W. 668, 94 Am. St. R. 383; § 379, *supra*. But see *Burt* v. *Union Cent. Life Ins. Co.*, 187 U. S. 362, 23 S. Ct. 139, 47 L. Ed. 216; *Collins* v. *Met. Life Ins. Co.*, 27 Pa. Super. Ct. 353.

CHAPTER XVIII

The Accident Policy

§ 384. **Introductory.**—Accident insurance is a branch of life insurance, and is governed by the same general principles of law.[1]

The accident policy illustrates conspicuously, on the one hand, the disposition of the insurers to narrow liability by the addition of restrictive clauses,[2] and, on the other hand, the determination of the courts to hold the company to the principal obligation of the contract by evading exceptions which are unreasonably inconsistent with the main purpose of the contract.[3]

[1] *State* v. *Federal Investment Co.*, 48 Minn. 110, 50 N. W. 1028. And the statutes, applicable to life, apply, also, to accident insurance, *Maryland Cas. Co.* v. *Gehrmann*, 96 Md. 634, 54 Atl. 678 (by statute warranty must be materially or fraudulently false to avoid); *Logan* v. *Fidelity & Cas. Co.*, 146 Mo. 114, 47 S. W. 948 (suicide no defense); *Pickett* v. *Pac. Mut. Life Ins. Co.*, 144 Pa. St. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. R. 618; *Zimmer* v. *Cent. Acc. Ins. Co.*, 207 Pa. St. 472, 56 Atl. 1003; unless the contrary appears from the wording of the statute, *Standard L. & A. Ins. Co.* v. *Carroll*, 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194. The Massachusetts court holds that neither health nor accident insurance can be incorporated in a life policy as a subsidiary feature, *Ætna Life Ins. Co.* v. *Hardison* (Mass., 1908), 84 N. E. 407. The doctrines of warranty and liberal rule of construction, of course, apply to accident insurance, for example, the warranty as to sound health, *French* v. *Fidelity & Cas. Co.* (Wis., 1908), 115 N. W. 869; *U. S. Health & Acc. Ins. Co.* v. *Bennett* (Ky., 1907), 105 S. W. 433 (statute); warranty as to amount of weekly income, *Heintz* v. *Continental Cas. Co.*, 121 App. Div. (N. Y.) 75. But in the following case under the liberal statute of Kentucky an overstatement of earnings was held immaterial, *Ætna Life Ins. Co.* v. *Claypool* (Ky., 1908), 107 S. W. 325. The doctrine of waiver applies to accident insurance, thus where the agent of the insurer knew the true age of the insured, *Crawford* v. *Travelers' Ins. Co.* (Ky., 1907), 99 S. W. 963; or knew that the insured was crippled, *Standard Life & Acc. Ins. Co.* v. *Holloway* (Ky.), 72 S. W. 796.

[2] For list of such restrictive clauses, see *Travelers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308. But the accident companies in their more recent forms of policies are coming to realize the wisdom of showing greater liberality to the assured. An older form of policy issued by the Travelers' Ins. Co., containing numerous restrictions, is selected for this chapter as a convenient model for consideration.

[3] *Metropolitan Acc. Assn.* v. *Froiland*, 161 Ill. 30, 43 N. E. 766, 52 Am. St. R. 359. To construe otherwise would well-nigh destroy the value of the contract to the insured, *Ætna Life Ins. Co.* v. *Hicks*, 23 Tex. Civ. App. 74, 56 S. W. 87. Probable intent of the parties is the test in construing the meaning of the contract, *Lovelace* v. *Travelers' Protective A.*, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209; *United States Mut. A. A.* v. *Newman*, 84 Va. 52, 58, 3 S. E. 805. Strict construction is applied against the company. Doubt resolved in favor of the insured, *Globe Acc. I. Co.* v. *Gerisch*, 163 Ill. 625, 54 Am. St. R. 486; *Peterson* v.

Life insurance protects against loss by death, whether caused by old age, disease, or accident.[1] Accident insurance is limited to loss caused by accident, whether such accident result in death or only in bodily disability or injury.[2]

§ 385. Accident Defined—What Constitutes.—An accident is an event which takes place without the foresight or expectation of the person acted upon or affected;[3] for example, an inadvertent fall from a moving train.[4] Within the meaning of the accident policy, the Indiana court defines the term "accident" as an event which takes place without one's foresight or expectation, and which proceeds from an unknown cause or an unusual effect of a known cause not within the expectation of the person injured.[5]

The United States Supreme Court approved of the following statement of the law: "The term 'accidental' was used in the policy in its ordinary, popular sense, as meaning happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected. If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means. But if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."[6]

If the injury occur without the intention of the insured it may

Modern Brotherhood, 125 Iowa, 562, 101 N. W. 289, 67 L. R. A. 631 (technical words, how construed); *Marshall* v. *Com. Travelers' Acc. Assn.*, 170 N. Y. 434, 63 N. E. 446; *Paul* v. *Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 8 Am. St. R. 758, 3 L. R. A. 443. The company is presumed to contract with regard to previous interpretations of the same phrases by the courts, *Fidelity, etc., Co.* v. *Lowenstein*, 97 Fed. 17, 38 C. C. A. 29.

[1] Life insurance often has also an investment feature, as in the case of an endowment policy. See § 34, *supra*.

[2] Various classes of accident policies are described in *Employers' Liability Assur. Corp.* v. *Merrill*, 155 Mass. 404, 29 N. E. 529.

[3] *Railway, etc., Assn.* v. *Drummond*, 56 Neb. 235, 76 N. W. 562 (citing many other cases giving substantially same definition); *Paul* v. *Ins. Co.*, 112 N. Y. 472, 20 N. E. 349, 3 L. R. A. 443, 8 Am. St. R. 758 (a leading case); *Steel* v. *Cammell* (1905), 2 K. B. 232. As for distinction between accident and disease see § 396.

[4] *Smith* v. *Ætna Life Ins. Co.*, 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. R. 153.

[5] *Phœnix Acc. & Sick Ben. Ass.* v. *Stiver* (Ind. App., 1908), 84 N. E. 772 (the insured was stabbed on the highway by an insane man without provocation and unexpectedly, or as a result of having shortly before pushed the stabber from the premises of another, not in consequence of any assault being then committed by the insured, and not as a result that might have been expected from a prior quarrel, and the insurer was held liable).

[6] *Mut. Acc. Assn.* v. *Barry*, 131 U. S. 100, 121, 9 S. Ct. 755, 33 L. Ed. 60 (jumping from a platform or walk to the ground).

be termed accidental though brought about designedly by another person.[1] And, again, an injury happening to the insured without the concurrence of his will or intent is nevertheless accidental although resulting from his own intentional act, provided only such result was not foreseen by him; thus in case of an injury to the insured caused by intentionally jumping from the platform of a train of cars under such circumstances that no harm could reasonably have been expected to follow.[2] The same conclusion was reached in the following cases: A sprain unexpectedly caused by lifting heavy weights;[3] blood poisoning from cutting a corn,[4] or from the use of a hypodermic needle;[5] an unintentional taking of poison;[6] an injury to the insured caused by a blow from the handle of a pitchfork slipping through his hands while he was loading hay, which produced peritoneal inflammation and ultimately death;[7] rupture of a blood vessel during exercise with Indian clubs;[8] exertion causing unusual dilation of the heart;[9] suicide while insane;[10] self-inflicted injuries while insane.[11] But if the acts of the insured are purely voluntary and usual, and the results natural, the injury has been held not to be accidental within the meaning of the policy,

[1] *Ripley* v. *Railway Pass. Assur. Co.*, 20 Fed. Cas. 823, aff'd 16 Wall. 336, 21 L. Ed. 469; *Fidelity & Cas. Co.* v. *Johnson*, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206 (hanging by mob); *Richards* v. *Ins. Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. R. 455 (death by a blow); *Hutchcraft's Exr.* v. *Travelers' Ins. Co.*, 87 Ky. 300, 8 S. E. 570, 12 Am. St. R. 484 (murdered for robbery); *Am. Acc. Co.* v. *Carson*, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. R. 473 (killing of officer by prisoner resisting arrest); *Accidental Ins. Co.* v. *Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. R. 685; *Button* v. *Am. Mut. A. A.*, 92 Wis. 83, 65 N. W. 866 (insured was intentionally shot and injured).

[2] *U. S. Mutual Accident Asso.* v. *Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60. But see *Southard* v. *Railway Pass. Assur. Co.*, 34 Conn. 574.

[3] *Martin* v. *Travelers' Ins. Co.*, 1 F. & F. 505. But see special clause relating to overexertion, § 402.

[4] *Nax* v. *Travelers' Ins. Co.*, 130 Fed. 985.

[5] *Bailey* v. *Interstate Cas. Co.*, 8 App. Div. 127, 40 N. Y. Supp. 513, aff'd 158 N. Y. 723, 53 N. E. 1123.

[6] *Healey* v. *Mut. Acc. Assn.*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. R. 637; *Mut. Acc. Asso.* v. *Tuggle*, 138 Ill. 428, 28 N. E. 1066; *Pollock* v. *U. S. Mut. Acc. Assn.*, 102 Pa. St. 230, 48 Am. Rep. 204. But see *Bayless* v. *Travelers' Ins. Co.*, 6 Ins. L. J. 109; *Preferred Mut. Acc. Asso.* v. *Beidelman*, 1 Monaghan (Pa.), 481. Injuries due to mistake in taking medicine, *Carnes* v. *Iowa Traveling Men's Assn.*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. R. 306 (larger dose of morphine than intended). And see *Dezell* v. *Fidelity & Cas. Co.*, 176 Mo. 253, 75 S. W. 1102. Unintentional inhaling of gas, *U. S. Mut. Acc. Assn.* v. *Newman*, 84 Va. 52, 3 S. E. 805.

[7] *North Am. Ins. Co.* v. *Burroughs* 69 Pa. St. 43.

[8] *McCarthy* v. *Travelers' Ins. Co.*, 15 Fed. Cas. 1254, 8 Biss. 362.

[9] *Horsfall* v. *Pac. Mut. L. Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. R. 846.

[10] *Blackstone* v. *Standard, etc., Ins. Co.*, 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; *Mut., etc., Ins. Co.* v. *Daviess*, 87 Ky. 541.

[11] *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740. But such accidents may be expressly excluded, § 369.

although unexpected. Such rulings, however, have usually turned upon the particular phraseology of the contract.[1]

Smouse, the insured, was convalescent after an attack of pneumonia, but his strength was not fully restored. He was lying on a couch asleep, and partly dressed. Being suddenly awakened by his wife and requested to dress quickly, he arose somewhat dazed, and hurriedly attempted to remove his nightshirt over his head. While his arms were raised, he became in some manner entangled in the garment, and, putting forth violent exertion to extricate himself, he sustained a rupture of a blood vessel, the hemorrhage from which caused his death within a few minutes. The judgment in favor of the plaintiff and against the insurer, was reversed on appeal, because, assuming the charge of the trial judge to be the law of the case, the Supreme Court held that the evidence did not justify the recovery. The jury had been told in effect that if the rupture of the blood vessel was the result of *voluntary* exertions on the part of Smouse the fatal result could not be regarded as accidental. Whether this part of the charge involved error the court did not determine, nor did it pass upon the merits of the case.[2]

Unless expressly excluded by the terms of the policy, an injury intentionally inflicted upon the insured by another, in the course of an affray or combat between them, may be included in the phrase "accidental injury."[3] But where the terms of the policy expressly

[1] *Feder* v. *Iowa, etc., Assn.*, 107 Iowa, 538, 78 N. W. 252, 43 L. R. A. 693, 70 Am. St. R. 212 (rupture in reaching to close a shutter); *Niskern* v. *United Brotherhood*, 93 App. Div. 364, 87 N. Y. Supp. 640 (the insured, a carpenter, put forth usual effort which proved too much for him in a weakened condition); *Clidero* v. *Ins. Co.*, 29 Scot. L. R. 303 (insured stooping to put on socks displaced intestines). But violent wrenching of body causing rupture was held to be accidental and hence covered by the policy, *Standard L. & A. Ins. Co.* v. *Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. R. 112.

[2] *Smouse* v. *Iowa State Traveling Men's Assn.*, 118 Iowa, 436, 92 N. W. 53. This injury might well have been held to be caused by accidental means, but whether the accident was the sole cause or whether the antecedent disease contributed to the result presented another question.

[3] *Order of Chosen Friends* v. *Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; *Furbush* v. *Maryland Cas. Co.*, 131 Mich. 234, 91 N. W. 135 (intentional homicide, the insured himself being in no wise responsible); *Lovelace* v. *Travelers' Protective Assn.*, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. R. 638 (in attempting to eject another guest from a tavern the insured was shot and killed by him; *held*, an accident, since the insured had no reason to suppose that the other was armed). The company was held liable where the insured was advancing in a threatening manner, but unaware that his slayer was armed, *Union Casualty & S. Co.* v. *Harroll*, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. R. 873. The rule is otherwise, if the fatal results are naturally to be expected by the insured who deliberately enters into a combat as aggressor, *Taliaferro* v. *Travelers' Protective Assn.*, 80 Fed. 368, 25 C. C. A. 494, 49 U. S. App. 275.

exclude an injury of that character, the restriction of the contract will prevail.[1]

Sunstroke is generally classified as a disease rather than an accident.[2] But sunstroke may be expressly included as one of the insured casualties.[3] And where it is so included, the Kansas court has held that the term "sunstroke" unexplained denotes a condition produced by any heat, solar or artificial.[4]

In regard to negligence of the insured, where the policy is silent, the rule is the same as in other branches of insurance;[5] but the usual conditions of the accident policy modify the insurer's liability in this respect. Accidental injury is a phrase of broad scope and the insurers have endeavored to limit its application by the introduction into their conventional policies of many restrictive provisions, differing somewhat in the forms of policies adopted by the different companies.[6]

§ 386. Injuries Effected Through External, Violent, and Accidental Means.—The phrase "external and violent means," added to the policy by the insurers for the purpose of restricting their liability, is very strictly construed against them. The word "external" refers to the force or cause and not to the injury. If the cause be external it may act internally without relieving the company;[7] And to hold the insurer it need not be shown that the cause was violent in the sense of breaking tissues, or visibly marring the body. Therefore, notwithstanding this restrictive clause, it is held that the policy covers death by accidental drowning;[8] death

[1] *Travelers' Ins. Co.* v. *McConkey* 127 U. S. 661; *DeGraw* v. *National Acc. Society*, 51 Hun (N. Y.), 142; *Grimes* v. *Fidelity & Cas. Co.*, 33 Tex. Civ. App. 275, 76 S. W. 811. See § 401.

[2] *Dozier* v. *Fidelity & Casualty Co.*, 46 Fed. 446, 13 L. R. A. 114; *Sinclair* v. *Maritime Passengers' Assn. Co.*, 3 Ellis & El. 478.

[3] *Railway Officials, etc., Association* v. *Johnson*, 109 Ky. 261, 58 S. W. 694, 52 L. R. A. 401, 95 Am. St. R. 370.

[4] *Continental Cas. Co.* v. *Johnson*, 74 Kan. 129, 85 Pac. 545 (prostration from heat of a furnace).

[5] *Schneider* v. *Providential Life Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157 (even gross negligence offers no defense to the insurer); *Wilson* v. *Assn.*, 53 Minn. 470, 55 N. W. 626. And see § 49, *supra*.

[6] The legal presumption is of accident rather than of murder or suicide, *Western Travelers' Acc. Assn.* v. *Holbrook*, 65 Neb. 469, 91 N. W. 276 (fall from great height); *Stevens* v. *Continental Cas. Co.*, 12 N. D. 463, 97 N. W. 862. Nevertheless, on the whole case, the burden of proof is with the plaintiff to show a right of recovery against the insurer, *Whitlach* v. *Casualty Co.*, 149 N. Y. 45, 43 N. E. 405; *Læssig* v. *Travelers' Protective Assn.*, 169 Mo. 272, 69 S. W. 469; *Maryland Casualty Co.* v. *Glass*, 29 Tex. Civ. App. 159, 67 S. W. 1062.

[7] *American Acc. Co.* v. *Reigart*, 94 Ky. 547, 21 L. R. A. 651, 23 S. W. 191, 42 Am. St. R. 374. The falling of scalding water into the ear is to be classed as an external and violent injury, *Driskell* v. *U. S. Health & Acc. Ins. Co.*, 117 Mo. App. 362, 93 S. W. 880.

[8] *Manufacturing Acc. Ind. Co.* v. *Dorgan*, 58 Fed. 945, 7 C. C. A. 581.

by accidental inhaling of gas;[1] intestinal inflammation from eating spoiled oysters;[2] choking to death in the attempt to swallow a piece of beefsteak;[3] a fatal bite of an insect upon the toe causing blood poison;[4] freezing to death caused by the collapse of a wagon;[5] a stumbling and fatal fall against a locomotive engine;[6] a blow intentionally struck by another person;[7] a rupture caused by jumping from a train;[8] lockjaw from a self-inflicted gunshot wound;[9] and hanging at the hands of a mob.[10] So also the insurer was held liable where the immediate cause of death was fright, but caused in conjunction with efforts to hold a runaway horse.[11] On the other hand, where an existing but dormant disease is brought into activity by the exertions of the insured it is decided that the resulting death is not caused by external, violent, and accidental means.[12]

22 L. R. A. 620; *Peele* v. *Provident Fund Soc.*, 147 Ind. 543, 44 N. E. 661; *Wehle* v. *United States M. A. Assn.*, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. R. 598; *Mallory* v. *Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *De Van* v. *Commercial Travelers' M. A. Assn.*, 92 Hun, 256, 72 N. Y. St. R. 304, 36 N. Y. Supp. 931, aff'd 157 N. Y. 690, 51 N. E. 1090; *United States Mut. A. Assn.* v. *Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; *Trew* v. *Ry. Pass. Assur. Co.*, 6 H. & N. 839; *Tucker* v. *Mutual Benefit Life Co.*, 50 Hun (N. Y.), 50, 121 N. Y. 718, 24 N. E. 1102 (boat upset while insured was trying to rescue a wrecked crew, insurer liable). But see *Tennant* v. *Travelers' Ins. Co.*, 31 Fed. 322 (death during a plunge bath in the house, *held*, not covered by the policy).

[1] *Paul* v. *Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. R. 758; *Pickett* v. *Pacific, etc., Ins. Co.*, 144 Pa. St. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. R. 618. The inadvertent taking of poison is so considered in Illinois, *Healey* v. *Mut. Acc. Assn.*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. R. 637. But see *Bayless* v. *Travelers' Ins. Co.*, 2 Fed. Cas. 1077; *Hill* v. *Hartford Acc. Ins. Co.*, 22 Hun (N. Y.), 187.

[2] *Maryland Cas. Co.* v. *Hudgins* (Tex. Civ. App., 1903), 72 S. W. 1047, reversed on another point, 97 Tex. 124, 76 S. W. 745. Injury to intestines from swallowing of hard substances, *Miller* v. *Fidelity & Cas. Co.*, 97 Fed. 836.

[3] *American Acc. Co.* v. *Reigart*, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651.

[4] *Omberg* v. *United States Mut. Assn.*, 101 Ky. 303, 40 S. W. 909, 72 Am. St. R. 413. But compare *Bacon* v. *Association*, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. R. 748 (contact with putrid matter caused malignant pustule on lip, *held*, disease and not accident).

[5] *Northwest Commercial T. A.* v. *London Guarantee & A. Co.*, 10 Manitoba, 537.

[6] *Equitable Acc. Ins. Co.* v. *Osborn*, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267. Same rule applies though fall is due to unexpected physical disorder, *Meyer* v. *Fidelity & Cas. Co.*, 96 Iowa, 378, 65 N. W. 328, 59 Am. St. R. 374.

[7] *Richards* v. *Travelers' Ins. Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. R. 455.

[8] *Travelers' Ins. Co.* v. *Murray*, 16 Colo. 296, 26 Pac. 774. But compare *Southard* v. *Railway, etc., Assur. Co.*, 34 Conn. 574.

[9] *Travelers' Ins. Co.* v. *Melick*, 65 Fed. 178, 12 C. C. A. 544.

[10] *Fidelity & Cas. Co.* v. *Johnson*, 72 Miss. 333, 17 So. 2.

[11] *McGlinchey* v. *Fidelity & Casualty Co.*, 80 Me. 251, 14 Atl. 13, 6 Am. St. R. 190.

[12] *Travelers' Ins. Co.* v. *Selden*, 78 Fed. 285, 24 C. C. A. 92, 42 U. S. App. 253. See *Scarr* v. *General Acc. Assur. Corp.* (1905), 1 K. B. 387 (death from heart failure brought on by physical exertion, not an accident). So of appendicitis caused by ordinary riding of bicycle, *Appel* v. *Ætna Life Ins. Co.*, 86 App. Div. 83, 83 N. Y. Supp. 238,

Fitzgerald, the insured, went to sleep with his hand under his head, and in this position his hand rested upon the edge of the bed rail. This quiet pressure, continuing for a considerable period, resulted in an inflammation of the periosteum of certain bones of the fingers, rendering an operation necessary. The court held that the injury was by "violent means," within the purport of the policy.[1]

The burden is on the plaintiff in an action on the policy to show that the alleged accident is the cause of the death or injury. Thus, in a federal court case, Winfield L. Scott, a railway postal clerk, was insured. The only evidence of accidental injury was a red looking bruise on his left shin, five or six inches long and two or three inches wide, seen by his wife some three months prior to his death. But for a long time before sustaining this bruise, the defendant, who was sixty years old, had been treated for double hernia, congestion of the liver and palpitation of the heart. The court concluded that there was an entire absence of proof tending to show that death had resulted from bodily injuries received through external, violent and accidental means, and the judgment in favor of the plaintiff was reversed.[2]

In another case in a federal court the death of the insured was due to rupture of the heart. The walls of the heart were thin, and weakened by fatty degeneration. Just before his death the insured was engaged in carrying a cellar door, weighing about 86 pounds, from one of his buildings to another. Upon arriving at his destination he exclaimed, "I am tired." A few seconds afterward his lips turned blue, he grabbed the door with both hands, and fell forward dead. In carrying the door, there was no stumble, wrench, slip or fall. There was no unforeseen, accidental, or involuntary movement of the body. The court held that the rupture was due, not to accident, but to disease, and affirmed the judgment directed by the court below in favor of the defendant.[3]

aff'd 180 N. Y. 514, 72 N. E. 1139. Burden of proof is on plaintiff, *Larkin* v. *Interstate Cas. Co.*, 43 App. Div. 365, 60 N. Y. Supp. 205. And the question under this clause of the policy is often for the jury, *Mfrs. Acc. Indem. Co.* v. *Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620; *Railway, etc., Acc. Assn.* v. *Coady*, 80 Ill. App. 563; *Modern Woodmen Assn.* v. *Shryock*, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826.

[1] *Ætna Life Ins. Co.* v. *Fitzgerald*, 165 Ind. 317, 75 N. E. 262 (the accident, not the resulting disease, was to be regarded the sole cause of the disability).

[2] *National Assn. of Ry. Postal Clerks* v. *Scott*, 155 Fed. 92.

[3] *Shanberg* v. *Fidelity & Cas. Co.*, 158 Fed. 1. To similar effect is the English case of *Scarr* v. *General Acc. Ass. Corp.* (1904), 1 K. B. 387. There the policy covered bodily injuries caused by "violent, accidental, external and visible means." The as-

And where the insured died of septicæmia after an operation for appendicitis, the court decided that the death was due to disease and not to external, violent and accidental means.[1]

In the controversy over McCormack's policy, the question arose, whether his death was the result of his fall, or his fall the result of his death. On the trial, evidence was received tending to show that the assured by his condition and habit of life was predisposed to an attack of apoplexy. He was driving a buggy in the city of St. Paul. While his horse was on a walk, and while he was putting on his gloves, he reached forward, apparently to gather up the reins, and at that instant the buggy bumped against an obstruction. The assured fell forward, struck his head against the pavement and died within a few minutes. Conflicting expert testimony was received as to the cause of death. The court concluded that the case was one for the jury.[2]

Where, however, it appears that the death or injury was caused by an accident, the burden then rests on the insurer to show that the accident happened by reason of something that was excepted from the provisions of the policy, and not on the insured to affirmatively show that the accident did not occur by reason of any or all of the exceptions incorporated therein.[3]

§ 387. Sole and Proximate Cause.—*Independently of all other causes.*

By the last section it was shown that unless the injury is effected by accidental means it does not come within the reach of the policy; but every injury must be the result of a combination of circumstances which in a sense may be termed contributing causes. And where the injury is the result of an accidental occurrence, acting

sured had a weak and unhealthy heart, though he was not aware of the fact. He attempted to eject a drunken man from his master's premises. In consequence of the physical exertion needed for this purpose a dilatation of the heart was set up which caused the death of the insured. There was no slip or fall or blow. The drunken man offered only passive resistance. The insured pushed or pulled him exactly as he intended to do. The court held that the injury was not sustained by accidental means. In another English case, the insured was stooping forward to pick up a marble dropped by a child as it rolled from him. He stood with his legs together, separated his knees, leaned forward, and made a grab at the marble, and in doing so wrenched his knee. The contention of the plaintiff's counsel was that, as the plaintiff did not mean to get into a position in which he might wrench his knee, there was something accidental. The court held the contention sound, *Hamlyn* v. *Crown Accidental Ins. Co.* (1893), 1 Q. B. 750.

[1] *Herdic* v. *Maryland Cas. Co.*, 146 Fed. 396.

[2] *McCormack* v. *Illinois C. Men's Ass.*, 159 Fed. 114.

[3] *Starr* v. *Ætna Life Ins. Co.*, 45 Wash. 128, 87 Pac. 1119.

conjointly or contemporaneously with one or more causes expressly excepted by the terms of the policy, like disease, for example, the question whether the insurer is liable or exonerated is not always easy of solution.[1]

So far as any sanction of law is concerned there is no reason why the accident policy may not be framed to cover bodily disability, or even death, arising from accidental sickness;[2] and most sickness is of that character.[3] The ordinary accident policy, however, specifically excepts disease and various other causes of injury,[4] and it is incumbent upon the court to determine under what circumstances the casualty insured against can be fairly considered the sole and proximate cause of the injury.

The policy provision that the injury contemplated must be effected by the specified means, "independently of all other causes," if understood literally, is so unreasonable and repugnant to the main purpose of the contract,[5] that the courts construe it very strictly against the insurers, and sometimes really seem to disregard it altogether.[6] Thus, though the policy excepted death arising from fits, acting directly or jointly with accidental injury, the insurance was held to cover a case where the insured was seized with a fit and fell under the wheels of an engine which caused his death.[7] And likewise the federal court regarded drowning as the sole and proximate cause of death unless the other cause, a fainting fit, would have produced the injury in the absence of water.[8] Accordingly, by the prevailing rule, where a disease follows and is induced by the accident, as a natural, or inevitable consequence, the accident is regarded the sole and proximate cause of the injury or death.[9] And

[1] *Freeman* v. *Mercantile Acc. Assn.*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753. Compare doctrine of proximate cause in marine insurance, §§ 437–442, *infra;* in fire insurance, §§ 231, 278, *supra.*

[2] The ordinary life insurance policy does not cover non-fatal injuries.

[3] Accident companies now often offer health insurance, that is, indemnity for loss from temporary or permanent disablement arising from sickness. See health clause in Appendix, ch. II.

[4] See § 396, *infra.*

[5] *Ætna Life Ins. Co.* v. *Hicks*, 23 Tex. Civ. App. 74, 56 S. W. 87.

[6] It is held that the words of the exception refer to proximate and direct and not to remote causes, *Fetter* v. *Fidelity & Cas. Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. R. 560 (where kidney was ruptured by an accidental fall which might not have produced rupture except for diseased condition of kidney).

[7] *Lawrence* v. *Accidental Ins. Co.*, 7 Q. B. D. 216; *Fitton* v. *Accidental Death Ins. Co.*, 17 C. B. (N. S.) 122; *Winspear* v. *Ins. Co.*, 6 Q. B. D. 42 (insured seized with a fit, fell into the river and was drowned).

[8] *Mfrs. Acc. Indem. Co.* v. *Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620.

[9] *Western Commercial Travelers' Assn.* v. *Smith*, 85 Fed. 401, 56 U. S. App. 393, 29 C. C. A. 223, 40 L. R. A. 653 (blood poisoning resulting from accidental chafing of toe by new shoe); *Delaney* v. *Modern Acc. Club*, 121 Iowa, 528, 97 N. W. 91; *Travelers' Ins. Co.* v. *Hunter*, 30 Tex. Civ. App. 489,

even where before the accident the insured is afflicted with a disease which may have remotely contributed to the injury, the courts attribute the injury to the accident as the sole and proximate or predominant cause, unless such a construction would do violence to the unmistakable import of the language employed.[1] But where disease is unmistakably excepted from the chain of causation, the rule may be modified.[2] Accordingly it seems clear, that whether the coöperating cause is antecedent or subsequent to the accident, the courts are astute to regard the peril insured against as the proximate and sole cause of the injury.

George C. French, a passenger conductor, had an accident policy

70 S. W. 798 (accident caused rheumatism which in turn caused death); *Hall* v. *American Masonic Acc. Assn.*, 86 Wis. 518, 57 N. W. 366. See many cases § 396. Where an accident produced a weakened condition of the system, from which cold and pneumonia resulted, it was held that the whole chain of events was caused by the accident as a proximate cause, *Isitt* v. *Railway Passengers' Assur. Co.*, L. R. 22 Q. B. D. 504. Within the same principle of law was classed an accident which caused physical injuries which, in turn, resulted in apoplexy and death, *National Benefit Assn.* v. *Grauman*, 107 Ind. 288, 7 N. E. 233. And in another case, although the policy expressly excepted "injuries from taking poison in any manner," the Illinois court allowed a recovery for death from an overdose of laudanum taken by mistake, *Mut. Acc. Asso.* v. *Tuggle*, 138 Ill. 428, 28 N. E. 1066. *Contra*, *Hill* v. *Ins. Co.*, 22 Hun (N. Y.), 187.

[1] *Freeman* v. *Mercantile Acc. Assn.*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753 (fatal peritonitis induced by a fall. Insured had previously had same disease). In the last case the court said: "Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and in dealing with such cases the maxim *causa proxima non remota spectatur* is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence in view of the existing circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death if he dies by reason of it even if he would not have died if his temperament or previous health had been different; and this is so, as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes." And see *Ætna Life Ins. Co.* v. *Hicks*, 23 Tex. Civ. App. 74, 56 S. W. 87.

[2] *Smith* v. *Accident Ins. Co.*, 22 L. T. N. S. 861. See § 396, *infra*. To avail the insurer the excepted risk must, in general, be the direct cause of the injury, *Wilkinson* v. *Travelers' Ins. Co.* (Tex. Civ. App., 1903), 72 S. W. 1016. As to the meaning of the clause that the insurance shall not extend "to any case except where the injury is the proximate and sole cause of the disability or death," see *Martin* v. *Mfrs. Acc. Indem. Co.*, 151 N. Y. 94, 45 N. E. 377 (if accidental wound coincidently causes blood poisoning, the insurer is liable). But see *Bacon* v. *U. S. Mut. Acc. Assn.*, 123 N. Y. 304, 25 N. E. 399, 20 Am. St. R. 748, 9 L. R. A. 617 (malignant pustule *held*, a disease though caused by contact with putrid matter).

for $5,000. He accidentally struck the lower part of his leg against a small iron safe in the baggage car, causing an abrasion of the skin. Septic poison set in, resulting in his death about two weeks after the happening of the accident. The court considered that the disease of blood poisoning was to be regarded as a mere incident or effect of the accidental injury and in no sense an independent cause; and held that the claimant was entitled to recover on the policy.[1]

In another case the insured, a railway employee, by being precipitated against the edge of timbers, sustained severe bruises on his chest. Pneumonia or pleurisy, accompanied by a large accumulation of pus resulted, and death followed about two months after the accident. The court held that the accident was to be regarded as the sole cause of death.[2]

The federal court enforces the same doctrine. A policy sued on in that court insured "against disability or death resulting, directly and independently of all other causes, from bodily injuries sustained through external, violent and accidental means." The insured engaged in an altercation with another party, and struck him in the mouth, causing an abrasion on the hand of the insured. Blood poisoning set in, caused by microbes in the mouth of the person receiving the blow. The arm of the insured was amputated and death ensued. A recovery on the policy was sustained.[3]

In a Kansas case the policy insured Despain against the "effects of bodily injuries sustained during the term of this policy and caused solely by external, violent and accidental means," and provided that indemnity in the sum of $2,000 should be paid in case "the irre-

[1] *French* v. *Fidelity & Cas. Co.* (Wis., 1908), 115 N. W. 869 ("we must hold, therefore, that where death results from disease which follows as a natural, though not the necessary, consequence of an accidental physical injury, it is within the terms of the accident policy; the death being deemed the proximate result of the injury, and not of the disease as an independent cause"; many cases cited).

[2] *Continental Cas. Co.* v. *Colvin* (Kan., 1908), 95 Pac. 565. The court said: "An injury may be said to be the sole producing cause of death when it stands out as the predominating factor in the production of the result. It need not be so violent and virulent as to have necessarily and inevitably produced the result regardless of all other circumstances and conditions. The active, efficient cause that sets in motion a train of events which bring about a result without the intervention of any force from a new and independent source may be regarded as the direct and proximate cause. If the immediate cause of death is a disease produced wholly by an injury, the death must be attributable to the injury and not to the disease. In this case, the insured was a strong young man in vigorous health at the time he received the injury, and his condition thereafter was clearly traceable to the injury as the effective and producing cause thereof; it must, therefore, be held that the injury was the sole cause of his death."

[3] *Carroll* v. *Fidelity & Cas. Co.*, 137 Fed. 1012. And see *Mardorf* v. *Acc Ins. Co.* (1903), 1 K. B. 584.

coverable loss of the sight of both eyes" should "result from such injuries within ninety days independently of all other causes;" and further provided that the insurance did not cover "anything of which the sole or secondary or contributory cause is, or which occurs while affected by, or under the influence of, bodily infirmity." During the life of the policy, Despain met with injuries which resulted in his total blindness, but some three months before the issuance of the policy his right eye had been so injured as to require medical treatment in a hospital for about a month. The severity and effect of this earlier wound were in dispute. The plaintiff's testimony tended to show that his right eye had been restored to its normal condition more than a month before the policy issued. The defendant's testimony tended to prove that the first injury was serious, its effects lasting, and likely to produce the destruction of the other eye within the course of a few months, through sympathetic inflammation. The court reversed the plaintiff's judgment on the ground that the issue should have been submitted to the jury as to whether the earlier injury was not the secondary or contributory cause of the blindness.[1]

§ 388. Same Subject—"Immediately and Wholly Disable."—The word "immediately" in this clause is construed as referring to time and not to the proximate or remote character of the cause.[2]

The meaning of the phrase, "wholly disable him from transacting any and every kind of business pertaining to his occupation," must depend largely upon the character of the occupation in which the insured is engaged.[3] If he cannot safely and efficiently follow his usual employment,[4] or can work only with great pain,[5] though he

[1] *Pacific Mut. Life Ins. Co.* v. *Despain* (Kan., 1908), 95 Pac. 580.

[2] *Merrill* v. *Travelers' Ins. Co.*, 91 Wis. 329, 64 N. W. 1039. See also *Pepper* v. *Order of Commercial Travelers*, 113 Ky. 918, 69 S. W. 956. But see, *contra*, *Thera* v. *Ocean Acc. & G. Corp.*, 32 Ont. 411; *Pac. Mut. Life Ins. Co.* v. *Branham*, 34 Ind. App. 243, 70 N. E. 174. The disability, therefore, must appear within a short time of the injury, *Preferred Mut. Acc. Assn.* v. *Jones*, 60 Ill. App. 106; *Hagadorn* v. *Masonic Eq. Acc. Assn.*, 59 App. Div. 321, 69 N. Y. Supp. 831. But not necessarily at once, *Williams* v. *Preferred Mut. Acc. Assn.*, 91 Ga. 698, 17 S. E. 982. Three or four days held to be within the term "immediately," *Ritter* v. *Acc. Assn.*, 185 Pa. St. 90, 39 Atl. 1117. Twenty-four days held to be too late, *Vess* v. *United Benev. Soc.*, 120 Ga. 411, 47 S. E. 942. And see *Marshall* v. *Commercial Trav. Mut. Acc. Assn.*, 170 N. Y. 434, 63 N. E. 446; *Rorick* v. *Railway, etc., Assn.*, 119 Fed. 63, 55 C. C. A. 369; *Am. Acc. Ins. Co.* v. *Norment*, 91 Tenn. 1, 18 S. W. 395. Insured, a doctor, was allowed to recover though he succeeded in visiting a patient the next day, but was afterward confined to house, *Brendon* v. *Traders' & Travelers' Acc. Co.*, 84 App. Div. 530, 82 N. Y. Supp. 860.

[3] *Wolcott* v. *United Life, etc., Assn.*, 55 Hun (N. Y.), 98; *Beach* v. *Supreme Tent*, 177 N. Y. 100, 69 N. E. 281.

[4] *U. S. Casualty Co.* v. *Hanson*, 20 Colo. App. 393, 79 Pac. 176.

[5] *Hehn* v. *Interstate Cas. Co.*, 115

may be able to visit his store or office and perform some trivial acts in connection with his business, he is held to be totally disabled.[1] The disability may be either physical or mental;[2] and the insurer is not to be relieved simply because the insured is able to perform light duties, or easy work disconnected with his usual occupation.[3] Death, however, is not the kind of disability here referred to.[4]

Where the insured, after the accident, is able to take substantial management of his business though his efforts be accompanied by some pain and inconvenience, the insurer must be allowed the benefit of this restrictive clause.[5]

Mich. 79, 72 N. W. 1105. For example, intolerable discomfort from wearing truss for hernia, *McMahon* v. *Supreme Council*, 54 Mo. App. 468.

[1] *Young* v. *Ins. Co.*, 80 Me. 244, 13 Atl. 896 (merchant may be totally disabled though physically able to go to store and do inconsiderable acts especially if at risk of health); *Lobdill* v. *Laboring Men's Mut. Aid Assn.*, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. R. 542 (if common prudence require him to desist from business). See also *Mutual Ben. Assn.* v. *Nancarrow*, 18 Colo. App. 274, 71 Pac. 423 (able to go to his physician's office); *Turner* v. *Fidelity & C. Co.*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. R. 428; *Faulkner* v. *Grand Legion*, 63 Kan. 400, 65 Pac. 653 (partial paralysis of arm, shoulder, and side). Compare *McKinley* v. *Bankers' Acc. Ins. Co.*, 106 Iowa, 81, 75 N. W. 670.

[2] *McMahon* v. *Supreme Council*, 54 Mo. App. 468. For instance, lunacy, *McCullough* v. *Expressmen's, etc., Assn.*, 133 Pa. St. 142, 19 Atl. 355, 7 L. R. A. 210.

[3] *Starling* v. *Supreme Council*, 108 Mich. 440, 66 N. W. 340, 62 Am. St. R. 709; *Neill* v. *Order United Friends*, 149 N. Y. 430, 44 N. E. 145, 52 Am. St. R. 738. A solicitor, confined to his room, though able to conduct correspondence was held "totally disabled," *Hooper* v. *Ins. Co.*, 5 H. & N. 546, 7 Jur. (N. S.) 73, 6 H. & N. 839. But an attorney is not totally disabled by loss of use of one hand, *U. S. Mut. Acc. Assn.* v. *Millard*, 43 Ill. App. 148. A surgeon, not a pharmacist, is totally disabled by loss of a hand, *Smith* v. *Supreme Lodge*, 62 Kan. 75, 61 Pac. 416. Twisting of a knee was held to disable a physician "immediately, continuously and wholly" though he was able to go home in a street car, *Brendon* v. *Traders' & Trav. Acc. Co.*, 84 App. Div. 530, 82 N. Y. Supp. 860.

[4] *Shaw* v. *Equitable Mut. Acc. Assn.* (Neb., 1904), 99 N. W. 672.

[5] *Coad* v. *Travelers' Ins. Co.*, 61 Neb. 563, 85 N. W. 558. Not enough that insured, "a leather cutter and merchant," was disabled as a leather cutter only, *Ford* v. *U. S., etc., Relief Co.*, 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700 (insurer not liable). Loss of time may be the specified criterion to determine right of recovery, not total or permanent disability, *Bean* v. *Ins. Co.*, 94 Cal. 581, 29 Pac. 1113; *Pennington* v. *Pac. Mut. L. Ins. Co.*, 85 Iowa, 468, 52 N. W. 482, 39 Am. St. R. 306. The provision is worded in various terms, thus "disability from carrying on all kinds of business," *Supreme Tent* v. *King*, 79 Ill. App. 145; *Lyon* v. *Assur. Co.*, 46 Iowa, 631; *Rhodes* v. *Railway Pass. Ins. Co.*, 5 Lans. (N. Y.) 71; *Supreme Tent* v. *Cox*, 25 Tex. Civ. App. 366, 60 S. W. 971. "Total inability to labor," *Bal. & O. Employees' R. Assn.* v. *Post*, 122 Pa. St. 579, 15 Atl. 885, 2 L. R. A. 44, 9 Am. St. R. 147. Sometimes confinement to house is made a condition of the company's liability, *Dunning* v. *Mass., etc., Assn.*, 99 Me. 390, 59 Atl. 535; *Bishop* v. *U. S. Cas. Co.*, 99 App. Div. 530, 91 N. Y. Supp. 176. But it has been held that insured need not stay in the house continuously, indeed, such a course might prevent recovery, *Hoffman* v. *Michigan, etc., Assn.*, 128 Mich. 323, 87 N. W. 265, 54 L. R. A. 746; *Scales* v. *Masonic etc., Assn.*, 70 N. H. 490, 48 Atl. 1084. But the insured must not be well enough to go to his business two or three hours a day, *Shirts* v. *Phœnix etc., Assn.*, 135 Mich. 439, 97 N. W

Bishop Green, a freight handler, was insured by a policy which provided that it should be liable in case of injury "at once resulting in continuous total disability" to engage in business. January 31st Green was seriously injured by a heavy crate of glass which fell upon him. February 2d, however, he returned to his work and continued at it until March 25th, when he died in consequence of the accident. The appellate court below, applying to the policy a liberal rule of construction in favor of the insured, held that the terms of the policy requiring the inability to be continuous had no reference to a death loss and affirmed the judgment in favor of the plaintiff. But the Supreme Court reversed, holding that the language of the policy being without ambiguity, and the disability resulting from the accident not being continuous, the claimant was entitled to no recovery from the defendant.[1]

Letherer's policy provided indemnity for loss of time resulting from bodily injuries which should "immediately, wholly and continuously disable and prevent the assured from performing any and all duties pertaining to any business or occupation." The insured fell and struck a scantling. The injury finally resulted in his giving up work altogether, but meanwhile he continued his duties in connection with running an engine in a cider mill for over a week, though the labor was accompanied with great pain. The court held that he was not entitled to recover his insurance money, and reversed his judgment.[2]

In the last two cases, if the insured had been less impatient to return to work, it seems probable that they would have succeeded in collecting their insurance.

In an earlier Michigan case the plaintiff, Hohn, was a barber. He was injured on Friday. On Saturday he went to his shop late and did some work but not nearly as much as he would have done if well. He rested on Sunday. On Monday he again went to his shop, and attempted to work, but suffered such pain that he fainted away; a physician was called, and the plaintiff was taken home in a carriage. He continued to visit his shop during the week, suffering

966. And see *Liston* v. *N. Y. Cas. Co.*, 58 N. Y. Supp. 1090, 28 Misc. 240. For meaning of "continuing or permanent disability," see *Grand Lodge* v. *Orrell*, 206 Ill. 208, 69 N. E. 68; *Pac. Mut. L. Ins. Co.* v. *Branham*, 34 Ind. App. 243, 70 N. E. 174; *Hollobaugh* v. *People's, etc., Assn.*, 138 Pa. St. 595, 22 Atl. 29; *Gordon* v. *U. S. Cas. Co.* (Tenn. Ch. App., 1899), 54 S. W. 98.

[1] *Continental Cas. Co.* v. *Wade* (Tex., 1907), 105 S. W. 35.

[2] *Letherer* v. *U. S. Health & Acc. Ins. Co.*, 145 Mich. 310, 108 N. W. 491. If the insured was able to perform his usual work for a week he was not *immediately* disabled, *Preferred Masonic Mut. Acc. Ass.* v. *Jones*, 60 Ill. App. 106; *Williams* v. *Acc. Assn.*, 91 Ga. 698.

pain all the while, and occasionally working a little, but was unable to perform all the duties of his business because of the pain he suffered. The court held, that the case was one for the jury.[1]

Colehouse held a certificate in a fraternal order, organized for the protection of switchmen, the laws of which provided that any member who should become totally blind should be considered permanently disabled and receive the full amount of his certificate, and also for any physical disability that might permanently disqualify a member from performing the duties of a switchman. The insured lost one eye, not two eyes, but because of his defective eyesight he was unable to retain his position with his employer, a railroad company, and for the same reason he was refused employment by another railroad company. The defendant contended that the certificate covered only total blindness and injuries of an entirely different character, but the court, construing the language liberally in favor of the insured, held that the later clause of the certificate would apply to the plaintiff's case.[2]

§ 389. Same Subject—Loss of Bodily Member.—The clause entitling the insured to a recovery for the loss of an entire hand does not mean that the entire hand must be severed or amputated as a result of the injury, but there may be a recovery if the member is so injured as to become practically useless.[3] So also where the insured was shot in the back, causing a paralysis which involved the loss of the use of his feet, it was held to be a loss of "two entire feet."[4]

[1] *Hohn* v. *Interstate Cas. Co.*, 115 Mich. 79, 72 N. W. 1105.

[2] *Switchmen's Union* v. *Colehouse* (Ill., 1907), 81 N. E. 696, citing, among other cases, *Terwilliger* v. *Nat. Masonic Acc. Assn.*, 197 Ill. 9, 63 N. E. 1034; *Forest City Ins. Co.* v. *Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. R. 161.

[3] *Lord* v. *American Mut. Acc. Assn.*, 89 Wis. 19, 61 N. W. 293, 26 L. R. A. 741; *Sisson* v. *Supreme Court*, 104 Mo. App. 54, 78 S. W. 297; *Supreme Court* v. *Turner*, 99 Ill. App. 310. "Loss by severance of one entire hand" construed similarly in *Sneck* v. *Travelers' Ins. Co.*, 88 Hun, 94, 34 N. Y. Supp. 545. Same rule applied as to loss of an arm, *Garcelon* v. *Commercial Travelers' Eastern Acc. Assn.*, 184 Mass. 8, 67 N. E. 868 (cut off a little below the elbow). Loss of an eye, or eyesight, *Mogé* v. *Société, etc.*, 167 Mass. 298, 39 L. R. A. 736; *Humphreys* v. *Nat. Ben. Assn.*, 139 Pa. St. 214, 20 Atl. 1047, 11 L. R. A. 564 (insured lost his only eye), *Maynard* v. *Locomotive, etc., Assn.*, 16 Utah, 145, 51 Pac. 259, 67 Am. St. R. 602. Loss of a foot, *Sheanon case*, 77 Wis. 618, 46 N. W. 799. But see *Stevers* v. *People's Ins. Assn.*, 150 Pa. St. 132, 24 Atl. 662, 16 L. R. A. 446; *Fuller* v. *Locomotive, etc., Assn.*, 122 Mich. 548, 81 N. W. 326, 48 L. R. A. 86, 80 Am. St. R. 598. Violinists, pianists, and other professional musicians sometimes insure each finger separately.

[4] *Sheanon* v. *Pacific Mutual Life Ins. Co.*, 77 Wis. 618, 46 N. W. 799. 20 Am. St. R. 151, 9 L. R. A. 685, 83 Wis. 507, 53 N. W. 878. Where a leg was amputated three months after accident the company was held liable, *Marshall* v. *Com. Travelers' Mut. Acc. Assn.*, 170 N. Y. 434, 63 N. E. 446. The term "breaking of a leg" was defined in the

§ 390. Exception of Hazardous Employment. The clause excepting the insurer from liability for a loss resulting from an injury received in a more hazardous occupation than that stated in the policy is binding upon the insured or his beneficiary and the insurer is not liable in the case of an injury so received.[1] But where a person is insured as engaged in a certain specified occupation, he may do whatever customarily appertains to such an occupation,[2] including acts that may be forbidden by general restrictions in the policy.[3] And an employment or occupation does not refer to some unusual and incidental act, which a person may chance to be engaged in temporarily, for convenience, pleasure, or recreation, but to his regular and usual vocation or calling in life.[4] Thus where the insured, cashier of a bank, lost his hand while engaged in trying to

policy in *Peterson* v. *Modern Brotherhood*, 125 Iowa, 562, 101 N. W. 289, 67 L. R. A. 631; "Broken leg" defined by by-law, see *Ross* v. *Modern Brotherhood*, 120 Iowa, 692, 95 N. W. 207.

[1] *Standard Life & A. I. Co.* v. *Martin*, 133 Ind. 376, 33 N. E. 105 (whether risk is increased is often a question for the jury; brakeman of passenger train became brakeman of construction train). Recovery was allowed for death by cyclone because wholly unconnected with the change of occupation, *Standard Life & Acc. Ins. Co.* v. *Koen*, 11 Tex. Civ. App. 273, 33 S. W. 133.

[2] *Bean* v. *Travelers' Ins. Co.*, 94 Cal. 581, 29 Pac. 1113 ("capitalist").

[3] *Richards* v. *Travelers' Ins. Co.*, 18 S. D. 287, 100 N. W. 428 ("a cattle dealer visiting yards" is not bound by a clause restricting to passenger cars); *Daily* v. *Preferred Masonic Mut. Acc. Assn.*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171 (railway conductor may enter moving train, in spite of general prohibition); *Wilson* v. *Northwestern Mut. Acc. Assn.*, 53 Minn. 470, 55 N. W. 626 ("pointing" a building is part of a brickmason's trade). "Cattle shipper," covers "tender of horses," *Brock* v. *Brotherhood Acc. Co.*, 75 Vt. 249, 54 Atl. 176. A railroad employee crossing tracks on way home is "in discharge of duty," *Kinney* v. *B. & O., etc., Assn.*, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142.

[4] *Berliner* v. *Travelers' Ins. Co.*, 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467 (a mining expert casually riding in locomotive is not an engineer or fireman); *Travelers' Preferred Acc. Assn.* v. *Kelsey*, 46 Ill. App. 371 (a farmer may recover, though temporarily acting as police at state fair); *Union Mutual Acc. Assn.* v. *Frohard*, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. R. 664 (merchant injured hunting, not "a hunter"); *Holiday* v. *American Mut. Acc. Assn.*, 103 Iowa, 178, 72 N. W. 448 (same rule applies to a bookkeeper); *Wildey Cas. Co.* v. *Sheppard*, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650 (a barber hunting is not "a hunter"); *Kentucky L. Ins. Co.* v. *Franklin*, 102 Ky. 512, 43 S. W. 709 (grocer, hunting); *Stone* v. *U. S. Casualty Co.*, 34 N. J. L. 371 (teacher fell from building which he was having built. No change of occupation); *Hoffman* v. *Standard Life & Acc. Co.*, 127 N. C. 337, 37 S. E. 466 ("a flagman is not a switchman" when engaged in a single act of coupling); *Fox* v. *Masons' Fraternal Acc. Assn.*, 96 Wis. 390, 71 N. W. 363 ("mill owner overseeing only" engaged in incidental act of cutting tree for sawmill); *McNeven* v. *Canadian Ry. Co.*, 32 Ont. 284 ("baggage man" killed while casually coupling cars). But the policy may expressly prohibit even temporary change or temporary exposure, *Thomas* v. *Masons' Fraternal Acc. Assn.*, 64 App. Div. 22, 71 N. Y. Supp. 692 (restriction as to hunting); *Doody* v. *National Masonic Acc. Assn.*, 66 Neb. 493, 92 N. W. 613, 60 L. R. A. 424 (restriction as to using firearms). As to meaning of phrase "usual or some other occupation," see *Neill* v. *Order of U. F.*, 149 N. Y. 430, 44 N. E. 145.

saw some boards for use in making a cabinet, he was allowed to recover.[1] And riding a bicycle for recreation is consistent with any vocation if not specifically forbidden.[2] But operating a buzz saw for amusement is not permissible, within the meaning of the policy, it has been said, to one insured as a "retired gentleman." [3]

An unauthorized employment must be actually entered upon to affect the policy. An intent to adopt a new occupation, until consummated, does not amount to a prohibited change. For example, where a lawyer intending to become a prospecting miner in Alaska lost his life on his way thither, it was held that the insured had not yet commenced to be a miner.[4]

In a Nebraska case, Simmons was insured with the defendant as a traveling salesman for a wholesale drug company. Having lost his position, for a period of some two years while trying to obtain another position he lived on his father's ranches. He came and went at his own will, put in most of his time hunting or visiting from one place to another, and though he sometimes communicated orders from his father to the employees on the ranches, he received no compensation and was never employed as a superintendent. The occupation of "stock farmer, owner or superintendent, supervising only" was classed by the policy as more hazardous than salesman. The father of Simmons asked him to examine the windmills at two of the wells to see if they were pumping properly. In compliance with this request Simmons stopped at the Lost Tank well and there accepted an invitation to dine with Mr. Franklin, the foreman of the ranch. He sat down on the ground with Franklin to eat dinner, when a large rattlesnake came out of the grass and bit him so that he died the following day. In the action on the policy the court held that Simmons had not changed his occupation to the more hazardous employment.[5]

Some policies provide, not that the insurance shall be avoided but that the indemnity shall be diminished [6] if the insured be injured while engaged in an employment classified as more hazardous than that named by him. The same principles, already explained, are applicable. Thus if a man insure as "a stockdealer visiting

[1] *Hess* v. *Preferred Masonic Acc. Assn.*, 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444; *Hess* v. *Van Auken*, 32 N. Y. Supp. 126, 11 Misc. 422.

[2] *Baldwin* v. *Fraternal Acc. Assn.*, 21 Misc. 124, 46 N. Y. Supp. 1016; *Comstock* v. *Same*, 116 Wis. 382, 93 N. W. 22.

[3] *Knapp* v. *Preferred, etc., Assn.*, 53 Hun, 84, 6 N. Y. Supp. 57.

[4] *Ætna Life Ins. Co.* v. *Frierson*, 114 Fed. 56, 51 C. C. A. 424.

[5] *Simmons* v. *Western Travelers' Acc. Ass.* (Neb., 1907), 112 N. W. 365.

[6] Such clause is a consent to change of occupation, *Standard L. & Acc. Ins. Co.* v. *Carroll*, 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194; *National Masonic Acc. Assn.* v. *Seed*, 95 Ill. App. 43.

yards, not tending in transit," when in reality at the time of injury his vocation is that of "stockdealer and tender in transit," classified in such a policy as more hazardous, his recovery will be reduced accordingly.[1] But a farmer's occupation does not change to that of a "pile driver," because he temporarily engages in driving piles in the construction of a private bridge.[2]

The policy issued to the plaintiff by the defendant contained the clause: "If the assured shall change his occupation to or be injured in any occupation or exposure or in performing acts classified by this company as more hazardous than that in which the member was classed when accepted, then and in all such cases, the insurance, fixed indemnity or weekly indemnity payable shall be only the amount fixed for such increased hazard in accordance with the classification of risks by the company and as per the table on the back hereof." Kenny was insured as a manager of a mill, but when on a visit of a few days at his brother's farm he undertook to work with his brother's new six-foot McCormick mowing machine. The season was unusually wet. The horses attached to the machine jumped a ditch of water with which Kenny had not been made acquainted. As a result Kenny was thrown into the air and on his descent struck his leg and back on the front part of the seat receiving injuries which developed into traumatic neuritis. The court held that Kenny was none the less a miller because temporarily occupied in riding a mowing machine as an act of exercise or diversion, and the larger scale of indemnity was allowed him.[3]

If, however, the more hazardous work in connection with which the injury is sustained is not incidental or occasional, but amounts to a change of vocation, though only for a limited season, the insured cannot claim the benefit of the original classification. Thus

[1] *Læsch* v. *Union Cas. & Sur. Co.*, 176 Mo. 654, 75 S. W. 621; *Employers' Liability Assur. Corp.* v. *Back*, 102 Fed. 229, 42 C. C. A. 286 ("an importer and dealer" became "a foreman of labor"); *Metropolitan Acc. Assn.* v. *Hilton*, 61 Ill. App. 100 ("proprietor" was injured driving cab); *Eaton* v. *Ins. Co.*, 89 Me. 570, 36 Atl. 1048 (a business trip on a bicycle was extended for amusement; *held*, that the insured brought himself within the exception "if engaged for pleasure"); *Standard Life & Acc. Ins. Co.* v. *Taylor*, 12 Tex. Civ. App. 386, 34 S. W. 781 (blacksmith became car coupler).

[2] *National Acc. Soc.* v. *Taylor*, 42 Ill. App. 97. Grocer may occasionally deliver goods, *Hall* v. *American Masonic Acc. Assn.*, 86 Wis. 518, 57 N. W. 366. "Ice man proprietor" may *deliver* ice, *Neafie* v. *Mfrs. Acc. Ind. Co.*, 55 Hun, 111, 8 N. Y. Supp. 202.

[3] *Kenny* v. *Bankers' Acc. Ins. Co.* (Iowa, 1907), 113 N. W. 566 (the policy also contained the provision, "Insurance in this company is not forfeited by a temporary change of occupation," but the court said that this clause did not affect the result). Policy gave occupation as "superintendent of inspection." There was not such an office. Question when for jury, *Wilder* v. *Continental Cas. Co.*, 150 Fed. 92.

where the supervisor of a gristmill became overseer of haying for the summer and was injured while riding a horse rake to shelter, the insurance was avoided.[1] But if the agent of the company, after being correctly advised of the facts, by his own mistake makes an erroneous classification without fault of the insured, the company will be bound.[2]

§ 391. Notice and Proof of Accident and Injury.—"*Immediate written notice with full particulars is to be given said company of any accident and injury,*" etc., "*Unless affirmative proof of death, loss of limb or sight or duration of disability,*" etc., "*is so furnished within seven months from time of such accident all claims based thereon shall be forfeited.*"

"Immediate notice" means within a reasonable time under all the circumstances of the case.[3] If the agent of the company gives

[1] *Estabrook* v. *Union Cas. & Sur. Co.*, 74 Vt. 473, 52 Atl. 1048, 93 Am. St. R. 906. As to where a conductor acted temporarily as brakeman, compare *Aldrich* v. *Mercantile Mut. Acc. Assn.*, 149 Mass. 457, 21 N. E. 873, with *Standard L. & Acc. Ins. Co.* v. *Kæn*, 11 Tex. Civ. App. 273, 33 S. W. 133.

[2] *Pacific Mut. Life Ins. Co.* v. *Snowden*, 58 Fed. 342, 12 U. S. App. 704, 7 C. C. A. 264 (agent erroneously classified insured as "a cattleman not accompanying shipments"). Compare *Employers' Liability Assur. Corp.* v. *Back*, 102 Fed. 229, 42 C. C. A. 286 (recovery reduced though agent knew the facts). The company is bound by the method of classification which appears on the face of policy though erroneous, *Ford* v. *U. S. Mut. Relief Co.*, 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700; *Schmidt* v. *Am. Mut. Acc. Assn.*, 96 Wis. 304, 71 N. W. 601. Burden is upon plaintiff to allege and prove that he is entitled to larger amount and not the restricted amount, *American Acc. Co.* v. *Carson*, 99 Ky. 441, 36 S. W. 169, 59 Am. St. R. 473, 34 L. R. A. 301. Whether one occupation is more hazardous than another is for the jury, unless the policy contains its own classification, *Eggenberger* v. *Guarantee Mutual Acc. Assoc.*, 41 Fed. 172; *Standard Life & A. I. Co.* v. *Martin*, 133 Ind. 376, 33 N. E. 105; *Tucker* v. *Mutual Benefit Life Co.*, 50 Hun, 50, aff'd 121 N. Y. 718, 24 N. E. 1102; *Knapp* v. *Preferred Mutual Acc. Assoc.*, 53 Hun (N. Y.), 84. Whether insured was engaged in a more hazardous occupation is usually for the jury, *Fox* v. *Masons' Fraternal Acc. Assn.*, 96 Wis. 390, 71 N. W. 363.

[3] *Nax* v. *Travelers' Ins. Co.*, 130 Fed. 985 (delay of sixty-six days; existence of policy was unknown; question when for jury); *Konrad* v. *Union Cas. & S. Co.*, 49 La. An. 636, 21 So. 721 (delay of two months; existence of policy unknown); *American Acc. Co.* v. *Card*, 13 Ohio Cir. Ct. 154, 7 O. C. D. 504 (delay of four months; existence of policy unknown); *Lyon* v. *Railway Pass. Assur. Co.*, 46 Iowa, 631 (delay of four weeks, under medical treatment); *Kentzler* v. *American Mut. Acc. Assn.*, 88 Wis. 589, 60 N. W. 1002 (insured not found in water for over five months). Twenty-nine days after knowledge of accident held too late, *Foster* v. *Fidelity & Cas. Co.*, 99 Wis. 447, 75 N. W. 69 (when for jury). So also unexcused delay of four months avoided policy, *Dunshee* v. *Travelers' Ins. Co.*, 25 Pa. Super. Ct. 559. Likewise six days, *Railway Pass. Assur. Co.* v. *Burwell*, 44 Ind. 460. On the other hand, delay of ten days *held*, not unreasonable, *McFarland* v. *U. S. Mut. Acc. Assn.*, 124 Mo. 204, 27 S. W. 436 (for jury). So also delay of twelve days, *Horsfall* v. *Pac. Mut. Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. R. 846. Likewise delay of two weeks occasioned by autopsy, *Ewing* v. *Commercial Travelers' Mut. Acc. Assn.*, 55 App. Div. 241, 66 N. Y. Supp. 1058

a notice containing the information, that will be regarded as a sufficient compliance.[1] As to the purport of the notice, the claimant need only give the best information possessed at the time.[2]

In a Wisconsin case the plaintiff, who was the beneficiary, had no knowledge of the existence of the policy until about sixty days after her husband died. As soon as she obtained such knowledge she complied with the terms of the policy respecting notice to the defendant. The policy provided that "immediate written notice must be given the company of any accident and injury for which a claim is to be made." The court held that the notice was seasonably served.[3]

The policy often provides for sending notice within a specified time, for instance, ten days. If expressly made a condition precedent, the provision must, if possible, be complied with;[4] but strict compliance will not be exacted if the delay is occasioned by circum-

aff'd 170 N. Y. 590, 63 N. E. 1116. Time of appearance of serious results of accident has a bearing on the question of reasonable delay, *People's Acc. Assn.* v. *Smith*, 126 Pa. St. 317, 17 Atl. 605, 12 Am. St. R. 870; *Am. Acc. Ins. Co.* v. *Norment*, 91 Tenn. 1, 18 S. W. 395. But delay of thirteen months was held fatal, *Coldham* v. *Pac. Mut. Life Ins. Co.*, 2 Ohio Dec. 314. And see *Harrison* v. *Masonic Mut. Ben. Soc.*, 59 Kan. 29, 51 Pac. 893. Disability of insured affects the question, what is reasonable time for serving proofs, *Mfrs. Acc. Indem. Co.* v. *Fletcher*, 5 Ohio Cir. Ct. 633, 3 O. C. D. 308 (delay of thirty-five days). And see *Conn. Mut. Life Ins. Co.* v. *Duerson*, 28 Grat. 630 (death in south during civil war). Claimant need not give the "immediate notice" until he has knowledge, *Mandell* v. *Fidelity & Cas. Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. R. 291 (liability policy); *Woolverton* v. *Fidelity & Cas. Co.*, 96 App. Div. 275, 89 N. Y. Supp. 292 (liability policy). Aggravation of injury or continuation of disability, when the basis of further claim, should be made the occasion for further proofs of loss, *Clanton* v. *Travelers' Protective Assn.*, 101 Mo. App. 312, 74 S. W. 510; *Woodall* v. *Pacific Mut. L. Ins. Co.* (Tex. Civ. App.), 79 S. W. 1090. Requirement for full particulars must be reasonably met, *Standard & Acc. Ins. Co.* v. *Strong*, 13 Ind. App. 315, 41 N. E. 604; *Stephenson* v. *Bankers' Life Assn.*, 108 Iowa, 637, 79 N. W. 459 (waiver).

[1] *Van Eman* v. *Fidelity & Cas. Co.*, 201 Pa. St. 537, 51 Atl. 177; *Brown* v. *Fraternal Acc. Assn.*, 18 Utah, 265, 55 Pac. 63.

[2] *Root* v. *London Guarantee & Acc. Co.*, 92 App. Div. 578, 86 N. Y. Supp. 1055, aff'd 180 N. Y. 527, 72 N. E. 1150. A notice of the accident should include the cause of the accident, *Standard Life & Acc. Ins. Co.* v. *Strong*, 13 Ind. App. 315, 41 N. E. 604; *Simons* v. *Iowa State Trav. Men's Assn.*, 102 Iowa, 267, 71 N. W. 254. Company cannot demand of an assignee proof of his assignment, unless the policy so provide, *Braker* v. *Conn. Indem. Assn.*, 27 App. Div. 234, 50 N. Y. Supp. 547.

[3] *Cady* v. *Fidelity & Cas. Co.* (Wis., 1907), 113 N. W. 967 (citing authorities including *Comstock* v. *Fraternal Acc. Assn.*, 116 Wis. 382; *McElroy* v. *John Hancock Life Ins. Co.*, 88 Md. 137). Delay in giving notice held excusable, *Edgefield Mfg. Co.* v. *Maryland Cas. Co.* (S. C., 1907), 58 S. E. 969. The question is elaborately discussed in the Comstock case, *supra*, where the accident itself incapacitated the insured from giving the ten day notice.

[4] *United Ben. Soc.* v. *Freeman*, 111 Ga. 355, 36 S. E. 764. But see *Hurt* v. *Employers' Liability Assur. Corp.*, 122 Fed. 828 (though named as a "condition precedent," no specific penalty of forfeiture was declared in policy); *Fidelity, etc., Co.* v. *Lowenstein*, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450.

stances over which the claimant has no control.[1] And the period for serving notice and proofs will, if possible, be construed to run from the time of acquiring knowledge of the facts,[2] or from the time of disability,[3] rather than from the date of the accident.

The furnishing of proof of death or disability within the seven months or other time specified is held to be a condition precedent.[4]

§ 392. Right to Examination or Autopsy.—*Company shall have the right and opportunity to examine the person when and so often as it requires in case of injury and to make an autopsy in case of death.*

In availing itself of this extraordinary right, the insurer is held to

[1] *Hayes* v. *Continental Cas. Co.*, 98 Mo. App. 410, 72 S. W. 135; *Western Travelers' Acc. Assn.* v. *Holbrook*, 65 Neb. 469, 94 N. W. 816 (circumstances not attributable to his laches); *Trippe* v. *Provident Fund Soc.*, 140 N. Y. 23, 35 N. E. 316; *Comstock* v. *Fraternal Acc. Assn.*, 116 Wis. 382, 93 N. W. 22 (incapacity excuses). Thus, dementia excuses prompt performance, *Woodmen Acc. Assn.* v. *Pratt*, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. R. 777 (citing many cases). Rule of construction must be liberal in favor of insured, *Peele* v. *Provident Friend Soc.*, 147 Ind. 543, 44 N. E. 661 (sixteen days in time). Delay of the mail will not affect claimant's rights, *Western Travelers' Acc. Assn.* v. *Holbrook*, 65 Neb. 469, 91 N. W. 276. But a more literal compliance is required by certain courts. See *Gamble* v. *Accident Assur. Co.*, 4 Ir. R. C. L. 204; *Patton* v. *Employers' Liability Assur. Corp.*, 20 Law Rep. (Ir.) 93. If notice is sent within the ten days it will avail though all the required particulars are not sent within that period, *Martin* v. *Mfrs. Acc. Ind. Co.*, 151 N. Y. 94, 106, 45 N. E. 377.

[2] *Trippe* v. *Provident Fund Soc.*, 140 N. Y. 23, 35 N. E. 316.

[3] *Rorick* v. *Railway Officials & E. A. Assn.*, 119 Fed. 63, 55 C. C. A. 369; *Odd Fellows, etc., Assn.* v. *Earl*, 70 Fed. 16, 16 C. C. A. 596, 34 U. S. App. 285; *Grant* v. *North Am. Cas. Co.*, 88 Minn. 397, 93 N. W. 312; *McFarland* v. *U. S. Mut. Acc. Assn.*, 124 Mo. 204, 27 S. W. 436.

[4] *Thornton* v. *Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. R. 99, 119 Ga. 455, 46 S. E. 678; *Legnard* v. *Standard Life & Acc. Ins. Co.*, 81 App. Div. 320, 81 N. Y. Supp. 516; *Meech* v. *National Acc. Soc.*, 50 App. Div. 144, 63 N. Y. Supp. 1008; *Martin* v. *Equitable Acc. Assn.*, 61 Hun, 467, 16 N. Y. Supp. 279; *Dean* v. *Ætna Life Ins. Co.*, 62 N. Y. 642; *Foster* v. *Fidelity & Cas. Co.*, 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833. But see *Heywood* v. *Maine Mut. Acc. Assn.*, 85 Me. 289, 27 Atl. 154; *Whalen* v. *Equitable Acc. Co.*, 99 Me. 231, 58 Atl. 1057. But courts have refused to regard the requirement as a condition precedent where the claimant was not cognizant of the existence of the policy, *McElroy* v. *John Hancock Mut. Life Ins. Co.*, 88 Md. 137, 41 Atl. 112, 71 Am. St. R. 400; *Munz* v. *Standard Life & Acc. Ins. Co.*, 26 Utah, 69, 72 Pac. 182, 62 L. R. A. 485, 99 Am. St. R. 830. Also where claimant must first take out letters of administration, *Globe Acc. Ins. Co.* v. *Gerisch*, 163 Ill. 625, 45 N. E. 563, 54 Am. St. R. 486. Also where claimant is ignorant of the nature of the injury or facts, *U. S. Cas. Co.* v. *Hanson*, 20 Colo. App. 393, 79 Pac. 176; *Peele* v. *Prov. Fund Soc.* 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; *Phillips* v. *U. S. Ben. Soc.*, 120 Mich. 142, 79 N. W. 1; *Hoffman* v. *Mfrs. Acc. Ind. Co.*, 56 Mo. App. 301; *Woodman Acc. Assn.* v. *Pratt*, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. R. 777; *Walsh* v. *Metropolitan Life Ins. Co.*, 105 App. Div. 186, 93 N. Y. Supp. 445; *Trippe* v. *Provident Fund Soc.*, 140 N. Y. 23, 35 N. E. 316, 37 Am. St. R. 529, 22 L. R. A. 432; *Kentzler* v. *Am. Mut. Acc. Assn.*, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. R. 934. As to limitation of time for bringing action, see *Kettenring* v. *Northwestern Masonic Aid Assn.*, 96 Fed. 177; *Ritch* v. *Masons'*

promptness of action, and only under unusual circumstances will the privilege of holding an autopsy be allowed after interment.[1]

The United States Circuit Court has held, aside from any policy provision, that a court of equity in furtherance of justice, though not in an action at law, may order an exhumation of the body of the deceased insured.[2]

§ 393. **Disappearances.**—*This insurance does not cover disappearances.*

The most natural method of establishing death is to prove an inspection of the dead body;[3] but where the insured has disappeared from sight and no such proof of death is forthcoming, the law allows the indulgence of certain presumptions. Thus at common law when a person has not been seen or heard from for seven years he is, speaking generally, presumed to be dead.[4] And again, if it appears that a person is in contact with some specific peril or impending danger likely to destroy life at the time of his disappearance, this circumstance may warrant the inference that he was killed by the peril.[5]

Fraternal Acc. Assn., 99 Ga. 112, 25 S. E. 191; *Dennison* v. *Masons' Fraternal Acc. Assn.*, 59 App. Div. 294, 69 N. Y. Supp. 291; *People* v. *Am. Steam Boiler Co.*, 10 App. Div. 9, 41 N. Y. Supp. 631. And see § 326, *supra*. As to when physician of the insured may testify on trial, see *Meyer* v. *Supreme Lodge*, 178 N. Y. 63, 70 N. E. 111, *Id.* 198, U. S. 515, 25 S. Ct. 754, citing cases.

[1] *Am. Employers' Liability Ins. Co.* v. *Barr*, 68 Fed. 873, 16 C. C. A. 51, 32 U. S. App. 444; *Wehle* v. *U. S. Mut. Acc. Assn.*, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. R. 598 (demand for autopsy ten days after burial *held*, too late); *Root* v. *London G. & Acc. Co.*, 92 App. Div. 578, 86 N. Y. Supp. 1055, aff'd 180 N. Y. 527, 72 N. E. 1150 (demand day after burial too late); *Ewing* v. *Commercial T. Mut. Acc. Assn.*, 55 App. Div. 241, 66 N. Y. Supp. 1056, aff'd 170 N. Y. 590. The right to examine confers no right to treat medically, and for negligence or misconduct of its medical adviser insurer will be liable, *Tompkins* v. *Pac. Mut. L. Ins. Co.*, 53 W. Va. 479, 44 S. E. 439, 62 L. R. A. 489. The word "autopsy" perhaps, but not the word "examination," carries with it the right to dissect the body, *Sudduth* v. *Travelers' Ins. Co.*, 106 Fed. 822. Exhumation is abhorrent to the sensibilities of relatives and should be allowed only to prevent fraud, *Union Cent. Life Ins. Co.* v. *Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Grangers' Ins. Co.* v. *Brown*, 57 Miss. 308, 34 Am. Rep. 446. Notice to local agent of holding of autopsy is an effective notice, *Legnard* v. *Standard L. & Acc. Ins. Co.*, 81 App. Div. 320, 81 N. Y. Supp. 516. And see *Læsch* v. *Union Cas. & L. Co.*, 176 Mo. 654, 75 S. W. 621.

[2] *Mutual Life Ins. Co.* v. *Griesa*, 156 Fed. 398 (suicide strongly suspected).

[3] This method is not exclusive, *Rogers* v. *Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348; *Travelers' Ins. Co.* v. *Sheppard*, 85 Ga. 751, 12 S. E. 18.

[4] *Fidelity Mut. Life Assn.* v. *Mettler*, 185 U. S. 308, 22 S. Ct. 662, 46 L. Ed. 922; *Kendrick* v. *Grand Lodge*, 8 Ky. L. R. 149. But see *Miller's Estate*, 9 N. Y. Supp. 639; *Schneider* v. *Ætna Life Ins. Co.*, 32 La. Ann. 1049, 36 Am. Rep. 276. The presumption may be rebutted, *Policemen's Benev. Assn.* v. *Ryce*, 213 Ill. 9, 72 N. E. 764. Thus it is relevant to show that he was a fugitive from justice, *Mutual Ben. Life Ins. Co.* v. *Martin*, 108 Ky. 11, 55 S. W. 694; or a defaulter, *Winter* v. *Supreme Lodge*, 96 Mo. App. 1, 69 S. W. 662.

[5] *Davie* v. *Briggs*, 97 U. S. 628;

The Kansas court says: "In order that the presumption that a person once shown to have been alive continues to live may be overcome by the presumption of death arising from seven years' unexplained absence from home or place of residence, there must be a lack of information concerning the absentee on the part of those likely to hear from him after diligent inquiry."[1]

The purpose and legal effect of the policy exception is to deprive the claimant of the benefit of such legal inferences and to require the production of more positive proof of death.[2]

§ 394. Suicide—Sane or Insane.—The exemption from liability for suicide, sane or insane, has been considered in the discussion of the clauses of the life policy.[3]

Cady, the insured, went to a hospital March 28th, in very low spirits, and was put in charge of a trained nurse. His thoughts dwelt upon the subject of dying. The same day he executed a will. The night thereafter he was somewhat delirious. March 30th during the temporary absence of his nurse, who went at his request to get him a glass of hot water, he ran up several flights of stairs, rapidly, in his night robe. On being hailed by a person, he quickened his pace, put his hands on a railing around an open shaft, leaped over, fell to the bottom and died in about three minutes. Judgment in favor of the beneficiary was affirmed.[4]

Travelers' Ins. Co. v. *Sheppard*, 85 Ga. 751, 12 S. E. 18 (hunter disappeared leaving gun and hat in bateau); *Lancaster* v. *Washington Life Ins. Co.*, 62 Mo. 121 (passenger disappeared from steamer on Lake Huron); *Supreme Council* v. *Boyle*, 10 Ind. App. 301 (person went bathing, leaving apparel which was found on shore). A yet more liberal rule has been laid down, *Tisdale* v. *Conn. Mut. Life Ins. Co.*, 26 Iowa, 170, 28 Iowa, 12; *John Hancock Mut. Life Ins. Co.*, v. *Moore*, 34 Mich. 41.

[1] *Modern Woodmen* v. *Gerdom* (Kan., 1908), 94 Pac. 788 ("The parents should only be held to the exercise of reasonable diligence in endeavoring to obtain tidings of their son. They were not required to prove conclusively that he was dead").

[2] *Porter* v. *Home F. Soc.*, 114 Ga. 937, 41 S. E. 45; *Kelly* v. *Supreme Council*, 46 App. Div. 79, 61 N. Y. Supp. 394. Burden of identifying insured after decease is on the claimant, *Quirk* v. *Metropolitan Life Ins. Co.*, 12 Pa. Super Ct. 250. The question of identification is often for the jury, *Wackerle* v. *Mut. Life Ins. Co.*, 14 Fed. 23. As to how to establish identity, see *Supreme Lodge* v. *Goldberger*, 72 Ill. App. 320; *Baxter* v. *Covenant Mut. Life Ins. Co.*, 77 Minn. 80, 79 N. W. 596; *Potter* v. *Union Cent. Life Ins. Co.*, 195 Pa. St. 557, 46 Atl. 111.

[3] § 369, *supra*.

[4] *Cady* v. *Fidelity & Cas. Co.* (Wis., 1907), 113 N. W. 967. In the last case the court said, "death resulting from an act committed under the influence of delirium, as by one who in a paroxysm of fear precipitates himself from a window, or having been bled removes the bandage, or takes poison by mistake and death ensues, never received nor deserved the name 'suicide,' and is not within the meaning of the language, 'death by suicide, felonious or otherwise, sane or insane.' Such language does not include an act of self-destruction resulting in death whether intentional or not, unso-

The issue of suicide must often go to the jury with appropriate instructions by the trial judge, but where the facts clearly indicate death by suicide there is no presumption of accidental death. And where an inference of suicide is the only inference that reasonable minds could fairly gather from the testimony, it is not error to withdraw the question from the jury.[1]

§ 395. **Visible Mark of Injury Required.**—*Injuries not covered of which there is no visible mark on the body, the body itself in case of death not being deemed such mark.*

The purpose of this clause is to guard the insurers from liability for injuries and death due solely to natural causes and for other fictitious or pretended accidents.[2] By virtue of this condition the burden is put upon the claimant to show some sign or mark of the injury of such a character that it may be apprehended by one of the senses; but a very strict rule of construction against the company is adopted.[3] Thus a discoloration of the skin,[4] or pallor,[5] or emacia-

companied by a purpose to effect death, with the absence of all design to take life. . . . It does not appear that Mr. Cady had ever been in that part of the building where he went to his death prior to the occasion in question. There is evidence tending to show that he might probably have left his room in a state of delirium and continued in such condition to the instant of the fatal act, not realizing what he was doing. There is evidence tending to prove that when he ran to the side of the shaft he was in a state of alarm and was fleeing from some fancied danger, and that a person in a delirious state is liable to do things dangerous to his own life or the lives of others under a misapprehension of what he is doing and its consequences. On the whole, there is room for belief that when Mr. Cady went over the railing he did not appreciate that he was going into the shaft; that he was not conscious of the nature of his act and did not have in mind any idea of self-destruction which, as we have seen, is essential to suicide."

[1] *Supreme Tent* v. *King*, 142 Fed. 678 (the insured, a policeman in need of money, shot himself).

[2] *Union Cas. & Surety Co.* v. *Mondy*, 18 Colo. App. 395, 401, 71 Pac. 677; *Gale* v. *Mut. Aid & Acc. Assn.*, 66 Hun, 600, 21 N. Y. Supp. 893. Formerly the exception was often worded "any bodily injury of which there shall be no external or visible signs upon the

[3] *Union Cas. & Surety Co.* v. *Mondy*, 18 Colo. App. 395, 71 Pac. 677. In *Barry* v. *U. S. Mut. Acc. Assn.*, 23 Fed. 712, aff'd 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60, the jury was charged, " 'Visible signs of injury,' within the meaning of this policy, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidences of an injury. Complaint of pain is not a visible sign because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see. But if the internal injury produces, for example, a pale and sickly look in the face; if it causes vomiting and retching or bloody and unnatural discharges from the bowels; if, in short, it sends forth to the observation of the eye, in the struggle of nature, any sign of injury—then those are external and visible signs, provided they are the direct result of the injury."

[4] *Sun Acc. Assn.* v. *Olson*, 59 Ill. App. 217.

[5] *Horsfall* v. *Pac. Mut. L. Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. R. 846.

tion or decline,[1] may be visible signs of internal injury sufficient to satisfy the policy requirement.[2]

Indeed, the court will not limit the phrase "visible signs" to evidence which may be perceived by the sense of sight. On the contrary, it is held sufficient if the indication of the injury affects the sense of touch or smell. Thus where a physician was able to feel the effect of a sprain in the muscles, though nothing unusual was visible to the eye.[3] So also the emanation of illuminating gas from the body of the insured as the effect of artificial respiration was held to be "an external and visible mark upon the body."[4] Nor is it essential that the sign of injury should appear upon the outside surface of the body;[5] or that it should become visible immediately after the accident;[6] or that it should remain visible until ensuing death.[7]

body of the insured." Under that wording the exception does not apply to fatal injuries, *Eggenberger* v. *Guaranty Mut. Acc. Assn.*, 41 Fed. 172, *Bernays* v. *U. S. Mut. Acc. Assn.*, 45 Fed. 455; *Paul* v. *Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. R. 758; *McGlinchey* v. *Fidelity & Cas. Co.*, 80 Me. 251, 14 Atl. 13, 6 Am. St. R. 190 (the dead body itself "is external and visible sign enough that the injury was received"). In consequence of these rulings the clause was extended by the companies as recited in the heading of this section; but the New York court says of the later phraseology: "The defendant evidently intended that this clause should exclude liability in case of death from accident, unless there is a visible mark upon the body. It is very doubtful whether the scope of the language will be so extended in any event," *Root* v. *London Guarantee & Acc. Co.*, 92 App. Div. 578, 582, 86 N. Y. Supp. 1055, aff'd without opinion, 180 N. Y. 527.

[1] *Root* v. *London Guaranty & Acc. Co.*, 92 App. Div. 578, 86 N. Y. Supp. 1055.

[2] *Thayer* v. *Standard Life & Acc. Ins. Co.*, 68 N. H. 577, 41 Atl. 182 ("any visible evidence" "which may appear within a reasonable time" is sufficient; it "need not be a bruise, contusion, laceration, or broken limb"); *Whitehouse* v. *Travelers' Ins. Co.*, 29 Fed. Cas. 1038 (bleeding from nose); *Summers* v. *Fidelity Mut. Aid Assn.*, 84 Mo. App. 605 (hernia); *Wehle* v. *U. S. Mut. Acc. Assn.*, 153 N. Y. 116, 47 N. E. 35, 60 Am. St. R. 598 (water running out of the mouth as proof of drowning); *U. S. Mut. Acc. Assn.* v. *Newman*, 84 Va. 52, 3 S. E. 805 (bloody froth exuding from mouth as proof of asphyxiation).

[3] *Gale* v. *Mut. Aid & Acc. Assn.*, 66 Hun, 600, 21 N. Y. Supp. 893 ("the evidence of the injury must be external, objective, but it must not necessarily be visible to the eye. . . . An object that is noticeable, apparent to the touch may be said to be visible"); *U. S. Cas. Co.* v. *Hanson*, 20 Colo App. 393, 79 Pac. 176 (sufficient, if perceptible to a digital examination).

[4] *Menneiley* v. *Employers' Liability Asur. Corp.*, 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. R. 716. "Direct and positive" proof of injury does not necessarily mean by eyewitnesses, *Peck* v. *Equitable Acc. Assn.*, 52 Hun (N. Y.), 255. The character of the injury itself may furnish evidence sufficiently "direct and positive" where there is no presumption that the injury was intentionally inflicted, *Travelers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308; *Utter* v. *Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. R. 913.

[5] *Union Cas. & Surety Co.* v. *Mondy*, 18 Colo. App. 395, 71 Pac. 677; *Freeman* v. *Mercantile Acc. Assn.*, 156 Mass. 351, 30 N. E. 1013 (redness of one lobe of the brain revealed by autopsy).

[6] *Pennington* v. *Pacific Mut. Life Ins. Co.*, 85 Iowa, 468, 52 N. W. 482, 39 Am. St. R. 306.

[7] *Bernays* v. *U. S. Mut. Acc. Assn.*, 45 Fed. 455.

In a Massachusetts case, the liability of the insured, by the terms of the policy, was limited in case of drowning, where the facts were not shown by eyewitnesses or the body recovered. Five minutes before drowning the insured was seen rowing in a canoe which could easily be overturned. It was held that the facts were shown by eyewitnesses within the meaning of the policy.[1]

A study of the many cases cited in this section brings conviction that the courts are not inclined to pay much respect to provisions of the policy which purport to control or modify the laws of evidence.[2] In case of any disputed material fact the question whether the injury was accidental must go to the jury.[3] The jury, too, is apt to decide the fact upon the testimony before them, without much regard to any rule of evidence that may be specified in the contract.

§ 396. Accidents Caused by Disease, etc., Excepted.—"*Nor accident, nor death, nor loss of limb, or sight, nor disability, resulting wholly or partly, directly or indirectly from any of the following causes, or while so engaged or affected: Disease or bodily infirmity, hernia, fits, vertigo, sleepwalking, medical or surgical treatment, except amputations necessitated solely by injuries and made within ninety days after accident.*" [4]

The distinction between an accident and a disease, within the meaning of the accident policy, is sometimes very subtle. Thus it has been held that blood poisoning, the result of a chafing or rubbing of the toe by a new shoe, is an accident.[5] But on the other hand, typhoid fever contracted by the unintentional swallowing of noxious germs hidden in water is undoubtedly a disease. And it is also held that a malignant pustule caused by putrid matter accidentally brought into contact with the lip must be classified as a disease.[6]

[1] *Lewis* v. *Brotherhood Acc. Co.*, 194 Mass. 1, 79 N. E. 802.

[2] *Reynolds* v. *Equitable Acc. Assoc.*, 59 Hun (N. Y.), 13, 15 ("The evidence was sufficient within the rules of law, and the language of the policy ['direct and affirmative'] cannot be construed to take the case out of the ordinary rules of evidence").

[3] *Mfrs. Acc. Ind. Co.* v. *Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620.

[4] This and similar clauses are omitted from the policy of health insurance. An accident policy insured against blood poisoning sustained by surgeons through septic matter introduced into the system through wounds in professional operations; *held*, that septic matter introduced into the eye of a dentist from the mouth of a patient while coughing, which did not bruise or penetrate the membrane, was not within the policy, *Fidelity & Cas. Co.* v. *Thompson*, 154 Fed. 484.

[5] *Western Commercial Travelers' Assn.* v. *Smith*, 85 Fed. 401, 56 U. S. App. 393, 29 C. C. A. 223, 40 L. R. A. 653. So also of blood poisoning from cutting a corn, *Nax* v. *Travelers' Ins. Co.*, 130 Fed. 985.

[6] *Bacon* v. *Association*, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. R. 748. Same holding where

The authorities, however, are well agreed that within the fair meaning of this exception a slight or temporary disorder or derangement of the functions is not to be regarded as a disease or bodily infirmity.[1] For example, fainting due to an attack of indigestion does not amount to a bodily infirmity; and in a case much cited the court concluded that drowning, though it happened in conjunction with such a temporary bodily condition of fainting or unconsciousness, was to be regarded the sole cause of the death, unless it were shown that death would have resulted without the presence of the water.[2] Indeed, the rule is firmly established that to constitute "a disease" or "bodily infirmity" there must be a material impairment of the bodily powers, an actual inroad upon the physical health.[3] An accident policy, before a federal court for construction, covered death which "resulted proximately and solely from accidental causes, and excluded death resulting wholly or partly, directly or indirectly, from disease, in any form, either as a cause or effect;" the court allowed the claimant to recover on the policy although the insured went to the platform of a railway car to vomit, and in consequence sustained a fatal fall.[4]

Farner's policy issued by the defendant contained two kinds of insurance, one against accidents and the other against disease. The part relating to accidents provided insurance, "For loss through personal, bodily injuries caused solely through accidents . . . . . due wholly to violent means external to the body . . . . and such as are not caused or contributed to by any deformity or disease." Another provision of the policy declared: "All cases of . . . . contact with poison, or with poisonous or infectious substances, are covered only under the health provisions of this policy." While Farner was sitting in front of his hotel holding a little dog on his lap, someone came behind him and pinched the dog's tail, whereupon the dog bit the insured on his thumb, from the poisonous

an unintentional fretting of the proas muscle from use of a bicycle, resulted in appendicitis, *Appel* v. *Ætna Life Ins. Co.*, 86 App. Div. 83, 83 N. Y. Supp. 238, aff'd 180 N. Y. 514, 72 N. E. 1139.

[1] *Meyer* v. *Fidelity & Cas. Co.*, 96 Iowa, 373, 65 N. W. 328, 59 Am. St. R. 374 (staggering before fall not attributed to "fits or vertigo;" company liable).

[2] *Mfrs. Acc. Indem. Co.* v. *Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L. R. A. 620.

[3] *Black* v. *Travelers' Ins. Co.*, 121 Fed. 732, 58 C. C. A. 14 (previous gunshot wound fracturing skull does not necessarily result in subsequent state of "bodily infirmity." Question for jury).

[4] *Preferred Acc. Ins. Co.* v. *Muir*, 126 Fed. 926, 61 C. C. A. 456 ("Muir's sickness at the stomach was a mere coincidence. It was the *occasion* of his going upon the platform of the car, but it was not a *cause* of death within the fair meaning of this provision").

effects of which, two weeks thereafter, he died. The court held that within the meaning of the policy it was a case of accident and not of disease or poisoning, and that the bite was to be regarded as the sole cause of the death.[1]

Bailey's policy excepted injuries resulting directly or indirectly from any disease. The insured was a physician, and, being in a somewhat emaciated and exhausted condition due to a prior injury, in order to gain stimulus during his drive on the highway in the country, he dissolved a tablet of morphia, as he had been accustomed to do, and injected it into his leg with a hypodermic needle, while sitting in his carriage. Owing to the disease of cellulitis, or blood poisoning, which shortly resulted, Dr. Bailey was disabled for about twenty weeks. On appeal, the judgment of nonsuit was reversed and it was held that the question whether the injuries complained of were sustained through external, violent, and accidental means should have been submitted to the jury.[2]

But if the insured is afflicted with a real disease at the time of the accident, except for which the accident would not have resulted in death, or if such disease aggravates the injury, there can be no recovery under such a clause.[3] Many instances may be cited by way of illustration. Thus if in consequence of delirium accompanying a feverish condition, due to grippe, an insured patient falls out of the window of a hospital, his insurer is relieved from liability;[4] or if, in consequence of a fit or vertigo, the insured falls into the water and is drowned;[5] or if a tumor at the base of the brain is the cause of his fall and injury;[6] or if, because of an apoplectic stroke and consequent fall, the insured is run over and crushed to death by an approaching

[1] *Farner* v. *Mass. Mut. Acc. Assn.* (Pa. St., 1907), 67 Atl. 927. The court said: "The insured died from the bite of a dog—certainly an accident, not a disease. The proximate cause of death was the bite, and the way in which it operated to produce death, whether by hemorrhage or lockjaw or blood poisoning, was a medical detail which did not affect the material fact of death resulting from the accident." Similar ruling in *Kenny* v. *Bankers' Acc. Ins. Co.* (Iowa, 1907), 113 N. W. 566. Same doctrine applied to the fire policy where fire is the risk and explosion the exception, *German Am. Ins. Co.* v. *Hyman* (Colo., 1908), 94 Pac. 27. And see §§ 278, 386, *supra*.

[2] *Bailey* v. *Interstate Cas. Co.*, 8 App. Div. 127, aff'd 158 N. Y. 723.

[3] *Western Commercial Travelers' Assn.* v. *Smith*, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653 (causing or aggravating injury); *Commercial Travelers' Mut. Acc. Assn.* v. *Fulton*, 79 Fed. 423, 24 C. C. A. 654, 45 U. S. App. 578; *Binder* v. *National Masonic Acc. Assn.*, 127 Iowa, 25, 102 N. W. 190 (causing or aggravating injury); *Ætna Life Ins. Co.* v. *Dorney*, 68 Ohio St. 151, 67 N. E. 254.

[4] *Carr* v. *Pacific Mut. Life Ins. Co.*, 100 Mo. App. 602, 75 S. W. 180.

[5] *Mfrs. Acc. & Indem. Co.* v. *Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620.

[6] *Sharpe* v. *Commercial Travelers' Mut. Acc. Assn.*, 139 Ind. 92, 37 N. E. 353.

wagon;[1] or if sleepwalking,[2] or hernia,[3] or heart disease,[4] is a contributing cause of the injury, the exception is operative and the insurer is exonerated.

The court, however, justly attaches great importance to the word "causes" in this exception, and if it appear that a disease in no sense contributes to the accident, but is either wholly independent of it, or simply a result of it, a strained construction, if need be, will be put upon the other restrictive words of the clause in order to grant indemnity for an injury purely accidental.[5]

For example, in a Colorado case the claimant was allowed to prevail against the insurer under the form of policy recited at the head of this section, notwithstanding the phrase "or while so engaged or afflicted," where the accident resulted in hernia followed by an unsuccessful surgical operation, in turn causing fatal peritonitis.[6] Likewise the Texas court, under the same form of policy, refused to release the company where an injury purely accidental caused rheumatism which in turn caused death.[7] And the same court allowed a recovery where, though the insured was diseased at the time, the accident did not result wholly or partly, directly or indirectly, from the disease.[8]

[1] *Clark* v. *Employers' Liability Assur. Co.*, 72 Vt. 458, 48 Atl. 639 (apoplexy the remote cause, but covered by the word "indirectly"). Compare *Winspear* v. *Accident Ins. Co.*, L. R., 6 Q. B. D. 42; *Lawrence* v. *Accidental Ins. Co.*, L. R., 7 Q. B. D. 216.

[2] *Travelers' Ins. Co.* v. *Harvey*, 82 Va. 949, 5 S. E. 553.

[3] *Miner* v. *Travelers' Ins. Co.*, 3 Ohio Dec. 289, 2 Ohio N. P. 103.

[4] *National Masonic Acc. Assn.* v. *Shryock*, 73 Fed. 774, 20 C. C. A. 3, 36 U. S. App. 658.

[5] To hold otherwise would well-nigh annul the contract, *Ætna Life Ins. Co.* v. *Hicks*, 23 Tex. Civ. App. 74, 56 S. W. 87. See cases § 387, *supra*.

[6] *Travelers' Ins. Co.* v. *Murray*, 16 Colo. 296, 26 Pac. 774, 25 Am. St. R. 267. Substantially the same ruling was made in *Thornton* v. *Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. R. 99; *Miner* v. *Travelers' Ins. Co.*, 3 Ohio Dec. 289, 2 Ohio N. P. 103. Also held in following cases that the insurer is not relieved if hernia is caused by the accident, all the courts enforcing the view that the natural results are to be attributed to the one sole proximate cause, to wit, the accidental injury, *Atlantic Acc. Assn.* v. *Alexander*, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; *Summers* v. *Fidelity Mut. Aid Assn.*, 84 Mo. App. 605. And where a resulting disease is a mere incident of the accident the latter is construed to be the sole cause, *Jiroch* v. *Travelers' Ins. Co.*, 145 Mich. 375, 108 N. W. 728 (diabetes); *Cary* v. *Preferred Acc. Ins. Co.*, 127 Wis. 67 (blood poisoning). Otherwise where the excepted cause, a disease, existed at time of accident, *White* v. *Stand., etc., Ins. Co.*, 95 Minn. 77, 103 N. W. 735. And prior disease though still existing if not a contributory cause does not exonerate the company, *Commercial Travelers' Mut. Acc. Assn.* v. *Fulton*, 79 Fed. 423, 24 C. C. A. 654; *Thornton* v. *Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. R. 99; *Ætna L. Ins. Co.* v. *Hicks*, 23 Tex. Civ. App. 74, 56 S. W. 87.

[7] *Travelers' Ins. Co.* v. *Hunter*, 30 Tex. Civ. App. 489, 70 S. W. 798.

[8] *Ætna Life Ins. Co.* v. *Hicks*, 23 Tex. Civ. App. 74, 56 S. W. 87. As between disease and accident as a cause for the injury it is said that there is no legal presumption, *Taylor* v. *General Acc. Assur. Corp.*, 208 Pa. St.

§ 397. **Intoxication or Narcotics.**—It is reasonable to require that the insured, when exposed to hazards, shall not be culpable of voluntarily putting himself under disturbing or exciting influences, likely to affect his judgment, or calculated to interfere with the full exercise of his faculties in their normal condition. Lack of sobriety brings peril, as shown by a case in New York. The insured, one of the guests at a convivial dinner, had been drinking freely of stimulants. One of his boon companions present boasted of his skill in the use of his pistol and declared his ability to shoot the insured in the ear without hurting him elsewhere. Presumably owing to his condition, the insured made no objection to the experiment. He was shot in the forehead and killed by his friend.[1] The policy was avoided.

Habits of intemperance in general, however, will not bring the insured within this particular exception unless he was intoxicated, or under the influence of narcotics, at the time of the accident;[2] but, to make the exception operative, it need not appear that the contemporaneous intoxication caused the injury or contributed to it.[3]

§ 398. **Poison, etc.**—*Voluntary or involuntary taking of poison or contact with poisonous substances.*

This exception covers the accidental taking of poison;[4] but many

439, 57 Atl. 830 (insured fell going up office steps); *Keefer* v. *Pacific Mut. Life Ins. Co.*, 201 Pa. St. 448, 455, 51 Atl. 366, 88 Am. St. R. 822. But it is also held that the burden is on the company to show that disease, being a specified exception, is the cause of the injury, *McCarthy* v. *Travelers' Ins. Co.*, 15 Fed. Cas. 1254; *Fetter* v. *Fidelity & Cas. Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. R. 560. And so, generally, the burden is on the defendant to show that the injury falls within any exception relied upon for defense, *Anthony* v. *Mercantile Mut. Acc. Assn.*, 162 Mass. 354, 38 N. E. 73, 26 L. R. A. 406, 44 Am. St. R. 367.

[1] *Shader* v. *Assurance Co.*, 66 N. Y. 441, 23 Am. Rep. 65.

[2] *Prader* v. *National Masonic Acc. Assn.*, 95 Iowa, 149, 63 N. W. 601; *Couadeau* v. *Am. Acc. Co.*, 95 Ky. 280, 25 S. W. 6; *Flint* v. *Travelers' Ins. Co.* (Tex. Civ. App.), 43 S. W. 1079, death from hypodermic dose of morphine administered by physician to relieve delirium tremens.

[3] *Standard L. & Acc. Ins. Co.* v. *Jones*, 94 Ala. 434, 10 So. 530; *Shader* v. *Railway Pass. Assur. Co.*, 66 N. Y. 441, 23 Am. Rep. 65. As to what amounts to intoxication, see *Standard L. & Acc. Ins. Co.* v. *Jones*, 94 Ala. 434, 10 So. 530; *Prader* v. *Nat. Masonic Acc. Assn.*, 95 Iowa, 149, 63 N. W. 601; *Campbell* v. *Fidel. & Cas. Co.*, 109 Ky. 661, 60 S. W. 492; *Conadean* v. *Am. Acc. Co.*, 95 Ky. 280, 25 S. W. 6; *Travelers' Ins. Co.* v. *Harvey*, 82 Va. 949, 5 S. E. 553 (insured fell out of a window of a boarding house). As to what questions are pertinent on the trial to prove a condition of sobriety or drunkenness, see *Cook* v. *Standard Life & Acc. Ins. Co.*, 84 Mich. 12, 47 N. W. 568. And compare § 355. Burden is on the company to allege, *Jones* v. *U. S. Mut. Acc. Assn.*, 92 Iowa, 652, 61 N. W. 485 (not on plaintiff to negative); and establish intoxication as a defense, *Sutherland* v. *Standard L. & Acc. Ins. Co.*, 87 Iowa, 505, 54 N. W. 453 (insured fell from street car); *Hester* v. *Fidel. & Cas. Co.*, 69 Mo. App. 186. The issue is usually for the jury; *Follis* v. *U. S. Mut. Acc. Assn.*, 94 Iowa, 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. R. 408; *DeVan* v. *Commercial Travelers' Mut. Acc. Assn.*, 92 Hun, 256, 36 N. Y. Supp. 931, aff'd 157 N. Y. 690, 51 N. E. 1090.

[4] *Early* v. *Standard Life & A. Co.*,

courts agree that if the exception contain only the phrase "taking poison," the insurer will not be relieved from liability in the case of a purely accidental taking, since the word "taking" points to a conscious act.[1] And the New York court was of opinion that the phrase "injury caused by poison" does not apply to death from a malignant pustule resulting from contact between an abraded part of the lips and a putrid animal substance, but that poison in its meaning is confined to the internal reception of a poisonous substance. It was, however, held, that the pustule in question was a disease, and so the case was brought within another exception in favor of the company.[2]

113 Mich. 58, 71 N. W. 200; 67 Am. St. R. 445 (aqua ammonia swallowed by mistake; *held*, "death by poison" and company not liable); *Meehan* v. *Traders' & Travelers' Acc. Co.*, 34 Misc. 158, 68 N. Y. Supp. 821 (carbolic acid thrown by a woman in the face of the insured); *Hill* v. *Hartford Acc. Ins. Co.*, 22 Hun, 187; *Pollock* v. *U. S. Mut. Acc. Assn.*, 102 Pa. St. 234, 48 Am. Rep. 204; *Maryland Cas. Co.* v. *Hudgins*, 97 Tex. 124, 76 S. W. 745, 64 L. R. A. 349 ("poison or anything accidentally, or otherwise, taken, administered, absorbed, or inhaled;" the insured was poisoned by eating one or two bad oysters, company not liable); *Preferred Acc. Ins. Co.* v. *Robinson* (Fla.), 33 So. 1005 (same form of policy as the last; *held*, exception covered inflammation of eye caused by contact with poisonous ivy); *Kennedy* v. *Ætna Life Ins. Co.*, 31 Tex. Civ. App. 509, 72 S. W. 602 (overdose of poisonous medicine instead of doctor's prescription); *Kasten* v. *Interstate Cas. Co.*, 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651 (septic poisoning from dentist's cotton); *Cole* v. *Acc. Ins. Co.*, 61 L. T. N. S. 227. Other courts take a different view of like clauses and hold, despite them, that if a poisoning is purely accidental, the company is not to be relieved by the exception, *Dezell* v. *Fidelity & Cas. Co.*, 176 Mo. 253, 75 S. W. 1102. And see *Metropolitan Acc. Assn.* v. *Froiland*, 161 Ill. 30, 43 N. E. 766, 52 Am. St. R. 359; *Travelers' Ins. Co.* v. *Dunlap*, 160 Ill. 642, 43 N. E. 765, 52 Am. St. R. 355; *Miller* v. *Fidelity & Cas. Co.*, 97 Fed. 836. The word "absorbed" used in such a clause means imbibing through the pores, *Fidelity & Cas. Co.* v. *Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654.

[1] *Miller* v. *Fidelity & Cas. Co.*, 97 Fed. 836; *Travelers' Ins. Co.* v. *Dunlap*, 160 Ill. 642, 43 N. E. 765, 52 Am. St. R. 355; *Healey* v. *Mut. Acc. Assn.*, 133 Ill. 557, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. R. 637; *Dezell* v. *Fidelity & Cas. Co.*, 176 Mo. 253, 75 S. W. 1102; *Paul* v. *Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 8 Am. St. R. 758, 3 L. R. A. 443, *Contra*, *Richardson* v. *Travelers' Ins. Co.*, 46 Fed. 843 and *Preferred Acc. Ins. Co.* v. *Robinson* (Fla.), 33 So. 1005. A federal court decided that the exception of "death resulting from poison" covered an accidental drinking of poison by the insured in the belief that it was harmless, although the phrase "taking poison" might involve the notion of a conscious act, *McGlother* v. *Prov. Mut. Acc. Co.*, 89 Fed. 685, 32 C. C. A. 318; *Westmoreland* v. *Preferred Acc. Ins. Co.*, 75 Fed. 244 (chloroform administered by physician). The exception does not cover the poisonous bite or sting of an insect, *Omberg* v. *Assoc.*, 101 Ky. 303, 40 S. W. 909, 72 Am. St. R. 413. Whether coal gas is a poison was left to the jury, *U. S. Mut. Acc. Assn.* v. *Newman*, 84 Va. 52, 3 S. E. 805. The burden is on the company to show that the death is within the exception, *Travelers' Protective Assn.* v. *Gilbert*, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538.

[2] *Bacon* v. *U. S. Mut. Acc. Assn.*, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. R. 748. The Pennsylvania court suggests that poison must be taken internally to come within the exception, *Preferred Mut. Acc. Assn.* v. *Beidelman*, 1 Monag (Pa.) 481.

Garvey, a railroad yard conductor, had an accident policy which provided that in the event of injuries or disability resulting directly or indirectly, accidentally or otherwise from poison or infection, the company's liability should be limited to one-tenth of the amount otherwise designated. While walking up an incline leading to the platform of a freight house, the insured slipped and fell, sustaining a severe and lacerated wound about two inches long on the left leg below the knee. About a week later septic or pyemic symptoms appeared. The insured was totally disabled for about four months. This prolonged disability was caused by the infectious condition of the wound which retarded the process of healing. The court concluded that the disability did not result from the poison, but the poison from the injury and sustained the plaintiff's judgment for the larger amount.[1]

§ 399. Inhaling of Gas or Vapor.—The words "inhaling gas" have been construed as applying to an intentional, voluntary or conscious act of the insured.[2] Hence in some policies the exception has been further strengthened by the addition of the words "voluntary or involuntary."[3] Where the insured died from the effects of chloroform intentionally administered it was held that the exception was operative to release the company.[4]

The strong leaning of the courts towards a construction of the terms of the accident policy which shall favor the insured is strikingly illustrated by an Illinois case. The policy provided: "This insurance shall not cover . . . . death . . . . resulting, wholly or partly, directly or indirectly . . . . from any gas or vapor." The insured met his death by reason of the unconscious and involuntary inhaling of escaping gas at night while he was asleep. The court allowed the plaintiff to recover on the policy, interpreting the clause to refer to a conscious inhaling of gas in connection with

[1] *Garvey* v. *Phœnix P. Acc. Ins. Co.*, 123 App. Div. (N. Y.) 106 ("conditions which inevitably or ordinarily are the effect of a disability covered by the policy are also within its compass, otherwise the contract is a sham").

[2] *Menneilley* v. *Employers' Liability Assur. Corp.*, 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 86, and see *Fidelity & Cas. Co.* v *Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654.

[3] "Breathing gas" involuntarily is not "inhaling gas," *Fidelity & Cas. Co.* v. *Lowenstein*, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450; *Paul* v. *Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. R. 758, 20 N. E. 347, 21 N. Y. St. R. 624, 3 L. R. A. 443; *Pickett* v. *Pacific Mut. Life Ins. Co.*, 144 Pa. St. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. R. 618 (insured descended into a well to repair a pump and was asphixiated. Company held liable. "To inhale gas requires an act of volition"). But see *Richardson* v. *Travelers' Ins. Co.*, 46 Fed. 843.

[4] *Westmoreland* v. *Preferred Acc. Ins. Co.*, 75 Fed. 244.

medical or surgical treatment, or dentist's work, or a suicidal purpose.[1]

§ 400. Duelling or Fighting.—This exception should not be construed as meaning that the insured shall submit without resistance to whatever violence may be offered him.[2] But if the insured is injured in consequence of his voluntary engagement in a fight the insurer will be exonerated from liability under this clause.[3]

§ 401. Intentional Injuries.—*Intentional injuries inflicted by the insured or any other person.*

The insurance contract being one of highest good faith[4] the insured would not, even in the absence of such a clause, be permitted to take advantage of injuries designedly inflicted by himself.

Intention, which is a question of fact to be inferred from the act itself and surrounding circumstances, is an essential element under this clause to relieve the insurer from liability.[5] But though the injury may be wholly accidental to the insured in that it was unforeseen by him, yet, if intended by his assailant, there can be no recovery under this exception.[6] And such an intent exists where a person has intentionally struck the insured in order to protect himself though without intent to inflict the particular injury sustained.[7]

[1] *Travelers' Ins. Co.* v. *Ayers*, 217 Ill. 390, 75 N. E. 506 (citing many Illinois and New York cases).

[2] *Coles* v. *New York Cas. Co.*, 87 App. Div. 41, 83 N. Y. Supp. 1063 (insured bartender forcibly ejected a noisy person, insurer liable); *Robinson* v. *United States Mut. Acc. Assn.*, 68 Fed. 825. Compare *U. S. Mut. Acc. Assn.* v. *Millard*, 43 Ill. App. 148; *Gresham* v. *Equitable Acc. Ins. Co.*, 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. R. 263, where both parties voluntarily engaged in combat. See clause under life policy as to violation of law, §§ 371, 372, *supra*.

[3] *Jones* v. *U. S. Mut. Acc. Ass.*, 92 Iowa, 653, 61 N. W. 485 (insured was shot in the street in connection with a quarrel about a hack after a visit by himself and a companion to a house of ill fame).

[4] § 94, *supra*.

[5] *Stevens* v. *Continental Cas. Co.*, 12 N. D. 463, 97 N. W. 862 (in case of death from gunshot presumption is of accident. Burden of proof is on defendant; many cases cited). See *Railway Officials & E. A. Assn.* v. *Drummond*, 56 Neb. 235, 76 N. W. 562 (shooting was by a robber and jury was allowed to find for plaintiff). The Kentucky court construed "injuries" as meaning non-fatal injuries only, *Am. Acc. Co.* v. *Carson*, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. R. 473.

[6] *Orr* v. *Travelers' Ins. Co.*, 120 Ala. 647, 24 So. 997; *Fischer* v. *Travelers' Ins. Co.*, 77 Cal. 246, 19 Pac. 425, 1 L. R. A. 572; *Travelers' Ins. Co.* v. *McCarthy*, 15 Colo. 351, 25 Pac. 713, 11 L. R. A. 297, 22 Am. St. R. 410; *De Graw* v. *National Acc. Soc.*, 51 Hun, 142, 4 N. Y. Supp. 912; *Butero* v. *Travelers' Acc. Ins. Co.*, 96 Wis. 536, 71 S. W. 811, 65 Am. St. R. 61.

[7] *Fidelity & Cas. Co.* v. *Smith*, 31 Tex. Civ. App. 111, 71 S. W. 391. And see *Matson* v. *Travelers' Ins. Co.*, 93 Me. 469, 45 Atl. 518, 74 Am. St. R. 368; *Richards* v. *Travelers' Ins. Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. R. 455 (*held*, construing a clause differently worded, that company was not relieved unless assailant "designed" not

By virtue of this exception, if the insured is murdered the company is relieved from liability.[1] And if a constable is intentionally injured in making an arrest or serving a process this exception in his accident policy becomes applicable.[2] But the act of an insane person incapable of forming a rational intent will not fall within the restriction.[3]

Weidner had an accident policy which provided that only a limited proportion should be paid in case of intentional injuries at the hands of another, except in case of assaults for the sole purpose of robbery. Weidner and his wife had spent the morning with Wottashek at Hale's Corners. In the afternoon Wottashek started to drive them and others back to Milwaukee in an express wagon. As they approached the toll gate they passed two men, one of whom, named Tinger, asked for a ride, and handed to one of the party a toll ticket. There were seven in the wagon and the request was refused. Tinger demanded his ticket back. It had been returned to the other man who said, "Come on! come on! I got the ticket." Tinger then took from the floor of the wagon a pair of rubber boots belonging to Weidner and started off. Weidner got out of the wagon, exclaiming, "See here! those are my boots, and I want them back." Thereupon Tinger, retaining possession of the boots, struck Weidner, knocked him down and while lying on the ground, he hit him with the heel of the rubber boot breaking his glasses and his nose. Septic poisoning and death resulted a few days later from the wound. The trial court granted a nonsuit in the action on the policy, deciding as matter of law that robbery was not the sole pur-

only to strike but to kill). The use of a deadly weapon may raise a presumption of intent to kill, *Travelers' Ins. Co.* v. *Wyness*, 107 Ga. 584, 34 S. E. 113.

[1] *Travelers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308; *Jarnagin* v. *Travelers' Protec. Assn.* 133 Fed. 892, 66 C. C. A. 622; *Travelers' Protective Assn.* v. *Langholz*, 86 Fed. 60, 29 C. C. A. 628, 52 U. S. App. 643; *Ging* v. *Travelers' Ins. Co.*, 74 Minn. 505, 77 N. W. 291. But see *Am. Acc. Co.* v. *Carson*, 99 Ky. 441, 34 L. R. A. 301, 59 Am. St. R. 473.

[2] *Grimes* v. *Fidelity & Cas. Co.*, 33 Tex. Civ. App. 275, 76 S. W. 811; *Miller* v. *Interstate Cas. Co.*, 17 Pa. Super. Ct. 360.

[3] *Corley* v. *Travelers' Protection Assn.*, 105 Fed. 854, 46 C. C. A. 278; *Berger* v. *Pacific Mut. L. Ins. Co.*, 88 Fed. 241; *Marceau* v. *Travelers' Ins. Co.*, 101 Cal. 338, 35 Pac. 856, 36 Pac. 813. Intoxication may prevent "an intent," *Northwestern Benev. Soc.* v. *Dudley*, 27 Ind. App. 327, 61 N. E. 207. Financial condition of insured bears upon issue whether injuries were self-inflicted, *Ætna L. Ins. Co.* v. *Vandecar*, 86 Fed. 282, 30 C. C. A. 48; *Long* v. *Travelers' Ins. Co.*, 113 Iowa, 259, 85 N. W. 24. Burden is on company to plead, *Coburn* v. *Travelers' Ins. Co.*, 145 Mass. 226, 13 N. E. 604; *Stevens* v. *Continental Cas. Co.*, 12 N. D. 463, 97 N. W. 862; and prove the exception, *Lampkin* v. *Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040. If the evidence is conflicting the question whether the injury was intentional or accidental is for jury, *Guldenkirch* v. *U. S. Mut. Acc. Assn.*, 5 N. Y. Supp. 428.

pose of the assault. But the Supreme Court by a divided vote reversed, holding that the question whether the assault was committed for the sole purpose of robbery was one of fact for the jury.[1]

§ 402. Voluntary Overexertion.—Under the exception the insured does not lose his right to recover unless there has been a conscious or intentional overexertion or a reckless disregard of consequences.[2]

§ 403. In Violation of Law.—This exception was considered, in dealing with the provisions of the life policy.[3]

The Nebraska court holds that by collecting dues on the policy with knowledge of the facts, the insurer waives forfeiture caused by conviction for the crime of felony.[4] Further illustration may be useful.

Duran's accident policy provided that the insurance did not cover an injury resulting wholly or partly, directly or indirectly, from violation of law. The Vermont statutes prohibited hunting, and unnecessary traveling, on Sunday. On a Sunday, however, Duran set out from Burlington for Colchester on a hunting expedition. After hunting, he started for home in the afternoon through a field, and while crossing frozen plowed ground to get to the highway, his foot slipped upon the frozen ground and his knee was injured. The court held that the injury was caused by the violation of law and that the risk was one not assumed by the company.[5]

[1] *Weidner* v. *Standard Life & Acc. Ins. Co.*, 130 Wis. 10, 110 N. W. 246. The majority of the court gave to the word "robbery" a somewhat popular meaning. The dissenting judges were of opinion that there was no robbery, since the only violence followed, and did not precede or accompany, the taking of the boots.

[2] *Rustin* v. *Standard Life & A. A. I. Co.*, 58 Neb. 792, 76 N. W. 712, 46 L. R. A. 253, 76 Am. St. R. 136 (lifting a 300 pound weight is not within the exception as matter of law). Raising heavy machinery in regular course of employment is no offense under this clause, *Standard L. & Acc. Ins. Co.* v. *Schmaltz*, 66 Ark. 588, 53 S. W. 49, 74 Am. St. R. 112. Great exertion demanded in time of danger does not come within this restrictive clause, *Reynolds* v. *Equitable Acc. Assn.*, 59 Hun, 13, 1 N. Y. Supp. 738, aff'd 121 N. Y. 649, 24 N. E. 1091. Indulging in a bicycle race raises a question for jury under this clause, *Keeffe* v. *National Acc. Soc.*, 4 App. Div. 392, 38 N. Y. Supp. 854. The issue is usually for the jury, *McKinley* v. *Bankers' Acc. Ins. Co.*, 106 Iowa, 81, 75 N. W. 670. But a verdict was held against the weight of evidence in *Metropolitan Acc. Assn.* v. *Bristol*, 69 Ill. App. 492.

[3] §§ 371, 372, *supra*. Burden is on insurer to establish the exception, *Smith* v. *Ætna Life Ins. Co.*, 115 Iowa, 217, 88 N. W. 368.

[4] *Pringle* v. *Modern Woodmen* (Neb. 1907), 113 N. W. 231.

[5] *Duran* v. *Standard Life & Acc. Ins. Co.*, 63 Vt. 437, 22 Atl. 530, 13 L. R. A. 637, 25 Am. St. R. 773. Compare case

Walters' certificate was to be null and void if he "should die in consequence of a duel or in consequence of the violation or attempted violation of the laws of the State, or of the United States." Walters and Spinks, his brother-in-law, lived together in Kentucky. Walters had been absent from home for a few days, and, upon his return, went into the room occupied by Spinks and his family, where Walters' wife was. The wife of Spinks was sick in bed at the time, and his little baby was in a dying condition. After leaving the room Walters and his wife returned shortly with their own baby. A few words—not of serious import—passed between the men, and immediately they began shooting at each other, it appearing by the weight of evidence that Spinks, as the aggressor, fired the first shot. In a few moments both men were lying dead in the hall adjacent to the room. The court sustained the verdict in favor of the insured, holding that there was no sufficient evidence to support the theory of a duel, and that the insured was not guilty of a violation of law, if he used his pistol in the belief that Spinks was then about to take his life, or inflict upon him great bodily harm.[1]

In an interesting case of first impression in Illinois, recently reported, Kilpatrick, the insured, was convicted and executed for murder. The defendant had issued to him a policy of life insurance which contained no special stipulation relating to loss of life in violation of law or at the hands of justice. In an action on the policy the defendant contended, that considerations of public policy precluded a recovery, and the courts below so decided. But the Supreme Court reversed, holding that the argument was erroneous and rested upon the same grounds that were urged centuries ago in support of the now obsolete doctrine of attainder and corruption of blood.[2]

§ 404. Voluntary Exposure to Unnecessary Danger.—A conspicuous object of insurance is to provide indemnity for misfortunes resulting from inadvertent heedlessness.[3] By the insertion of an

when hunting expedition was concluded and company held liable, *Prader* v. *Accident Assn.*, 95 Iowa, 149, 63 N. W. 601.

[1] *Woodmen of the World* v. *Walters* (Ky., 1907), 99 S. W. 930.

[2] *Collins* v. *Met. Life Ins. Co.* (Ill. Dec., 1907), 83 N. E. 542, citing, among other cases, *Knights* v. *Menkhausen*, 209 Ill. 277, 70 N. E. 567; *Shellenberger* v. *Ransom*, 41 Neb. 641, 59 N. W. 935, 25 L. R. A. 564; *Owens* v. *Owens*, 100 N. C. 240, 6 S. E. 794; *Carpenter's Estate*, 170 Pa. St. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. R. 765.

[3] *Providence Life Ins. & Inv. Co.* v. *Martin*, 32 Md. 310, 313; *Lehman* v.

exception covering injury or death caused by voluntary exposure to unnecessary danger,[1] insurers against accidental injuries have attempted to impose a very considerable restriction upon their general liability. While this provision of the contract may not be altogether ignored, the courts do not construe the words as meaning the same as contributory negligence in the law of torts.[2] They hold rather that there must be a conscious and intentional exposure to unnecessary danger, that is to say, that the insured must be aware of such danger and purposely assume the risk of it, before the insurer can invoke the aid of this clause in defense.[3] Self-defense, apparently necessary, is justifiable.[4] An act is not unnecessary if performed in

Great Eastern Cas. & Ins. Co., 7 App. Div. 424, 39 N. Y. Supp. 912, aff'd 158 N. Y. 689, 53 N. E. 1127.

[1] Sometimes "due diligence for personal safety or protection" is required, § 408, *infra*.

[2] *Travelers' Ins. Co.* v. *Randolph*, 78 Fed. 754, 24 C. C. A. 305, 47 U. S. App. 260 (cases cited); *Keene* v. *New Eng. Mut. Acc. Assn.*, 164 Mass. 170, 41 N. E. 203; *Wilson* v. *Northwestern Mut. Acc. Assn.*, 53 Minn. 470, 479, 55 N. W. 626 (distinction explained). But see *Sargent* v. *Central Acc. Ins. Co.*, 112 Wis. 29, 87 N. W. 796, 88 Am. St. R. 946; *Shevlin* v. *Association*, 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52.

[3] *Ashenfelter* v. *Employers' Liability Assur. Corp.*, 87 Fed. 682, 31 C. C. A. 193 (contractor suffocated by burning bucket of tar, company liable); *Collins* v. *Bankers' Acc. Ins. Co.*, 96 Iowa, 216, 64 N. W. 778, 59 Am. St. R. 367 (fishing in the dark from boat without knowledge of snags, company liable); *Irwin* v. *Phœnix Acc., etc., Assn.*, 127 Mich. 630, 86 N. W. 1036 (not mere thoughtlessness meant, as where mason stepped on unsupported end of scaffold), *Thomas* v. *Masons' Fraternal Acc. Assn.*, 64 App. Div. 22, 71 N. Y. Supp. 692 (gun standing against a tree slipped and injured hunter. The court said, "voluntary exposure in such cases is not mere carelessness and recklessness, but implies that the person accused has knowingly and without reason put himself in the way of some danger from which injury is likely to occur"). It is not enough that the act of the insured is voluntary; there must also be knowledge of the danger, *Equitable Acc. Ins. Co.* v. *Osborn*, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267. The words are not to be strictly and literally interpreted as including every exposure avoidable by exercise of due care, *U. S. Mut. Acc. Assn.* v. *Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453 (traveling salesman drowned in a slough which he deliberately attempted to cross, company held liable). Some courts hold even that the negligence must be "gross and wanton" to avail the company, *Johnson* v. *London G. & Acc. Co.*, 115 Mich. 86, 72 N. W. 1115, 40 L. R. A. 440, 69 Am. St. R. 549 (insured attempted to drive a bull out of a pasture, company liable); So it is said, there must be knowledge of the special danger; thus, a warning that it is dangerous in general to sleep over a steamboat boiler is not knowledge of danger from steam escaping from safety valve of boiler, *Travelers' Ins. Co.* v. *Clark*, 109 Ky. 350, 59 S. W. 7, 95 Am. St. R. 374. But knowledge of danger does not mean knowledge that injury will surely ensue, *Carpenter* v. *American Acc. Co.*, 46 S. C. 541, 24 S. E. 500 (insured handled a kicking mule. The court said: "If the unnecessary danger be such that a reasonable, prudent man ought to have known it, and he voluntarily goes into it, it would be a voluntary exposure to unnecessary danger"). And see *De Loy* v. *Travelers' Ins. Co.*, 171 Pa. St. 1, 32 Atl. 1108, 50 Am. St. R. 787 (intention may be determined in some cases from acts and conduct and if a man acts so carelessly as to show an utter disregard of a known danger he then may be said to voluntarily expose himself within the meaning of the provision).

[4] *Campbell* v. *Fidelity & Cas. Co.*, 109 Ky. 661, 60 S. W. 492.

the line of duty.[1] Attempts to save life are not prohibited, for example, to prevent a person from being run over;[2] or to rescue wrecked sailors.[3]

The exception as worded above, however, is applicable to a death or injury where the insured is struck by a railroad train while needlessly running along the track at night.[4] But if the insured is injured when boarding a slowly moving street car a question for the jury is presented.[5] And whether going upon or crossing a railroad track is within the exception, it is usually for the jury to say.[6]

[1] *Pacific Mut. Life Ins. Co.* v. *Snowden*, 58 Fed. 342, 7 C. C. A. 264 (cattle dealer in transit), *Rustin* v. *Ins. Co.*, 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. R. 136 (proprietor of pleasure resort to test veracity of one of his performers raised a very heavy dumb-bell, company liable); *Freeman* v. *Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372 (employee of railroad company shoveling snow); *Bateman* v. *Travelers' Ins. Co.*, 110 Mo. App. 443, 85 S. W. 128 (flagman involuntarily went to sleep); *Jamison* v. *Continental Cas. Co.*, 104 Mo. App. 306, 78 S. W. 812 (flagman fell asleep, question for jury, many cases reviewed); *Coles* v. *N. Y. Cas. Co.*, 87 App. Div. 41, 83 N. Y. Supp. 1063 (bartender ejected a noisy customer); *Richards* v. *Travelers' Ins. Co.* 18 S. D. 287, 100 N. W. 428 67 L. R. A. 175 ("cattle dealer visiting yards"). When the insured was engaged regularly in electric light repairing, and fell from a tree while so engaged it was not voluntary exposure to unnecessary danger, *Continental Cas. Co.* v. *Jennings* (Tex. Civ. App., 1907), 99 S. W. 423.

[2] *William's* v. *U. S. Mut. Acc. Assn.*, 82 Hun, 268, 31 N. Y. Supp. 343, aff'd 147 N. Y. 693, 42 N. E. 726.

[3] *Tucker* v. *Ins. Co.*, 50 Hun, 50, 4 N. Y. Supp. 505, aff'd 121 N. Y. 718.

[4] *Tuttle* v. *Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316. And see *Cornish* v. *Accident Co.*, L. R., 23 Q. B. D. 453. The exception applies in favor of the company when the insured is injured sitting on the track, *Metropolitan Acc. Assn.* v. *Taylor*, 71 Ill. App. 132. (But compare *Fidelity & Cas. Co.* v. *Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432.) Or crossing at an improper place, *Glass* v. *Masons' Fraternal Acc. Assn.*, 112 Fed. 495. Or attempting to cross between freight cars, *Willard* v. *Masonic Eq. Acc. Assn.*, 169 Mass. 288, 47 N. E. 1006, 61 Am. St. R. 285. Or climbing over car couplings, *Bean* v. *Employers' L. Assur. Corp.*, 50 Mo. App. 459. Or where the insured is injured by jumping from a moving train after passing station, *Smith* v. *Preferred Mut. Acc. Assn.*, 104 Mich. 634, 62 N. W. 990; *Shevlin* v. *American Mut. A. Assn.*, 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52 (rapidly moving car, gross negligence). Or needlessly attempting to pass over a dangerous trestle on a dark night, *Travelers' Ins. Co.* v. *Jones*, 80 Ga. 541, 7 S. E. 83, 12 Am. St. R. 270; *Follis* v. *Assoc.*, 94 Iowa, 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. R. 408. Or needlessly making a passageway of a blocked railroad yard and boarding a moving freight train, *Alter* v. *Union Cas. & Surety Co.*, 108 Mo. App. 169, 83 S. W. 276. Or steeplechase riding, *Smith* v. *Ætna Life Ins. Co.*, 185 Mass. 74, 69 N. E. 1059, 64 L. R. A. 117, 102 Am. St. R. 326. Or lowering himself from a window to escape a policeman, *Shaffer* v. *Travelers' Ins. Co.*, 31 Ill. App. 112, 22 N. E. 589. Or pulling a loaded, cocked gun through a fence, *Sargent* v. *Central Acc. Ins. Co.*, 112 Wis. 29, 87 N. W. 796, 88 Am. St. R. 946.

[5] *Johanns* v. *Nat. Acc. Soc.*, 16 App. Div. 104, 45 N. Y. Supp. 117.

[6] *Keene* v. *New Eng. Mut. Acc. Assn.*, 161 Mass. 149, 36 N. E. 891; *Meadows* v. *Pac. Mut. Life Ins. Co.*, 129 Mo. 76, 31 S. W. 578, 50 Am. St. R. 427; *Duncan* v. *Preferred Mut. Acc. Assn.*, 59 N. Y. Super. 145, 13 N. Y. Supp. 620, aff'd 129 N. Y. 622, 29 N. E. 1029. So of bicycle racing, *Keeffe* v. *Nat. Acc. Soc.*, 4 App. Div. 392, 38 N. Y. Supp. 854. And of engaging in a fight, *Campbell* v. *Fidel. & Cas. Co.*, 109 Ky. 661, 60 S. W. 492; *Collins* v. *Fidel. & Cas. Co.*, 63 Mo. App. 253; *Union Cas. & S. Co.* v. *Harroll*, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. R. 873.

An insured does not, however, voluntarily expose himself to unnecessary danger by scaling a bank with a loaded gun; [1] or by cleaning a gun in ignorance that it is loaded; [2] or by crossing a railroad track at a point recognized as a thoroughfare; [3] or, as matter of law, by standing on the platform or steps of a railroad car; [4] or by passing from one car to another in a vestibuled train.[5] And where the insured stepped from a train through a hole in the floor of a bridge, on which the train had temporarily stopped, the assured having no reason to suspect the existence of the hole, the court held that the exception did not apply and that the company was liable.[6]

Rebman's policy contained the provisions. "Nor does this contract extend to, nor insure against, death or any kind of disablement resulting wholly or partly, directly or indirectly, from voluntary exposure to unnecessary danger. The certificate holder is required to use all due diligence for personal safety and protection." Rebman had frequently taken the 1:02 P. M. train for Pittsburg at a station near his home. Shortly before the accident, orders had been given not to take on passengers at this station, but mail was received and discharged there. Rebman did not know of this order. He went to the station expecting the train to stop. He saw it approach with steam off and at reduced speed. While it was running six or eight miles an hour and passing to his right, he seized the handrail at the front platform of the last car with his left hand, placed his left foot on the lower step, and was in the act of raising his body, when his hold was broken, and he fell backward and was killed. He was nearly sixty-six years of age, weighed 184 pounds, and had an umbrella under his left arm. The Pennsylvania Supreme Court held that a judgment of nonsuit was proper, since the insured was injured by exposing himself to a risk not covered by the policy. [7]

[1] *Cornwell* v. *Fraternal Acc. Assn.*, 6 N. D. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. R. 601.

[2] *Union Cas. & S. Co.* v. *Goddard*, 25 Ky. L. R. 1035, 76 S. W. 832; *Miller* v. *American Mut. Acc. Assn.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765.

[3] *Payne* v. *Fraternal Acc. Assn.*, 119 Iowa, 342, 93 N. W. 361; *Lehman* v. *Great Eastern Cas. & I. Co.*, 7 App. Div. (N. Y.) 424, 39 N. Y. Supp. 912.

[4] *Travelers' Ins. Co.* v. *Mitchell*, 78 Fed. 754, 24 C. C. A. 305, 47 U. S. App. 260; *Smith* v. *Ætna Life Ins. Co.*, 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. R. 153. Especially if forced out of the car by the crowd, *Equitable Acc. Ins. Co.* v. *Sandifer*, 12 Ky. L. R. 797. Or by illness, *Preferred Acc. Ins. Co.* v. *Muir*, 126 Fed. 926, 61 C. C. A. 456.

[5] *Robinson* v. *Society*, 132 Mich. 695, 94 N. W. 211.

[6] *Burkhard* v. *Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205; *Scheiderer* v. *Travelers' Ins. Co.*, 58 Wis. 13, 46 Am. Rep. 618.

[7] *Rebman* v. *General Acc. Ins. Co.* (Pa. St.), 66 Atl. 859 ("the words 'voluntary exposure to unnecessary danger' . . . . have been construed

The Massachusetts court came to a somewhat similar conclusion. The defendant had issued to the plaintiff, Garcelon, its policy, by the terms of which no indemnity was to be paid to anyone for an injury caused wholly or in part, directly or indirectly, by voluntary exposure to unnecessary danger, or for any injury which he might have averted or prevented by the exercise of ordinary care, prudence and foresight, or to which his own negligence might have contributed. Garcelon was a commercial traveler and desired to go by a freight train from one town in Nebraska to another. He arrived seasonably at the railroad station, found the freight train there, and put his baggage in the caboose which was the last car of the train. Seeing that the train was not ready to start, he got off the caboose and went along the street a short distance away from the train, and was then returning toward the train when it suddenly started. Believing that the train was proceeding on its journey he ran up to it, and, while it was in motion, started at a point in the street to climb up the iron ladder upon the side of one of the freight cars, intending to reach the top of that car, and, by walking upon the top of it and the following cars while the train was in motion, to reach the caboose. As he grasped one of the rounds of the ladder, the train, which was still in motion, gave a sudden and violent jerk, and he was thrown to the ground in such a manner that his left hand and arm extended over one rail of the track and the car wheel passed over it and crushed it, necessitating its amputation. It was shown that commercial travelers in Nebraska and the neighboring states are accustomed to take the same risks that Garcelon took. The court on appeal held that a verdict for the defendant was rightly ordered because upon the undisputed facts the inference was unavoidable that Garcelon's negligence contributed to the injury for which he sued.[1]

In another case, the plaintiff's recovery was affirmed on appeal. The insured was employed as a brakeman on a freight train known as "Extra East." His train was backed in on a side-track at Balfour to permit train No. 108, which was due there soon, to pass. It was his duty to close the switch after his train had backed upon the side-track. The engineer of "Extra East" testified that it was the duty of the insured to remain on the engine when not at work, but there was no evidence that he disobeyed any instructions or

by this court and generally, as an intentional and unnecessary exposure to danger so obvious that a prudent person exercising reasonable foresight, would have avoided it").

[1] *Garcelon* v. *Commercial Travelers' E. Acc. Assn.*, 195 Mass. 531, 81 N. E. 201 (citing many cases).

rules in remaining at the switch some thirty or forty minutes until the arrival of train No. 108. This train in some way passed over both his feet and ankles, causing injuries from which death ensued. The appellate court held that the most that could have been claimed by defendant was that there was sufficient evidence to require the submission to the jury of the question as to whether the injury resulted from "unnecessary exposure to danger or to obvious risk of injury." [1]

Hunt's policy excepted injuries resulting from "voluntary or unnecessary exposure to danger." Hunt, thirty-six years of age, was engaged in playing a game of indoor baseball in a gymnasium of the Young Men's Christian Association. The floor was slippery. Having batted the ball, he overran first base and, as he was in the habit of doing to stop himself, he put out his foot and hand against the side wall of the gymnasium which was between six and ten feet beyond the base. In doing this he broke his ankle. He admitted that he could have stopped short of the wall if he had tried. The court below directed a verdict for the defendant. The judgment was reversed and a new trial ordered.[2]

It must be observed that while in ordinary actions for personal injuries the burden of proof rests upon the plaintiff to prove his due care, or absence of contributory negligence, under the clauses of the accident policy the burden is upon the insurance company to show that there was a voluntary exposure to unnecessary danger or a lack of due diligence.[3]

Where the exemption was worded to except injuries from "exposure to obvious risk," the English court gave the following rule:

[1] *Kephart* v. *Continental Cas. Co.* (N. Dak., 1908), 116 N. W. 349.

[2] *Hunt* v. *U. S. Acc. Assn.*, 146 Mich. 521, 109 N. W. 1042. The court suggested that Hunt might have slipped on the floor if he had tried to stop short of the wall, and held that the clause refers to cases in which there is a realization that an accident will in all probability result, and an injury follow, from the action about to be taken, and that the danger of injury must be obvious, citing many cases among them, *Johnson* v. *Accident Co.*, 115 Mich. 86, 40 L. R. A. 440, where it was said: "The term 'voluntary exposure to unnecessary danger' . . . . means a conscious or intentional exposure, involving gross or wanton negligence on the part of the insured." There seems to have been no contention that playing baseball in the usual manner is repugnant to the provisions of the policy. The same doctrine would seem to be applicable to football, polo, swimming, etc., but some policies provide for a lesser indemnity for injuries received while the insured is engaged in such sports. And see *Keefe* v. *National Acc. Soc.*, 4 App. Div. 392, 38 N. Y. Supp. 854.

[3] *Garcelon* v. *Commercial Travelers' E. Acc. Assn.*, 195 Mass. 531, 81 N. E. 201; *Noyes* v. *Commercial Travelers' E. Acc. Assn.*, 190 Mass. 171, 183. Where a party has the burden of proving a fact by the testimony of witnesses the jury cannot often be required by the court to say that the fact is proved, *Anthony* v. *Mercantile Acc. Assn.*, 162 Mass. 354, 357.

"Two classes of accidents are excluded from the risks insured against: viz. (1) accidents which arise from an exposure by the insured to risk of injury, which risk is obvious to him at the time he exposes himself to it; (2) accidents which arise from an exposure by the insured to risk of injury, which risk would be obvious to him at the time, if he were paying reasonable attention to what he was doing." [1]

§ 405. Boarding or Leaving Cars in Motion.—*Entering or trying to enter or leave a moving conveyance using steam as a motive power, except cable and electric street cars.*

This provision is valid and enforceable.[2] That the insured had alighted at an intermediate station and had not expected the train to start so suddenly offers no excuse for failing to observe the policy restriction.[3] If, however, the car is not moving when the insured begins his attempt to enter, but just afterwards moves and causes his fall, the insurer will be liable.[4]

[1] *Cornish* v. *Accident Ins. Co.*, L. R., 23 Q. B. D. 453 (1889). The insured must not wantonly take the risk of a known danger, *North Am. Acc. Ins. Co.* v. *Gulick*, 25 Ohio Cir. Ct. 395. But there is no obvious danger to an experienced house painter in using a rope-sling, thirty feet above the floor, *Matthes* v. *Imperial Acc. Assn.*, 110 Iowa, 222, 81 N. W. 484. The policy provision is held to include those cases where the insured negligently exposes himself to unnecessary danger, *Price* v. *Standard Life & Acc. I. Co.*, 92 Minn. 238, 99 N. W. 887 (attempting to light fire with kerosene; question for jury); as where he attempts to board a train, running eight or ten miles an hour, *Small* v. *Travelers' Protective Assn.*, 118 Ga. 900, 45 S. E. 706, 63 L. R. A. 510. Whether an act constitutes "voluntary exposure to unnecessary danger" is often for jury, *Traders', etc., Acc. Co.* v. *Wagley*, 74 Fed. 457, 20 C. C. A. 588, 45 U. S. App. 39; *Fidelity & Cas. Co.* v. *Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359 (getting on car when moving); *Anthony* v. *Mercantile Mut. Acc. Assn.*, 162 Mass. 354, 38 N. E. 973, 44 Am. St. R. 367, 26 L. R. A. 406. The burden is on the company to allege the facts in defense, *Voluntary R. Depart. of Penn. Lines* v. *Spencer*, 17 Ind. App. 123, 46 N. E. 477. And to prove the facts in defense, *De Greayer* v. *Fidelity Cas. Co.*, 126 Cal. 17, 58 Pac. 390 (shot in altercation with park policeman), *Anthony* v. *Mercantile Mut. Acc. Assn.*, 162 Mass. 354, 38 N. E. 973, 44 Am. St. R. 367, 26 L. R. A. 406 (citing cases); *Meadows* v. *Pac. Mut. Life Ins. Co.*, 129 Mo. 76, 31 S. W. 578, 50 Am. St. R. 427.

[2] *Miller* v. *Travelers' Ins. Co.*, 39 Minn. 548; *Travelers' Ins. Co.* v. *Snowden*, 45 Neb. 249, 63 N. W. 392. See cases in last section.

[3] *Travelers' Ins. Co.* v. *Brookover*, 71 Ark. 123, 71 S. W. 246. Nor, if making an attempt to enter, is it any excuse that the insured slips and falls just before taking hold of the rail, *Huston* v. *Travelers' Ins. Co.*, 66 Ohio St. 246, 64 N. E. 123.

[4] *Terwilliger* v. *National Masonic Acc. Assn.*, 197 Ill. 9, 63 N. E. 1034. And going to a platform of the moving train to vomit is not within the exception, *Preferred Acc. Ins. Co.* v. *Muir*, 126 Fed. 926, 61 C. C. A. 456. In some policies the exception is aimed specifically at "riding on the platform or steps." This is held to mean something more than being there temporarily and necessarily, *Standard Life & Acc. Co.* v. *Thornton*, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116. But see *Hull* v. *Equitable Acc. Assn.*, 41 Minn. 231, 42 N. W. 936; *Sawtelle* v. *Railway Pass. Assur. Co.*, 21 Fed. Cas. 555, 15 Blatch. 216. Sometimes the phraseology of the clause is "in any part of the conveyance not provided

§ 406. *Riding in or on any such conveyance not provided for transportation of passengers.*

Under this clause it was held that the company is not relieved from liability by reason of the fact that the insured when injured is temporarily riding in a locomotive constituting part of a passenger train.[1]

The defendant insured Ward as a "contractor, office and traveling," these words being written in the policy. By its printed terms, the policy did not cover injury or death, "while or in consequence of riding in or on any locomotive." Ward, in his capacity of railroad contractor and in company with the superintendent of the road and a bridge contractor, was riding over the Rutland railroad in the Nehasane. This conveyance was in fact a locomotive, though part of it was a cab or observation car regularly used by the officials of the road. Being stopped to permit an inspection of bridge No. 78, the locomotive was started again, causing Ward to fall accidentally from the cab. He was run over by the locomotive as he lay upon the track and his head severed from his body. The court held that the written words of the policy must be given precedence over the printed clauses, and that since Ward was insured as a railroad contractor he impliedly had the right to travel in the Nehasane in connection with his business, notwithstanding the inconsistent provisions of the printed clauses.[2]

§ 407. **Walking or being on Railway Bridge or Roadbed.**—This exception is not aimed at defects in bridges and roadbeds causing

for occupancy by passengers," *Overbeck* v. *Travelers' Ins. Co.*, 94 Mo. App. 453, 68 S. W. 236. Such general provisions do not apply if inconsistent with the orderly conduct of the occupation of the insured stated in policy, *Cotten* v. *Fidel. & Cas. Co.*, 41 Fed. 506 (baggage checker); *Dailey* v. *Preferred Masonic Mut. Acc. Assn.*, 102 Mich. 299, 60 N. W. 694, 26 L. R. A. 171 (conductor); *Employers' Liability Assur. Corp.* v. *Rochelle*, 13 Tex. Civ. App. 232, 35 S. W. 869 (railroad employee). An alleged practice of insured to jump on cars in motion is not relevant and cannot be shown by the company, *Mulville* v. *Pac. Mut. Life Ins. Co.*, 19 Mont. 95, 47 Pac. 650. Some policies provide a double indemnity, "If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable or electricity as a motive power;" under this clause it is held that the insured is covered by the policy until he has completely alighted in spite of the above exception, *King* v. *Travelers' Ins. Co.*, 101 Ga. 64, 28 S. E. 661, 65 Am. St. R. 288. And see *Travelers' Preferred Acc. Assn.* v. *Stone*, 50 Ill. App. 222. Burden is on the insured to establish facts within the exception, *Anthony* v. *Mercantile Mut. Acc. Assn.*, 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. R. 367; *Smith* v. *Ætna Life Ins. Co.*, 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. R. 153. Issue often for jury, *Myler* v. *Standard L. & Acc. Ins. Co.*, 92 Fed. 861, 35 C. C. A. 55.

[1] *Berliner* v. *Travelers' Ins. Co.*, 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. R. 49. But see *Ætna Life Ins. Co.* v. *Vandecar*, 86 Fed. 282, 30 C. C. A. 48.

[2] *Trow* v. *Preferred Acc. Ins. Co.* (Vt., 1907), 67 Atl. 821.

injury to passengers engaged in lawful transit, but rather at the needless danger of voluntary and unnecessary track walking.[1]

In construing the meaning of the term "roadbed" the court limits it to the dangerous space occupied by track and ties. Hence the prohibition of the policy applies only to the danger zone as so defined and does not extend to the entire right of way of the railway company.[2] Nor does the term "roadbed" include a space of ten feet in width between double tracks.[3]

§ 408. Due Diligence for Personal Safety and Protection.—The provision found in some policies calling for due diligence for personal safety and protection is satisfied if reasonable diligence is exercised.[4]

[1] *Metropolitan Acc. Assn.* v. *Taylor*, 71 Ill. App. 132. Thus the insurer was held liable where the insured alighting from a stationary train on a bridge fell through a concealed hole in it, *Burkhard* v. *Travelers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205. Also, where the insured unintentionally stumbled down a bank against the engine, *Equitable Acc. Ins. Co.* v. *Osborn*, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267. Also where the insured properly went on the roadbed to take a train, *De Loy* v. *Travelers' Ins. Co.*, 171 Pa. St. 1, 32 Atl. 1108. Or properly crossed the track to reach the station, *Duncan* v. *Preferred Mut. Acc. Assn.*, 13 N. Y. Supp. 620, aff'd 129 N. Y. 622. Or was bitten by a dog or struck by lightning when on the track or bridge, *Dougherty* v. *Pac. Mut. L. Ins. Co.*, 154 Pa. St. 385, 25 Atl. 739. Or crossed the track at the regular place provided for that purpose. *Traders' & T. A. Co.* v. *Wagley*, 74 Fed. 457, 20 C. C. A. 588, 45 U. S. App. 39; *Payne* v. *Fraternal Acc. Assn.*, 119 Iowa, 342, 93 N. W. 361; *Dougherty* v. *Pacific Mut. L. I. Co.*, 154 Pa. St. 385, 25 Atl. 739. But see *Keene* v. *New England Mut. Acc. Assn.*, 164 Mass. 170, 41 N. E. 203. That many others may be in the habit of using the same portion of the track for a similar purpose offers no justification to the insured for violation of restriction, *Piper* v. *Mercantile Mut. Acc. Assn.*, 161 Mass. 589, 37 N. E. 759; *Weinschenk* v. *Ætna Life I. Co.*, 183 Mass. 312, 67 N. E. 242.

[2] *Standard Life & A. I. Co.* v. *Langston*, 60 Ark. 381, 30 S. W. 427 (ends of extra long ties held to be not included in the restriction); *De Loy* v. *Travelers' Ins. Co.*, 171 Pa. St. 1, 32 Atl. 1108.

[3] *Meadows* v. *Pac. Mut. L. Ins. Co.*, 129 Mo. 76, 31 S. W. 578, 50 Am. St. R. 427.

[4] *Kentucky L. & Acc. Ins. Co.*, 102 Ky. 512, 43 S. W. 709 (hunter on fence with gun cocked). The burden of proof is on the insurer, *Keene* v. *New England Mut. Acc. Assn.*, 161 Mass. 149, 36 N. E. 891 (crossing railway tracks); *Freeman* v. *Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372. And the issue is usually for the jury, *U. S. Cas. Co.* v. *Hanson*, 20 Colo. App. 393, 79 Pac. 176 (failing to follow advice of physician); *Sutherland* v. *Stand. L. & Acc. Ins. Co.*, 87 Iowa, 505, 54 N. W. 453 (riding on platform of street car); *Badenfeld* v. *Mass. Mut. Acc. Assn.*, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263 (insured found dead on the edge of the track); *Stone* v. *U. S. Cas. Co.*, 34 N. J. L. 371 (a fall from barn in process of construction); *Duncan* v. *Preferred Mut. Acc. Assn.*, 59 N. Y. Super. Ct. 145, 13 N. Y. Supp. 620, aff'd 129 N. Y. 622 (crossing track); *North Am., etc., Ins. Co.* v. *Burroughs*, 69 Pa. St. 43 (accidental strain). But the court will hold certain acts of negligence to be plainly within the exception, *Standard L. & Acc. Co.* v. *Langston*, 60 Ark. 381, 30 S. W. 427 (fell asleep on railroad tie); *Morel* v. *Miss. Val. L. Ins. Co.*, 4 Bush (Ky.), 535 (put arm out of car window); *Tuttle* v. *Travelers' Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316 (ran along track at night in front of moving train). The insured may, however, do whatever naturally appertains to his occupation as stated in policy, *Pac. Mut. L. Ins. Co.* v. *Snowdon*, 58 Fed

§ 409. **Insurance against Injuries received while Traveling.**—Many policies are confined to an insurance against loss while traveling by public or private conveyances for transportation of passengers. Under this class of insurance the assured was allowed to recover for an injury received by a fall on a sidewalk while walking from a steamboat landing to a railway station, this walk being usual for travelers on that route, although he might have ridden in a hack; the court regarding the act of walking as an inseparable part and incident of an uncompleted journey.[1] But, in general, walking cannot be held to be a "traveling by public or private conveyance."[2]

Ira H. Wood was insured against loss by accident while actually riding as a passenger in or on any regular passenger conveyance. He was by occupation a United States railway mail clerk. In pursuance of the duties of his employment he was in the mail car of a moving train, when an accident by derailment caused his death. The court held that the phraseology of the policy would not cover the case.[3]

Where double compensation is allowed by the policy for injuries received "while riding as a passenger in a passenger conveyance" such compensation cannot be recovered if the insured is injured while riding on the open platform of a railway car.[4]

342, 7 C. C. A. 264. A passenger on a vestibuled train is not guilty of negligence in going into the dining car when the train is moving at full speed, if he does not know that a side door of the vestibule is open, *Robinson* v. *U. S. Ben. Soc.*, 132 Mich. 695, 94 N. W. 211. See cases § 404, *supra*.

[1] *Northrup* v. *Railway Passenger Assur. Co.*, 43 N. Y. 516, 3 Am. Rep. 724, and see *Theobald* v. *Railway Passengers' Assur. Co.*, 10 Ex. 45. And injuries were covered sustained in boarding a train at an intermediate station, *Tooley* v. *Railway Pass. Assur. Co.*, 24 Fed. Cas. 53.

[2] *Ripley* v. *Ins. Co.*, 16 Wall. 336, 21 L. Ed. 469 (attacked by robbers walking home after railway journey ended). Insured to recover must be a passenger at the time, *Fidelity & Cas. Co.* v. *Teter*, 136 Ind. 672, 36 N. E. 283 (stock dealer fell from loft of livery stable; company not liable), *Hendrick* v. *Employers' Liability Assur-Corp.*, 62 Fed. 893 (returning to speak to train-man after journey ended is not enough to make the insured still "a passenger"). Pay car is not "a public conveyance for transportation of passengers," *Travelers' Ins. Co.* v. *Austin*, 116 Ga. 264, 42 S. E. 522, 59 L. R. A. 107, 94 Am. St. R. 125. But insured, a prospector, is a passenger on steamboat, though steamboat company shares the profits of the expedition, *Ætna Life Ins. Co.* v. *Frierson*, 114 Fed. 56, 51 C. C. A. 424. The shot that killed the insured was fired from a passing street car, but the insured was on the front steps of her house. The defendant was not liable, *Wheeler* v. *Fidelity & Cas. Co.*, 129 Ga. 237, 58 S. E. 709.

[3] *Wood* v. *General Acc. Ins. Co.*, 160 Fed. 926. See note 38 C. C. A. 3.

[4] *Ætna Life I. Co.* v. *Vandecar*, 86 Fed. 282, 30 C. C. A. 48, 57 U. S. App. 446; *Van Bokkelen* v. *Travelers' Ins. Co.*, 34 App. Div. 399, 54 N. Y. 307, aff'd 167 N. Y. 590. But see *Berliner* v. *Travelers' Ins. Co.*, 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. R. 49 (a recovery was not precluded from the fact that the insured rode on the engine). An engineer may ride on his engine, *Brown* v. *Railway Pass. Assur. Co.*, 45 Mo. 221. And a cattle dealer on freight cars, *Richards* v. *Travelers' Ins. Co.*, 18 S. D. 287, 100 N. W. 428, 67 L. R. A. 175.

CHAPTER XIX

The Marine Policy[1]

§ 410. Introductory.—The marine policy in common use in this country [2] is largely a transcript from the policy formerly adopted by English Lloyds.[3]

The conventional marine policy is in marked contrast with many other classes of policies, in that it is occupied mainly in describing what the underwriters are content to bear or undertake, not what they refuse to undertake.[4] It is to this circumstance, namely, the general tenor of the contract itself as framed by marine under-

[1] In the first edition of this book prepared for an impending course of recitations in a law school, this chapter and the next contained many excerpts from the excellent treatises on Marine Insurance by MacArthur and Lowndes, the phraseology of which is in part still retained.

[2] See Appendix, ch. II.

[3] English policy is given in full in Arnould, Ins. § 10; Chalmers & Owen, Ins. (1907), 138. Adopted as a standard form for England in 35 Geo. 3, c. 63, 30 Vict., c. 23 and Mar. Ins. Act (1906), § 30. Its use is not compulsory, Mar. Ins. Act (1906), § 30, which provides, "a policy may be in the form in the First Schedule to this Act." If a special clause is inconsistent with the provisions of the general form, the special clause will control, *Hydarnes S. S. Co.* v. *Indemnity Mut. M. Ins. Co.* (1895), 1 Q. B. 500. For description of English Lloyds and Lloyds policy, see § 10, notes, *supra*. In England and in Continental countries the marine insurance contract must be in writing; see 54 & 55 Vict., c. 39, § 93; and in England the term of a time policy must not exceed 12 months, *Royal Exch. Assur. Corp.* v. *Sjoforsakrings, etc.* (1902), 2 K. B. 384. Statutory provisions as to type refer to what clauses, *Cline* v. *Western Assur. Co.*, 101 Va. 496, 44 S. W. 700. As to whether under the English stamp act, a binding slip if stamped, will become a valid policy, see *Home Mar. Ins. Co.* v. *Smith* (1898), 2 Q. B. 351, 67 L. J. Q. B. (N. S.) 777, 78 Law T. Rep. 734. Compare *Ionides* v. *Pacific, etc., Co.*, L. R. 7 Q. B. 517 (it may be evidence); *Cory* v. *Patton*, L. R. 9 Q. B. 577; *Lishman* v. *Northern Mar. Ins. Co.*, L. R. 10 C. P. 179. In construing the meaning of a marine policy great weight is given to usage, §§ 10, 89, *supra*, 1 Arn. Ins. §§ 55, 56 *et seq.*; 1 Duer, Ins., p. 158 *et seq.*; *Mey* v. *South Caro. Ins. Co.*, 3 Brev. (S. C.)* 329, 331; *Kingston* v. *Knibbs*, 1 Camp. 508 n. But evidence of usage is not admissible if the usage is repugnant to the terms of the policy as written, *Hearne* v. *Mar. Ins. Co.*, 20 Wall. 488, 249, 22 L. Ed. 395 (citing cases); *The Schooner Reeside*, 2 Sumn. 567 (Story, J.); *Trueman* v. *Loder*, 11 A. & E. 589. See also *Moore* v. *United States*, 196 U. S. 157, 166 ("usage may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract"); *Lillard* v. *Kentucky, etc., Co.*, 134 Fed. 168 (citing many cases). Written and special clauses prevail over general printed form, *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423, 428, 429, 22 S. Ct. 862. As to rules of construction generally, see §§ 84–93, *supra*.

[4] Except where the underwriters add special restrictive clauses in their own favor. The modern memorandum clause constitutes one of such restrictions, see § 456, *infra*.

writers, that we must look to find a reasonable explanation of the friendly attitude of the courts towards that class of underwriters in matters pertaining to the interpretation of the meaning and effect of the marine policy, as compared with the attitude of the courts in construing other classes of policies.[1]

It is also interesting to note, that in spite of obscure phraseology in certain portions of the instrument,[2] the British Parliament, when codifying marine insurance law in the year 1906, gave the seal of its approval to the form of policy adopted long ago and known as the English Lloyd's policy, almost every word of which has been judicially construed.[3]

In maritime matters, Great Britain, as ocean carrier of the world's goods, has always occupied a foremost place among the Powers. The marine policy has naturally been regarded by her courts as a commercial instrument of the highest importance, and ever since the accession of Lord Mansfield to the bench we find that the great judges of England, including that illustrious jurist, have devoted their ability and learning without stint to a consistent and harmonious development of marine insurance law, difficult of attainment in our own country, where there are some fifty independent jurisdictions, one for each State in the Union, and federal courts besides. In this connection, however, it is worthy of mention that the English judges, as well as the American, often cite with approval a text-book on this subject written many years ago by a New England gentleman,[4] which ranks in merit with the standard work of old England by Mr. Arnould.

§ 411. **Name of the Assured.**—All persons except alien enemies, that is, subjects of a foreign state at war with the home country, have the right to protect their property with the home insurer.[5]

[1] See, for example, § 107, notes, *supra*, §§ 440, 446, *infra*. In view of the unsympathetic attitude, of both legislatures and courts, towards fire and life insurance companies, it is a question whether it would not have been more expedient for those companies originally to have framed their contracts of insurance in very simple form, making suitable provision for requiring proofs of loss or death, but as to other matters trusting very much for their own protection to their preliminary examination of the proffered risk, and to the stringent common-law rules existing in their favor, and borrowed from marine insurance law, to wit, that the contract is one of highest good faith, and that therefore, on peril of forfeiture, there must be no misrepresentation or concealment of material facts in negotiating the contract, and no willful enhancement of the risk by the insured during the period of insurance, §§ 10, 94, 107, *supra*.

[2] See, for example, § 456, *infra*.

[3] Mar. Ins. Act (1906).

[4] Phillips on Ins.

[5] *Sands* v. *N. Y. Life Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535; *Ex parte*

The name of the insured should be inserted after the words "on account of."[1] The words "on account of whom it may concern," or similar phrases, are frequently added to the marine policy;[2] but without them a marine policy is assignable at common law, even before loss, to the assignee of the thing insured.[3]

§ 412. Lost or not Lost.—The effect of this stipulation[4] is that the insurer takes upon himself not only the risk of future loss, but also loss, if any, that may have already happened.[5] The necessity for such a retrospective application in policies is evident; for, owing

Lee, 13 Ves. Jr. 64. It is contrary to public policy to allow a subject insurance company to give help and pecuniary indemnity to foreign enemies, *Brandon* v. *Curling*, 4 East, 410; *Furtado* v. *Rodgers*, 3 B. & P. 198. But see *Driefontein, etc., Gold Mines* v. *Janson* (1901), 2 K. B. 419. Unless the alien enemy is licensed to trade in the home country, *Usparicha* v. *Noble*, 13 East, 332.

[1] By the phrase often used in connection with the name of the insured in the marine policy "on account of whom it may concern," only those classes are included who were intended by the insured to be covered when the insurance was procured, *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423, 22 S. Ct. 862, 46 L. Ed. 1229. But to make the phrase operative the insured need not have in mind a specific individual of the intended class, *Munich Assur. Co.* v. *Dodwell*, 128 Fed. 410 (citing many cases); *Palmer* v. *Great Western*, 10 Misc. 167, 30 N. Y. Supp. 1044, aff'd 153 N. Y. 660. A person intended to be included is covered by such a general description though his name was not disclosed to the underwriter when the policy issued, *Buck* v. *Chesapeake Ins. Co.*, 1 Pet. 151, 7 L. Ed. 90. Only those parties for whose benefit the policy was in fact effected, are covered by general descriptions, *Boston Fruit Co.* v. *British & For. Mar. Ins. Co.* (1905), 1 K. B. 637. Insurance effected in good faith by one person on behalf of another may be ratified by the latter even after loss, *Hooper* v. *Robinson*, 98 U. S. 528, 25 L. Ed. 219; *Williams* v. *North China Ins. Co.*, L. R. 1 C. P. D. 757, 3 Asp. M. C. 342, 35 L. T. 884; Eng. Mar. Ins. Act (1906), § 86. *Query*, must there not be mutuality to the contract? Can principal ratify where underwriter, without such ratification, could have held no one for the premium? See §§ 236, 238, *supra*, and notes. "For whom it may concern," *Munich Assur. Co.* v. *Dodwell*, 128 Fed. 410; *Mannheim Ins. Co.* v. *Hollender*, 112 Fed. 549; *Scottish Union & Nat. Ins. Co.* v. *Hollender*, 102 Fed. 919.

[2] English Lloyd's policy begins: "Be it known that . . . . as well in . . . . own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause . . . . and them, and every of them, to be insured." An undisclosed principal may sue in his own name, though the contract be made by an agent in the agent's name, *Maspons* v. *Mildred*, 9 Q. B. D. 530.

[3] See § 63, *supra*. But if the character of the interest of the assignee, for instance of a ship, is such as to materially change the character of the risk, the consent of the underwriter to an assignment before loss should be procured, *Mackenzie* v. *Whitworth*, L. R. 1 Exch. 36.

[4] Or any words showing similar intention and such intent may be indicated by antedating the policy, *Mercantile Mut. Ins. Co.* v. *Folsom*, 18 Wall. 237, 21 L. Ed. 827; without evidence of such intent the policy would not attach if subject-matter were already destroyed, *Mead* v. *Phœnix Ins. Co.*, 158 Mass. 124, 32 N. E. 945; *Commercial Ins. Co.* v. *Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379.

[5] *Hooper* v. *Robinson*, 98 U. S. 528, 25 L. Ed. 219; *General Ins. Co.* v. *Ruggles*, 12 Wheat. 408, 6 L. Ed. 674; *Sutherland* v. *Pratt*, 11 M. & W. 311, 312; *Paddock* v. *Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

to the time occupied in the transmission of advices from abroad or other unavoidable causes, property is often exposed to marine risks before the parties interested are cognizant of the fact or have had an opportunity to protect themselves by insurance.[1]

The phrase "lost or not lost" is applicable also to reinsurances which, indeed, are frequently effected in case of overdue vessels.

October 3d the Phœnix Insurance Company insured a cargo by the *Alata*, lost or not lost, from Philadelphia to Rochfort. November 14th the *Alata* arrived safely at Rochfort. She discharged there her cargo undamaged, and sailed thence December 18th. December 23d the insurer effected a policy of reinsurance on the same cargo and risk to the extent of £1500 at a premium of 75 guineas per cent at English Lloyd's, neither insurer nor reinsurer having any knowledge of the safe arrival of the ship the month before. The action was brought by the reinsurer against the original insurer to recover the premium, and was defended on the ground that, the voyage being completed before the reinsurance was taken out, there was no risk to which the policy of reinsurance could attach. The Lloyd's reinsurer recovered judgment for his premium.[2]

§ 413. **Master's Name—Ship's Name.**—Provision is made in the policy for the insertion of the master's name, partly as a means of distinguishing the ship insured from others of the same name, and partly because the personal character and professional reputation of the captain are not infrequently taken into account by the underwriters in their estimation of the risk. But in practice the blank left for that purpose is often unfilled.

In immediate sequence to this blank are the words, "or whoever else shall go for master in the said vessel," etc. In case the person originally mentioned to the underwriter as the master of the vessel is prevented from going in her, and another is substituted for him, the insurance is not vitiated, even though the original name may

[1] *Henshaw* v. *Ins. Co.*, 73 N. Y. Supp. 1, 36 Misc. 405. If the assured is aware of the loss at the time when the insurance is effected he cannot recover from the underwriter who undertook the risk in ignorance of the fact, *McLanahan* v. *Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98; *Gauntlett* v. *Sea Ins. Co.*, 127 Mich. 504, 86 N. W. 1047. Nor is it permissible for an underwriter to retain the premium if at the time of such insurance he is privately informed of the ship's arrival, *Carter* v. *Boehm*, 3 Burr, 1905, 1909, 1 W. Bl. 593. But if, at the time when the insurance is effected, the vessel has arrived in safety, the underwriters will be entitled to the premium on a policy "lost or not lost," provided they and the assured were alike ignorant of the fact, *People* v. *Dimick*, 107 N. Y. 13, 14 N. E. 178; *Bradford* v. *Symondson*, 4 Asp. Mar. L. C. 455, 45 L. T. 364, 7 Q. B. D. 456.

[2] *Bradford* v. *Symondson*, L. R. 7 Q. B. D. 456.

have been inserted in the policy, and may never have been altered, provided the assured has acted throughout in good faith.[1] Again, if the master resign his command, or become incapacitated during the voyage through sickness, and another is appointed in his place, the validity of the insurance is not compromised by the change.[2]

A mistake in the ship's name, however innocently made, will vitiate the policy if it materially misled the underwriter as to the identity of the risk, but otherwise not.[3]

Sometimes, especially in insuring consignments from abroad, the ship is not named, the goods being insured per ship or ships.[4] The usual course in such cases is to "declare" the interest by an indorsement on the policy as soon as the ship by which they are to come is known.[5]

§ 414. The Subject of Insurance.—*Upon the body, tackle, apparel, and other furniture of the good ship, or upon all kinds of lawful goods and merchandise laden or to be laden on board the good ship, or upon the freight of all kinds of lawful goods and merchandises laden or to be laden, etc.*

This phraseology covers the general description of ship, cargo, and freight in the three principal classes of American policies, respectively.[6]

As before shown,[7] prospective profits may also be insured. Insurance of profits on merchandise is sometimes accomplished by adding a percentage to the amount representing the value of the goods; but if the intention is to insure profits this must in some form be expressly shown in the policy.[8]

[1] *Walden* v. *Firemen's Ins. Co.*, 12 John. 128.

[2] 1 Arn. § 194.

[3] *Ionides* v. *Pacific F. & M. Ins. Co.*, L. R. 6 Q. B. 674, aff'd L. R. 7 Q. B. 517, 41 L. J. Q. B. 190, 26 L. T. 738, 1 Asp. M. C. 330, 21 W. R. 22 (policy avoided). Policy not avoided in *Hall* v. *Molineaux*, 6 East, 385; *Le Mesurier* v. *Vaughan*, 6 East, 382; *Clapham* v. *Cologan*, 3 Camp. 382.

[4] Known as a floating policy, see § 420. With such a policy a mistake in declaring the name of the ship apparently would not be fatal, *Robinson* v. *Touray*, 3 Camp. 158.

[5] *Snowden* v. *Guion*, 101 N. Y. 458, 5 N. E. 322.

[6] This general description in the printed form is controlled by the written description of the particular interest which it is intended to insure, § 87; *Manilla Prize Cases*, 188 U. S. 254, 268, 23 S. Ct. 415; *Gale* v. *Laurie*, 5 Barn. & C. 156, 11 E. C. L. 187; *Hill* v. *Patten*, 8 East, 375; *Brough* v. *Whitmore*, 4 Term. R. 206 (provisions for crew are covered). So also certain cloths and mats though not in use, *Hogarth* v. *Walker* (1900), 2 Q. B. 283. If ship is a steamer, machinery, and coal as well as outfit in stores and provisions are covered, *Roddick* v. *Indemnity, etc., Ins. Co.* (1895), 1 Q. B. 842; *Forbes* v. *Aspinall*, 13 East, 323.

[7] See § 48, *supra*. And see *Canada Sugar Ref. Co.* v. *Ins. Co.*, 175 U. S. 609, 20 S. Ct. 239.

[8] See § 48. And see *Wyllie* v. *Povah* (1907), 12 Com. Cas. 317.

§ 415. Same Subject—Ship.—The terms of the description in the policy of insurance upon a ship are evidently not to be confined to the body or hull of the vessel, but extend to her boats, tackle, materials, outfit, and appurtenances.[1]

§ 416. Same Subject—Cargo.—"Goods," or "merchandise," denotes whatever is transported on board ship for purposes of traffic, but does not cover articles carried for other reasons.[2] The term may also include shifting or successive cargoes on board in the course of the same continued venture.[3]

But in the absence of usage to the contrary,[4] goods stowed on deck, especially for ocean transit,[5] and live stock and supplies for

[1] But if the custom is to insure separately the movable outfit for a particular business, for instance, whaling, it will not be covered by policy on ship, *Hoskins* v. *Pickersgill*, 3 Dougl. 222, 26 E. C. L. 85; *Macy* v. *China Mut. Ins. Co.*, 135 Mass. 328. "Ship of War" covers what, *Manilla Prize Cases*, 188 U. S. 254, 269, 23 S. Ct. 415; *Infanta Maria Teresa*, 188 U. S. 283, 289, 23 S. Ct. 412. Naphtha launch usually carried on davits, lost on trip to shore is part of the furniture or appurtenances of the ship, *Dennis* v. *Home Ins. Co.*, 136 Fed. 481. Compare *Hall* v. *Ocean Ins. Co.*, 21 Pick. 472 (boat on stern davits). Policy may be written as a floating or shifting risk on vessels to be substituted, *New Haven S. Co.* v. *Prov. Wash. Ins. Co.*, 159 N. Y. 547, 54 N. E. 1093. Building materials not yet incorporated are not covered by usual policy on ship, *Mason* v. *Ins. Co.*, 12 Gill & J. (Md.) 468; *Hood* v. *Ins. Co.*, 11 N. Y. 532. But the owner may insure cost of repairs by term "disbursements," *Cunard* v. *Nova Scotia Mar. Ins. Co.*, 29 Nova Sco. 409. The Eng. Mar. Ins. Act, 1906, c. 41, defines "ship" as follows, "The term ship includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a regular trade, the permanent fittings requisite for the trade; and also, in the case of a steamship, the machinery, boilers and coals." Meaning of the word "advances," *Burnham* v. *Boston Mar. Ins. Co.*, 139 Mass. 399, 1 N. E. 837. The phrase "the good ship" appearing in Lloyd's policy is not a warranty, *Smalt* v. *Gibson*, L. R. 16 Q. B. 151.

[2] *Ross* v. *Thwaites*, 1 Park, 23, 24. Such term does not cover provisions and stores for use on board, *Brown* v. *Stapyleton*, 4 Bing. 122. Nor personal effects of passengers, *Wilkinson* v. *Hyde*, 3 C. B. (N. S.) 30; *Duff* v. *MacKenzie*, 3 C. B. (N. S.) 16, 91 E. C. L. 16. Nor clothes of officers and crew, *Ross* v. *Thwaites*, 1 Park, 23. Nor bills of exchange and notes, *Thomas* v. *Royal, etc., Assur. Co.*, 1 Price, 195; *Palmer* v. *Pratt*, 2 Bing. 185, 9 E. C. L. 375. But cash, precious metals and jewels when shipped as merchandise may be so protected by the usual description of the policy, *American Ins. Co.* v. *Griswold*, 14 Wend. (N. Y.) 399; *Seton* v. *Ins. Co.*, 2 Wash. C. C. 178. The term "goods" or "merchandise" covers the wagon, tent, and other outfit of an emigrant, *Wilkinson* v. *Hyde*, 27 L. J. C. P. 116; the produce and results of a fishing expedition, *Hill* v. *Patten*, 8 East, 373, and the interest or liability of a carrier, *Crowley* v. *Cahen*, 3 B. & Ad. 478. Respondentia and bottomry must be specifically described, *Glover* v. *Black*, 3 Burr. 1394.

[3] *Hill* v. *Patten*, 8 East, 373, 377. Cargo need not be laden at the initial port named, *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 383, 6 L. Ed. 664; *McCargo* v. *Merchants' Ins. Co.*, 10 Rob. (La.) 334.

[4] *Allen* v. *St. Louis Ins. Co.*, 85 N. Y. 473 (live stock); *Orient Mut. Ins. Co.* v. *Reymershoffer's Sons*, 56 Tex. 234 (deck load).

[5] *Taunton Copper Co.* v. *Merchants' Ins. Co.*, 22 Pick. (Mass.) 108; *Ross* v. *Thwaites*, 1 Park, 23; *Backhouse* v. *Ripley*, 1 Park, 24; *Blackett* v. *Royal Exch. Assn. Co.*, 2 C. & J. 250. Unless the

feeding them, and bullion, should be insured specifically and not under the general denomination of goods.[1]

§ 417. **Same Subject—Freight.**—The term "freight" as used in the marine policy, may mean any one of three things: (1) the price to the shipowner for carriage of goods payable on arrival at destination;[2] (2) the price payable to the shipowner by a charterer for hire of ship under charter party or like contract; (3) the profit or increased value of his own goods which the shipowner expects to earn by carrying them on his own ship to port of destination.[3]

Freight must be insured *eo nomine*, and is not included as an incident in the usual description of ship or cargo.[4] Freight does not include passage money of passengers, which it is usual to insure under a distinct name, and which unlike freight is by usage payable in advance.[5]

§ 418. **Commencement of Risk—Ship—Freight.**—The words "at and from" precede the blank for the description of the voyage.

There is a material difference between insurance "from," and one "at and from," any place. The first form of description does not

intent is to cover a deckload as the usual cargo, *Chesapeake Ins. Co.* v. *Allegre's Heirs*, 2 Gill & J. (Md.) 164.

[1] *Allegre's Admrs.* v. *Ins. Co.*, 8 Gill & J. (Md.) 190, 29 Am. Dec. 536; *Wolcott* v. *Eagle Ins. Co.*, 4 Pick. (Mass.) 429. See *Gabay* v. *Lloyd*, 3 B. & Cr. 793.

[2] Freight on goods usually is not payable unless earned by delivery, *Asfar* v. *Blundell* (1896), 1 Q. B. 123.

[3] *Forbes* v. *Aspinwall*, 13 East, 323; *Winter* v. *Haldiman*, 2 B. & Ad. 649; *De Vaux* v. *J'Anson*, 5 Bing. N. C. 519, 35 E. C. L. 207. "Freight" here has a broader meaning than as used in the law of shipping and denotes "the benefit derived by the shipowner from the employment of his ship," *Flint* v. *Flemying*, 1 B. & Ad. 48. Freight on cargo contracted for but not loaded when vessel starts is covered by policy on freight, *Stilwell* v. *Ins. Co.*, 2 Mo. App. 22.

[4] *Riley* v. *Delafield*, 7 Johns. (N. Y.) 522; *Clark* v. *Ocean Ins. Co.*, 16 Pick. 289; *Etches* v. *Aldan*, 1 Mann. & R. 157. Freight may be insured for part of the voyage or time only, *Michael* v. *Gillespy*, 2 C. B. (N. S.) 627, 26 L. J. C. P. 306. The charterer may insure his advances on account of freight, *Robbins* v. *N. Y. Ins. Co.*, 1 Hall (N. Y.), 325; *Allison* v. *Bristol Mar. Ins. Co.*, 1 App. Cas. 229. "Person advancing the freight has an insurable interest in so far as such freight is not repayable in case of loss," Eng. Mar. Ins. Act (1906), § 12. Where the interest consists of a shipowner's profit from carrying his own goods, though this may be insured separately as freight, yet generally speaking the method most advantageous to the owner is to insure it in the same policy with the goods, and to value both together, describing them as goods including freight. As to freight of successive voyages see *Lincoln* v. *Boston Mar. Ins. Co.*, 159 Mass. 337, 34 N. E. 456.

[5] *Ogden* v. *N. Y. Mut. Ins. Co.*, 21 N. Y. Sup. Ct. 248, aff'd 35 N. Y. 418; *Denoon* v. *Home & C. Assur. Co.*, L. R. 7 C. P. 341, 41 L. J. C. P. 162, 20 W. R. 970, 126 L. T. 628, 1 Asp. N. C. 309. There is usually no obligation to return passage money when the voyage is interrupted or not completed, *Gillan* v. *Simpkin*, 4 Camp. 241; *Gibson* v. *Bradford*, 4 El. & Bl. 586, 24 L. J. Q. B. 159. Inchoate profits of a voyage may be insured as such, *McSwiney* v. *Royal Exch. Ass. Co.*, 14 Q. B. 634; *Eyre* v. *Glover*, 3 Camp. 276, 16 East, 218;

attach to the subject-matter until the ship starts on the voyage insured, but the second covers also the risk in port.[1]

Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.[2] If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety.[3] But there is an implied condition that the adventure shall be commenced within a reasonable time.[4] Where an insurance is effected "at and from" an island, or other district comprising several places of trade, then the risk commences on the ship as soon as the vessel has arrived in good safety at any port within such district,[5] and on cargo upon its loading.[6]

Patapsco Ins. Co. v. *Coulter*, 3 Pet. (U. S.) 222, 7 L. Ed. 659. And § 48.

[1] *Motteux* v. *London Assur.*, 1 Atk. 545. But risk does not attach until assured acquires his insurable interest, *Seamans* v. *Loring*, 21 Fed. Cas. 920. As to what is breaking ground to sail see *Pettigrew* v. *Pringle*, 3 Barn. & Adol. 514, 23 E. C. L. 136; *Bowen* v. *Hope Ins. Co.*, 20 Pick. (Mass.) 275. See § 419. As to "port risk," see *Nelson* v. *Sun Mutual Ins. Co.*, 71 N. Y. 453; *Slocovich* v. *Orient Mut. Ins. Co.*, 108 N. Y. 56, 14 N. E. 802. As to what are the limits of a "port," see *De Longuemere* v. *N. Y. Fire Ins. Co.*, 10 Johns. (N. Y.) 120; *Same* v. *Firemen's Ins. Co.*, *id.* 126; *Murray* v. *Columbian Ins. Co.*, 4 Johns. 443; *St. Paul F. & M. Ins. Co.* v. *Troop*, 26 Can. Sup. Ct. 5; *Sailing Ship Garston Co.* v. *Hickie*, 15 Q. B. D. 580; *Hunter* v. *Northern Mar. Ins. Co.*, 13 App. Cas. 726; *Constable* v. *Noble*, 2 Taunt. 403; *Payne* v. *Hutchinson*, 2 Taunt. 405*n*. "New York harbor" includes what, *Fulton* v. *Ins. Co.*, 136 Fed. 182; *Hastrof* v. *Greenwich Ins. Co.*, 132 Fed. 122; *Petrie* v. *Phœnix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380.

[2] *St. Paul F. & M. Ins. Co.* v. *Troop*, 26 Can. Sup. Ct. 5 (cases cited); *Palmer* v. *Marshall* (1831), 8 Bing. 79. But it is held in New York that risk does not attach until preparations for voyage are begun, *Snyder* v. *Atlantic Mut. Ins. Co.*, 95 N. Y. 196, 47 Am. Rep. 29 (cases cited).

[3] *Parmeter* v. *Cousins*, 2 Camp. 235. If the vessel, though damaged, be in a condition consistent with her security in port, the risk will commence from the first moment of her arrival within the port specified, *Haughton* v. *Empire Marine Ins. Co.*, L. R. 1 Ex. 206, 43 Hurl. & C. 44, 12 Jur. N. S. 376. Arrival in safety in this connection means physical not political safety, *Bell* v. *Bell*, 2 Camp. 475. As to "safely moored" clause see *Ryan* v. *Prov. Wash. Ins. Co.*, 79 App. Div. 320, 79 N. Y. Supp. 460.

[4] Summer turned to winter risk, *Maritime Ins. Co.* v. *Stearns* (1901), 2 K. B. 912 (policy avoided); *De Wolf* v. *Ins. Co.* (1874), L. R. 9 Q. B. 451. Delay of six months, *Grant* v. *King* (1802), 4 Esp. 175. Delay of four months, *Palmer* v. *Fenning* (1833), 9 Bing. 460. Abandonment of voyage for war, *Parkin* v. *Tunno* (1809), 11 East, 22.

[5] *Warre* v. *Miller*, 4 Barn. & C. 538, 10 E. C. L. 405.

[6] *Patrick* v. *Ludlow*, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130. As matter of construction intermediate ports held covered in, *Crocker* v. *Sturge* (1897), 1 Q. B. 330, 75 L. T. R. 549, 66 L. J. Q. B. (N. S.) 142. Reasonable time must be allowed in port for preparing for voyage, *Thebaud* v. *Great Western Ins. Co.*, 155 N. Y. 516, 523, 50 N. E. 284; *Palmer* v. *Marshall*, 8 Bing. 317. Eng. Mar. Ins. Act (1906), 1st Schedule provides: "where chartered freight is insured 'at and from' a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded the risk attaches as soon as she arrives there in good safety [see *Foley* v. *Ins. Co.* (1870), L. R. 5 C. P. 155]. Where freight other than chartered freight is insured 'at and

If the ship sail from any place of departure, or to any place of destination, other than that specified by the policy, the risk does not attach, since such an act constitutes a change of voyage.[1]

§ 419. Commencement of the Risk—Cargo.—*Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof, etc.*

Goods are not insured under the general form of policy until they are loaded aboard the ship.[2] If, therefore, the merchant desires to cover the risk in boats or lighters from the shore to the ship, he should insert the clause, "to include all risk of craft whilst loading."[3]

If property in the goods does not pass to the insured until a certain point in the process of shipment, the policy will not attach until that point is reached; as, for example, where, by the terms of a contract for the purchase of a cargo of rice, no interest in the rice passed to the buyers until the shipment of the cargo was completed, it was held that the latter had no insurable interest in the cargo while in course of shipment.[4]

If the purpose is to cover goods shipped at some place other than the port of departure, that intention ought clearly to appear by the terms used.[5]

from' a particular place, the risk attaches pro rata as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo." See *Jones* v. *Neptune Ins. Co.* (1872), L. R. 7 Q. B. 706. Policy on freight will not attach before the vessel arrives at the port named, though goods are then ready for shipment, *The Copernicus* (1896), P. 237, 74 L. T. R. 757.

[1] See § 186, *supra*.

[2] *Hicks* v. *Merchants' Auto & Mfrs. Ins. Co.*, 1 Ohio Dec. 374. Goods lying on wharf ready to be loaded are not covered, *Cottam* v. *Merchants' & T. Ins. Co.*, 40 La. An. 259, 4 So. 510. Loading may be at unnamed port sanctioned by usage, *Wells Fargo & Co.* v. *Pac. Ins. Co.*, 44 Cal. 397; *Moxon* v. *Atkyns*, 3 Camp. 200. But held that risk attached where both parties knew that loading could not be made, *Hydarnes S. Co.* v. *Indemnity, etc., Ins. Co.* (1895), 1 Q. B. 500, 64 L. J. Q. B. (N. S.) 353.

[3] *Hurry* v. *Royal Exch. Ass. Co.*, 2 B. & P. 430. But see as to usage, *Coggeshall* v. *Am. Ins. Co.*, 3 Wend. (N. Y.) 283. The insurance on craft is separate from the insurance on ship. Stranding of the lighter is not a stranding of the ship within the meaning of the memorandum clause, *Hoffman* v. *Marshall*, 2 Bing. N. C. 383. And stranding of the ship is not stranding of the lighter, *Thames & M. M. Ins. Co.* v. *Pitts* (1893), 1 Q. B. 476. The implied warranty of seaworthiness of ship does not include the lighter, *Lane* v. *Nixon*, L. R. 1 C. P. 412. The craft risk may not extend beyond the usual purposes of loading or unloading. Thus the risk of waiting in lighters for transshipment into another vessel was held not covered, *Houlder* v. *The Merchants' Mar. Ins. Co.*, 17 Q. B. D. 354.

[4] *Anderson* v. *Morice*, 3 Asp. M. C. 290, 46 L. J. Q. B. 11, 35 L. T. 566, 1 App. Cas. 713, 25 W. R. 14. And see *Seamans* v. *Loring*, 21 Fed. Cas. 920; *Marine Ins. Co.* v. *Walsh-Upstill Coal Co.*, 68 Ohio St. 469, 68 N. E. 21.

[5] *Murray* v. *Columbian Ins. Co.*, 11 John. 302; *Robertson* v. *French*, 4 East,

§ 420. Same Subject—Indorsements—Declarations.—Under a running or floating policy [1] the risk usually attaches to each shipment from time of reporting it to the underwriters,[2] or, by the terms of some policies, from the time of actual indorsement.[3] Whether after knowledge of a loss the underwriter may refuse to make indorsement depends upon the circumstances, and the wording of the policy.[4]

Declarations made on the policy are always subject to rectification in case it shall subsequently appear that the advices have come forward, and that the declarations in fact have therefore been made in an order different from that of the actual shipment of the goods. The shipments declare themselves, so to speak, and take rank under the policy in the order in which they occur; so that the declaration written on the policy is merely provisional, and must be set right in case of need.[5]

§ 421. The Voyage.—The voyage should be described in the policy

130; *Spitta* v. *Woodman*, 2 Taunt. 416; *Rickman* v. *Carstairs*, 5 B. & Ad. 651. Commencement of risk on goods may turn on time of starting of ship, *Sea Ins. Co.* v. *Blogg* (1898), 2 Q. B. 398, 67 L. J. Q. B. (N. S.) 757 (citing *Cockrane* v. *Fisher*, 1 C. M. & R. 809); *City of Cambridge*, L. R. 5 P. C. 451, see (1898), 1 Q. B. 27, 67 L. J. Q. B. (N. S.) 22. See § 418. As to the necessity of loading the insured cargo at the place designated as the port of departure and not at some place reached prior thereto, compare *Richards* v. *Mar. Ins. Co.*, 3 John. (N. Y.) 307, and *Carr* v. *Montefiore*, 33 L. J. Q. B. 256.

[1] "(1) A floating policy is a policy which describes the insurance in general terms, and leaves either the name of the ship or ships or other particulars to be defined by subsequent declaration. (2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner," Eng. Mar. Ins. Act (1906), § 29; *E. Carver Co.* v. *Mfrs. Ins. Co.*, 6 Gray (Mass.), 214.

[2] *Corpo. of London Assur.* v. *Paterson*, 106 Ga. 538, 32 S. E. 650; *Block* v. *Columbian Ins. Co.*, 42 N. Y. 393. Prompt reports are required, *Camors* v. *Union Mar. Ins. Co.*, 104 La. 349, 28 So. 926, 81 Am. St. R. 128. Notice to local agent may be sufficient by usage, *Ins. Co. of N. A.* v. *Bell*, 25 Tex. Civ. App. 129, 60 S. W. 262.

[3] *Delaware Ins. Co.* v. *White Dental Mfg. Co.*, 109 Fed. 334, 48 C. C. A. 382, 65 L. R. A. 387 (actual approval and indorsement held essential); *Wass* v. *Maine Mut. Mar. Ins. Co.*, 61 Me. 537. But indorsement omitted through inadvertence may be rectified in equity, *Phœnix Ins. Co.* v. *Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548.

[4] *Held*, refusal was not justified and underwriter was liable, *Wells Fargo & Co.* v. *Pacific Ins. Co.*, 44 Cal. 397; *E. Carver Co.* v. *Mfgrs. Ins. Co.*, 6 Gray (Mass.), 214. *Held*, repudiation of insurance on refusal to indorse was justified, *Delaware Ins. Co.* v. *White Dental Co.*, 109 Fed. 334, 48 C. C. A. 382, 65 L. R. A. 387; *Hartshorn* v. *Shoe & L., etc., Ins. Co.*, 15 Gray (Mass.), 240; *Platho* v. *Merchants' & Mfrs. Ins. Co.*, 38 Mo. 248; *Neville* v. *Merchants' & Mfrs. Ins. Co.*, 19 Ohio St. 452. *Held*, no physical indorsement necessary where no space was left for it, *Callaway* v. *Orient Ins. Co.*, 63 Fed. 830 and company may waive written indorsement, *Emery* v. *Boston Mar. Ins. Co.*, 138 Mass. 398. What constitute a sufficient indorsement, *Edwards* v. *Miss. Valley Ins. Co.*, 1 Mo. App. 192; *Petrie* v. *Phœnix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380; *Heilner* v. *China Mut. Ins. Co.*, 60 N. Y. Super. Ct. 362, 18 N. Y. Supp. 177.

[5] *Stephens* v. *Australasian Ins. Co.*, L. R. 8 C. P. 18, 27 L. T. 585, 1 Asp. M. C. 458.

in such a manner that a mercantile man conversant with the usages of trade can clearly understand what adventure is contemplated.

There are three ways of describing a voyage: Either every port which the ship is to visit may be named, or general words may be used which cover a certain range, and leave room for variations within it;[1] or, lastly, if there is a clearly known custom as to the track, and that custom is intended to be followed, it may suffice to name the termini only, and rely on the custom.[2]

As regards the prosecution of the voyage which is described in the policy, whether it be a voyage or a time policy, the fatal results to the insured of a change of voyage or of a deviation by the ship from the proper track without legal excuse have already been pointed out in connection with the discussion of general principles in marine insurance law.[3]

It will be remembered, also, that the conduct of the ship is a matter of concern not only to the insurers of the ship, but likewise to the insurers of freight or cargo, or other interest, insured for the same voyage. The insurers, to whichever class they belong, have assumed only the risks of a certain voyage as specified or contemplated by the parties to the insurance contract. Any unjustifiable

[1] *Uhde* v. *Walters*, 3 Camp. 16.

[2] *Commonwealth Ins. Co.* v. *Cropper*, 21 Md. 311; *Robertson* v. *Clarke*, 1 Bing. 445. "The termini of the voyage afford the surest criterion by which to determine its identity," *Murray* v. *Columbian Ins. Co.*, 4 Johns. (N. Y.) 443, 449. See *Dickey* v. *Baltimore Ins. Co.*, 7 Cranch, 327, 3 L. Ed. 360. Sometimes a deviation clause is inserted, providing that the property is covered in the event of a deviation, or change of voyage at a premium to be agreed upon, *Hyderabad Co.* v. *Willoughby*, L. R. 2 Q. B. D. 530. Or that liability shall be suspended during deviation, *St. Paul F. & M. Ins. Co.* v. *Knickerbocker S. Towage Co.*, 93 Fed. 931, 36 C. C. A. 19. By English law a determination to change a voyage as soon as manifested or entered upon discharges the underwriters, even before actual departure from the track, Mar. Ins. Act (1906), § 45; *Tasker* v. *Cunningham* (1819), 1 Bligh, H. L. 87, 102 (to like effect). But compare *Simpson S. Co.* v. *Premier, etc., Assn.* (1905), 10 Com. Cas. 198, 201 (Bigham, J., says, "an intention to commit a breach of course does not itself constitute a breach"); *Bearns* v. *Columbian Ins. Co.*, 48 Barb. (N. Y.) 445 (an intent to deviate is not deviation). The "voyage" may cover also a subsidiary or incidental overland transit, *Phetteplace* v. *Brit. & For. Mar. Ins. Co.*, 23 R. I. 26, 49 Atl. 33. And see *Kratzenstein* v. *Western Assur. Co.*, 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799. See also § 22. The voyage may be confined to inland waters. "Voyage" may refer to the enterprise rather than the route, *Friend* v. *Gloucester Mut. Fishing Ins. Co.*, 113 Mass. 326. Gulf of Mexico held to be part of Atlantic Ocean, *Merchants' Mut. Ins. Co.* v. *Allen*, 121 U. S. 67, 7 S. Ct. 821, 30 L. Ed. 858. So of Charleston Bay, *St. Paul F. & M. Ins. Co.* v. *Knickerbocker, etc., Co.*, 93 Fed. 931, 36 C. C. A. 19. Bayou held "a tributary" of the Mississippi, *Miller* v. *Citizens', etc., Ins. Co.*, 12 W. Va. 116, 29 Am. Rep. 452. As to what are the limits of a port or harbor or other waters see *Fulton* v. *President, etc., of Ins. Co.*, 127 Fed. 413; *Cogswell* v. *Chubb*, 1 App. Div. 93, 36 N. Y. Supp. 1076, aff'd 157 N. Y. 709, 53 N. E. 1124; *Kirk* v. *Home Ins. Co.*, 92 App. Div. 26, 86 N. Y. Supp. 980. See § 418.

[3] §§ 186–188.

departure from this will discharge the underwriters as from the time of departure.

The defendants insured the plaintiff's coat on a voyage by the bark *Coryphene* from Seattle to Alaskan ports. The final port of discharge was Teller, on Port Clarence Bay. On arriving off Tin City, an intermediate port of discharge, the vessel was unable to land freight on account of a strong shoreward wind and fog, and so she continued onward to and anchored in the bay of Port Clarence. After being at anchor there for three days she went out to sea again for the purpose of delivering freight at Tin City, intending to return to Teller, but before she reached Tin City she was wrecked and the plaintiff's cargo aboard was lost. The court held that the voyage covered by the insurance terminated when the vessel reached her port of final destination and that the insurers were not liable for the cargo lost after she had voluntarily left the bay of Port Clarence.[1]

§ 422. **Duration and Termination of Risk.**—*Until the ship hath moored anchor twenty-four hours in good safety; until the goods and merchandises shall be safely landed.*[2]

Under a voyage policy the subject insured is protected during the voyage between the termini designated, regardless of needful or accidental interruptions and delays whether on sea or in ports.[3]

It is important to understand clearly what is meant by mooring in good safety or mooring in good safety for a specified time, after which the ship is no longer covered by the policy. In the first place, these words presuppose the arrival of the vessel at the terminal

[1] *Alaska B. & Safe Deposit Co.* v. *Maritime Ins. Co.*, 156 Fed. 710.

[2] Or as in Lloyd's policy "be there discharged and safely landed."

[3] Compare §§ 418, 421. Thus to load or discharge cargo, *Annen* v. *Woodman*, 3 Taunt. 299. Or to make necessary repairs to ship, *Phillips* v. *Irving*, 7 M. & G. 325, 13 L. J. C. P. 145, 8 Scott N. R. 3; *Motteux* v. *London Assur. Co.*, 1 Atkyns, 545, 548; *Smith* v. *Surridge*, 4 Esp. 25. Frozen in by ice, *Brown* v. *St. Nicholas Ins. Co.*, 61 N. Y. 332; *Delahunt* v. *Ins. Co.*, 97 N. Y. 537. If landing and transshipment of cargo fall within regular course of the voyage the policy covers goods on land, *Underwriters Agency* v. *Sutherlin*, 55 Ga. 266; *Parsons* v. *Mass., etc., Ins. Co.*, 6 Mass. 197 (in small boat); *Pelly* v. *R. E. Ins. Co.*, 1 Burr. 348. If not within the regular course of the voyage a marine policy does not cover on land, *Brown* v. *Carstairs*, 3 Camp. 161; *Australian Agri. Co.* v. *Saunders*, L. R. 10 C. P. 668; *Harrison* v. *Ellis*, 7 E. & B. 465, 3 Jur. N. S. 908, 26 L. J. Q. B. 239, 5 W. R. 494; *Martin* v. *Mar. Ins. Co.*, 2 Mass. 420, and see § 421, notes. Goods may be covered in a warehouse or substituted vessel if landing or transshipment becomes imperatively necessary, *Malinckrodt* v. *Jefferson Mut. Ins. Co.*, 1 Mo. App. 205; *Salisbury* v. *Ins. Co.*, 23 Mo. 553. 66 Am. Dec. 687; *Field* v. *Citizens' Ins. Co.*, 11 Mo. 50; *Plantamour* v. *Staples*, 1 T. R. 611*n*; *De Cuadra* v. *Swann*, 16 C. B. (N. S.) 772. Or if landing and transshipment are expressly permitted by the policy, *Tierney* v. *Etherington*, 1 Burr. 348; *Ætna Ins. Co.* v. *Stivers*, 47 Ill. 86, 95 Am. Dec. 467.

point of the voyage, which is, in the case of a cargo-laden ship, the usual place of discharge;[1] and, secondly, they provide that she shall have been securely anchored at that spot for the period described.[2]

The term "good safety" does not mean absolute immunity from danger, for that would be a condition impossible of attainment at any stage of a marine adventure, but such a measure of security as will suffice to enable the vessel to discharge her cargo and accomplish the other ordinary purposes of a stay in port. Two kinds of security are included in the term "good safety"; namely, physical and political safety.[3] Good physical safety means not the safety of the moorings, but of the ship; not absolute freedom from damage, for then the loss of a rope or sail or spar would prevent the vessel from being considered in safety; but, on the other hand, she must not be in a sinking condition, as was the case with a vessel which arrived at her port of destination a complete wreck, and after being kept afloat for a few days, lashed to a hulk, sank in the harbor.[4] Good political safety means immunity from capture or arrest; thus a British vessel, which the day after her arrival at a French port was laid under an embargo then existing against all British ships, was held to have never moored at anchor twenty-four hours in good safety.[5]

A cargo-laden ship must be moored at her usual place of discharge in good safety during the whole twenty-four hours or other period specified in the policy,[6] and accordingly in the case of a vessel which arrived at her moorings in the Thames, but the same day received an order to go into quarantine, and was, many days after, destroyed by fire before obtaining her release, it was held that the policy on the ship was still running at the time of loss because the vessel had not been moored at anchor twenty-four hours in good safety.[7]

Where the insurance is on a vessel to a place generally without

[1] *Samuel* v. *Royal Exchange Assur. Co.*, 8 B. & C. 119, 6 L. J. O. S. K. B. 315 (ship lost while being warped towards the dock); *Sage* v. *Middletown Ins. Co.*, 1 Conn. 239; *King* v. *Middletown Ins. Co.*, 1 Conn. 184; *Upton* v. *Salem Commercial Ins. Co.*, 8 Metc. 605; *Bramhall* v. *Sun Ins. Co.*, 104 Mass. 510, 6 Am. Rep. 261. As to limits of "port" see § 418.

[2] *Meigs* v. *Mut. Mar. Ins. Co.*, 2 Cush. (Mass.) 439; *Dickey* v. *United Ins. Co.*, 11 Johns. (N. Y.) 358. Period in port, if named as days, is reckoned as consecutive periods of twenty-four hours each, beginning from the time of the safe mooring of the ship, *Cornfoot* v. *Royal Exch. Ass. Corp.* (1904), 1 K. B. 40, 73 L. J. K. B. 22, 89 L. T. 490.

[3] *Horneyer* v. *Lushington*, 15 East, 46, 3 Camp. 85.

[4] *Shawe* v. *Felton*, 2 East, 109.

[5] *Minett* v. *Anderson*, 1 Peake's N. P. 277. And see *Horneyer* v. *Lushington*, 15 East, 46.

[6] *Simpson* v. *Pacific Mut. Ins. Co.*, 22 Fed. Cas. 174; *Meigs* v. *Sun Mut. Ins. Co.*, 16 Fed. Cas. 1323.

[7] *Waples* v. *Eames*, 2 Str. 1243.

any provision as to her safety there, the risk on the vessel terminates when she is safely anchored at her port of destination, in the usual place and manner.

By special endorsement on the policy, in consideration of an additional premium, the ship *Ravensworth Castle* was at liberty to go to Antwerp. She never reached the inner dock at Antwerp, which was the usual place for discharging cargo, although she arrived at the outer dock of that port. The court held that the voyage was not at an end.[1]

Although it is necessary that a vessel should have arrived at her place of discharge to terminate the insurance,[2] it is not necessary that the discharge should have actually commenced; for if the vessel has arrived at her moorings and remained there the specified period, awaiting her turn to unload, the risk on the ship is ended.[3] Policies on outward bound vessels are sometimes so framed as to continue in force for thirty days after arrival at port of destination.

The ship *Afton* was insured for a voyage to any port of discharge in the United Kingdom "and whilst in port during thirty days after arrival." She arrived at Greenock on the Clyde, discharged her cargo, and was placed in a dock for repairs. Within thirty days after arrival at this port of discharge she proceeded in tow on a new voyage for Glasgow. She had reached the channel of the Clyde, her stern being about 500 feet distant from the Greenock harbor works, when she was capsized by a sudden gust of wind. It was held that she was not "in port" and that the underwriters were not liable.[4]

With regard to time policies, the precise dates of commencement and termination of the risk are named in the policy.[5] The day, unless otherwise expressed, begins and ends at midnight.[6]

[1] *Stone* v. *The Marine Ins. Co., etc.*, 1 Exch. D. 81. If it is doubtful whether the ship in a given situs has arrived at the specified harbor, place, or anchorage, the question is one of fact for the jury, *Lindsay* v. *Janson*, 4 H. & N. 699.

[2] *Lapham* v. *Atlas Ins. Co.*, 24 Pick. (Mass.) 1.

[3] *Bill* v. *Mason*, 6 Mass. 313; *Lidgett* v. *Secretan*, L. R. 5 C. P. 190.

[4] *Hunter* v. *Northern Mar. Ins. Co.*, L. R. 13 App. Cas. 717 (port is a place of safety or shelter).

[5] *Pitt* v. *Phœnix Ins. Co.*, 10 Daly (N. Y.), 281. See *Leeds* v. *Mechanics' Ins. Co.*, 8 N. Y. 351. Time policies, however, often provide that if the vessel is at sea or on passage the risk shall continue until she arrives at port of destination. A vessel was held to be at sea or on passage, when started on a river twenty-five miles inland, *Union Ins. Co.* v. *Tysen*, 3 Hill (N. Y.), 118

[6] Usually noon is expressed which means solar and not standard time, *Jones* v. *German Ins. Co.*, 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860. Reckoned according to longitude of place of contract, *Walker* v. *Protection Ins. Co.*, 29 Me. 317. Compare § 230, *supra*.

The risk on cargo continues until the goods have been deposited upon the wharf or their customary place of discharge.[1] It then ceases, for the underwriter is not liable for loss arising from theft, fire, or any other perils to which the goods may be subjected while lying on the wharf or in dock,[2] unless an express clause to that effect has been inserted in the policy. In order that the policy may continue to protect the goods while in course of landing, they must be taken from the ship to the shore in the mode which is usual in the trade at the port where the discharge takes place. If it is customary in the trade to convey goods from the ship to the shore in lighters, launches, or other small craft, they are protected by the policy during such transport.[3] Otherwise the insured should secure the benefit of the special craft clause, as in the case of loading.[4]

By endorsement on an open canal cargo policy Petrie's shipment of cement was insured against perils of the seas, canals, rivers, etc., "to New York harbor." The cargo in fact was shipped to Tarrytown from the Brooklyn stores. Evidence of custom, however, was received on the trial in the action against the insurer to the effect that the term "harbor of New York," as used in the business of

("sailing" and "departure" distinguished); driven into port by compulsion of capture or weather, *Hutton* v. *Am. Ins. Co.*, 7 Hill (N. Y.), 321. Vessel held to be at sea or on passage when detained in foreign port by compulsion, *Wood* v. *New England Mar. Ins. Co.*, 14 Mass. 31, 7 Am. Dec. 182. Held otherwise where vessel was in port to obtain necessary clearance, water and crew, *Washington Ins. Co.* v. *White*, 103 Mass. 238. So also where vessel was in a roadstead, not a port, to take cargo, *Cole* v. *Union Mut. Ins. Co.*, 12 Gray (Mass.), 501, 74 Am. Dec. 609. See *Wales* v. *China Mut. Ins. Co.*, 8 Allen (Mass.), 380; *American Ins. Co.* v. *Hutton*, 24 Wend. (N. Y.) 330.

[1] *Gracie* v. *Marine Ins. Co.*, 8 Cranch, 75, 3 L. Ed. 492; *Mobile, etc., Ins. Co.* v. *McMillan*, 31 Ala. 711, 27 Ala. 77. They need not reach consignee, *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314, 7 M. & Gr. 850. The risk continued where goods were detained outside port by ice, *Samuel* v. *Royal Exch. Ass. Co.* (1828), 8 B. & Cr. 119.

[2] *Mansur* v. *New England Mut. Mar. Ins. Co.*, 12 Gray (Mass.), 520; *Beddall* v. *Brit. & For. Mar. Ins. Co.*, 143 N. Y. 94, 37 N. E. 613. Compare *Fletcher* v. *St. Louis Mar. Ins. Co.*, 18 Mo. 193; *Gardiner* v. *Smith*, 1 Johns. Cas. (N. Y.) 141.

[3] *Wadsworth* v *Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *Stewart* v. *Bell*, 5 B. & Ald. 238; *Matthie* v. *Potts*, 3 Bos. & P. 23 (cases cited in note); *Osacar* v. *Louisiana Ins. Co.*, 5 Mart. (N. S.) 574 (386). If, however, the assured depart from the usual course of trade by taking charge of the goods at an earlier period than they would have been delivered to him under ordinary circumstances, the underwriters will be discharged from responsibility, *Houlder* v. *Merchants' Mar. Ins. Co.*, 17 Q. B. D. 354 (goods put in lighters, risk ended); *Sparrow* v. *Caruthers*, 2 Str. 1236 (owner put goods in lighter). But see *Paul* v. *Ins. Co.*, 15 T. L. R. 535. The policy covers goods only while they are at the risk of the assured; and consequently, if cargo be sold afloat, without an assignment of the policy, and the buyers take delivery of the cargo in lighters sent alongside, the risk of lighterage from ship to shore will not be covered, as the underwriters' risk would, under such circumstances, cease on delivery, *North of England, etc., Co.* v. *Archangel M. Ins. Co.*, L. R. 10 Q. B. 249, 32 L. T. 561, 2 Asp. M. C. 571.

[4] See § 419, *supra*.

marine insurance, included Tarrytown and other points within the New York custom house district. It also appeared that the boat, which was seaworthy, arrived at Tarrytown, was moored alongside the dock, but when the tide went out it grounded and was so broken or strained that it sank and the cargo was destroyed. The jury found for the plaintiff and the judgment was affirmed, the court holding that a loss had occurred within the harbor of New York by a peril insured against, and that the insurer was liable.[1]

Cargo should be landed within a reasonable time after the ship's arrival where no time is specified; otherwise it will cease to be covered by the policy. What is a reasonable time in any particular case depends upon the usages of the trade.[2]

When goods are insured by vessel bound to several ports in succession, the risk ends at the final port of discharge named in the policy. But the insurance may be prolonged by the addition of the words "the risk to continue until arrival of the goods at a market at their final port of discharge." [3]

The underwriters' risk upon the bill of lading freight may be considered coincident with the risk on goods, since it does not commence until the cargo is shipped, and then only applies to such portion of it as may be actually on board, unless cargo has been contracted for under a valid agreement, and is lying in readiness to be placed on board, the ship also being ready to receive it.[4] The termination of the risk on cargo and freight, respectively, is in general simultaneous. For concurrently with the landing of the goods in safety the shipowner earns the freight upon them, and the risk of the underwriter on freight is proportionately reduced;[5] so that, in the event of the ship being lost after a part of her cargo has been discharged, the loss on the freight policy will be limited to the freight on the cargo remaining on board.[6] In the case of chartered freight, however—that is, money payable for hire of a ship under a charter party [7]—the risk commences as soon as there is an inception of performance under the charter party (*i. e.*, when the owner or hirer has incurred expenses and taken steps toward earning freight) irrespective

[1] *Petrie* v. *Phœnix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380.

[2] *Parkinson* v. *Collier*, 2 Park, Ins. 653; *Noble* v. *Kennoway*, 2 Dougl. 510.

[3] *Richardson* v. *London Assur. Co.*, 4 Camp. 94; *Deblois* v. *Ocean Ins. Co.*, 16 Pick. (Mass.) 303; *Maxwell* v. *Robinson*, 1 Johns. (N. Y.) 333.

[4] See § 418.

[5] *The Scottish Mar. Ins. Co.* v. *Turner*, 17 Jur. 631; *Benson* v. *Chapman*, 2 H. L. Cas. 696.

[6] *Fay* v. *Alliance Ins. Co.*, 16 Gray (Mass.), 455.

[7] *U. S. Shipping Co.* v. *The Empress Ass. Corp.* (1906), 12 Com. Cas. 142; *Jackson* v. *The Union Mar. Ins. Co.*, L. R. 10 C. P. 125.

of the question whether any cargo has been placed on board or is in readiness to be so placed, and continues until the vessel has performed her contract. But the words "from the loading thereof" in a freight policy exclude the goods not actually loaded, and also the freight for them.[1]

§ 423. **Touch and Stay.**—*And it shall be lawful for said vessel in her voyage to proceed and sail to, touch and stay at, any ports or places if thereunto obliged by stress of weather, etc., without prejudice to this insurance.*

The words "if obliged by stress of weather, etc.," [2] practically nullify the important privilege which would otherwise be extended to the insured by this clause. If such a privilege is given to touch and stay at any ports or at certain ports named, it is understood in the case of a voyage policy that the ports visited must lie within the ordinary track of the voyage, and that they must be visited for some purpose connected with the object of the adventure.[3]

Whether liberty to call at a port gives liberty to land or load cargo there, must depend on whether such an intention may naturally be inferred from the description of the voyage in the policy taken in conjunction with the customs of the particular trade;[4] and wherever a ship has liberty to call at a place, she may always land or load goods there, provided this can be done without additional delay.[5]

§ 424. **Prohibited Waters.**—In the case of insurance on coasting or inland trade it is customary either to specifically limit the course or else to expressly exclude certain waters, regions, or ports. Such limitations are warranties and, therefore, must be strictly observed.[6]

[1] *Jones* v. *Neptune Marine Ins. Co.*, L. R. 7 Q. B. 702, 41 L. J. Q. B. 370, 1 Asp. M. C. 416, 27 L. T. 308.

[2] These words are sometimes omitted and specific ports named.

[3] *Lavabre* v. *Wilson*, 1 Dougl. 284; *Hogg* v. *Horner*, 2 Park, 626; *Bragg* v. *Anderson*, 4 Taunt. 229; *Williams* v. *Shee*, 3 Camp. 469; *Hammond* v. *Ried*, 4 B. & Ald. 72; *Solly* v. *Whitmore*, 5 B. & Ald. 45; *Laing* v. *Union Mar. Ins. Co.*, 1 Com. Cas. 11; *Bottomley* v. *Bovill*, 5 B. & Cr. 210. Where steamers or sailing vessels of a particular line or in a particular trade habitually follow a specific route or call at certain ports, the usage so to do will be tacitly incorporated in a policy in the ordinary form without the addition of any special clause.

[4] *Metcalfe* v. *Parry*, 4 Camp. 123; *Urquhart* v. *Barnard*, 1 Taunt. 450, 10 Rev. Rep. 574.

[5] *Kingston* v. *Girard*, 4 Dall. 274; *Hughes* v. *Union Ins. Co.*, 3 Wheat. (U. S.) 159; *Kane* v. *Columbian Ins. Co.*, 2 Johns. (N. Y.) 264; *Raine* v. *Bell*, 9 East, 195; *Cormack* v. *Gladstone*, 11 East, 347.

[6] *Lovett* v. *China Mut. Ins. Co.*, 174 Mass. 108, 54 N. E. 338 (prohibited from Cape Breton waters, etc.); *Parker* v. *China Mut. Ins. Co.*, 164 Mass. 237, 41 N. E. 267 (Gulf of Campeachy); *Odiorne* v. *New Eng. Mut. Mar. Ins. Co.*, 101 Mass. 551, 3 Am. Rep. 401

The limitation or exception often takes the form of an express warranty.[1]

The house boat *Mon Mon* was insured by a policy which "warranted confined to the inland waters of New Jersey, New York and Long Island." She sank under tow from Gravesend to Sheepshead Bay and when opposite the Oriental Hotel and within about a quarter of a mile of Coney Island. The court held that the natural boundary of inland waters was to be found in the line connecting the extremity of Sandy Hook with the nearest point on Rockaway Beach and that the insurers were liable.[2]

(cannot by offer of usage contradict a plain description contained in the policy); *Cobb* v. *Lime Rock F. & M. Ins. Co.*, 58 Me. 326; *Fulton* v. *President, etc., of Ins. Co.*, 127 Fed. 413 ("confined to inland waters of New Jersey, New York, and Long Island"); *Kirk* v. *Home Ins. Co.*, 92 App. Div. 26, 86 N. Y. Supp. 980 ("confined to waters of New Haven Harbor," etc.). The same rule applies to ocean traffic, *Birrell* v. *Dryer*, 9 App. Cas. 345; *Colledge* v. *Harty*, 6 Exch. 205. See § 186. That a breach in no wise contributes to the loss is immaterial, *Cogswell* v. *Chubb*, 1 App. Div. 93, 72 N. Y. St. R. 20, 36 N. Y. Supp. 1076, aff'd 157 N. Y. 709, 53 N. E. 1124. But mere intention or attempt, for instance, going towards prohibited places, constitutes no breach, *Thames, etc., Ins. Co.*, 86 Fed. 150, 56 U. S. App. 676, 29 C. C. A. 624; *Snow* v. *Columbian Ins. Co.*, 48 N. Y. 624, 8 Am. Rep. 578; *Bearns* v. *Columbian Ins. Co.*, 48 Barb. 445. Whether customary or statutory boundary lines control, see *Fulton* v. *Ins. Co.*, 136 Fed. 182.

[1] See § 455, *infra*. Cullen, Ch. J., says, though not in a case of marine insurance, "It has been suggested that, under the decision we are about to make, insurance companies, to avoid the law of waiver, will change the terms of their policies and, instead of inserting conditions the breach of which render a policy void, provide that in case of such a breach the policy shall not cover the loss. There is no such danger. A provision of the kind suggested would be just as much a forfeiture as if expressed in the form now in use, that the policy shall be void," *Draper* v. *Oswego Co. Fire Relief Assn.*, 190 N. Y. 18, 82 N. E. 755.

[2] *Fulton* v. *Ins. Co. of N. A.*, 136 Fed. 182, 69 C. C. A. 198. But Rondout Creek, two and one-half miles from the North River, cannot be construed to be part of the "North River," *Hastorf* v. *Greenwich Ins. Co.*, 132 Fed. 122; Tarrytown shown to be within "New York harbor," *Petrie* v. *Phœnix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380.

CHAPTER XX

Marine Policy—Concluded

§ 425. Perils of the Sea.[1]—In considering the scope of the marine insurance policy, it must be observed that the term "perils of the seas" refers only to fortuitous casualties of the seas, and does not include the ordinary action of the winds and waves, known as "wear and tear," nor incidental delay;[2] but any ordinary occurrence may become extraordinary if qualified by unusual conditions.

Thus, a transport in government service was ordered into Boulogne, where there is a dry harbor, and was moored near one of the quays. The vessel took the ground on the ebb of the tide, as was inevitable; but, owing to the presence of a considerable swell in the harbor, she struck the ground with unusual violence, and subsequently eighteen of her knees were found to be broken. The court held that this damage was the result of a peril of the sea.[3]

[1] "Touching the adventures and perils which the said insurance company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all Kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said . . . . or any part thereof."

[2] *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 596 (wreck). Lord Bramwell suggests the following definition of "perils of the seas": "Every accidental circumstance, not the result of ordinary wear and tear, delay, or the act of the assured, happening in the course of the navigation and incidental to the navigation, and causing loss to the subject-matter of the insurance," *Thames F. M. Ins. Co.* v. *Hamilton* (1887), 12 App. Cas. 492. It must be a peril of the sea and not merely a peril on the sea, *Cullen* v. *Butler*, 5 M. & Sel. 461 (another ship fired upon and sunk the ship insured. *Held*, however, covered under the later phrase "all other perils"), *Laveroni* v. *Drury*, 8 Exch. 166, 22 L. J. (Exch.) 2 (damage to cargo of cheese by rats not covered). But striking a vessel on sunken rock on a calm day and foundering is a sea peril, *The Xantho*, 12 App. Cas. 503; *Ajum Goolam* v. *Union Mar. Ins. Co.*, 17 T. L. R. 376. So also striking an iceberg, *Hamilton* v. *Pandorf*, 12 App. Cas. 527. A marine policy may be worded to cover nothing but fire loss, *Dwinnell* v. *Minneapolis F. & M. Mut. Ins. Co.*, 90 Minn. 383, 97 N. W. 110. May even follow provisions of standard fire policy, *Jackson* v. *British Am. Assur. Co.*, 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636. Ship moored as hospital is a fire rather than a marine risk, *City of Detroit* v. *Grummond*, 121 Fed. 963, 58 C. C. A. 301. But *held* that insurance on a seagoing vessel against fire only is a marine contract coming within admiralty jurisdiction, *North German Fire Ins. Co.* v. *Adams*, 142 Fed. 439, 73 C. C. A. 555.

[3] *Fletcher* v. *Inglis*, 2 B. & Ald. 315.

In another case, the ship proceeded in the course of her trading to Sunderland, where she was moored head and stern, and took the ground in the usual way at the ebb of the tide. The beach was hard and steep, and the ship lay with a slight list toward it. She appeared to strain in this position, especially when taking the ground and floating, and after remaining some time in the place it was found that she was hogged. The court held that the damage received under the above circumstances was not caused by perils of the seas, but fell within the designation of wear and tear. Here the vessel in consequence of the rising and falling of the tide, rested upon the river's bed and received damage. There was nothing fortuitous, no peril, no accident.[1]

So also the English court has declared that difficulties arising merely from the ordinary obstruction or closing in by ice of a port, which is subject to be closed, and is always closed, in the winter months, do not amount to a peril of the seas within the ordinary meaning of a policy of marine insurance, but that when the obstruction by ice is accidental and unexpected, due, for example, to the

[1] *Magnus* v. *Buttemer*, 11 C. B. 876. Compare *Seaman* v. *Ins. Co.*, 21 Fed. 778. *Held*, that loss was by peril of the sea in following cases: Where live cattle carried between decks were thrown violently together and killed by the tremendous rolling of the sea, though not touched by water, *Snowden* v. *Guion*, 101 N. Y. 458, 5 N. E. 322. And see *Coit* v. *Smith*, 3 Johns. Cas. (N. Y.) 16. So also though the cattle, in the course of their disturbance, kicked one another to death, *Gabay* v. *Lloyd*, 3 Barn. & C. 793, 10 E. C. L. 229 (compare *Compania de, etc.*, v. *Brauer*, 168 U. S. 104). Where a cargo was thrown into the river by the careening of the vessel though due to carelessness of those unloading, *Crescent Ins. Co.* v. *Vicksburgh, etc., Packet Co.*, 69 Miss. 208, 13 So. 254, 30 Am. St. R. 537. Where drums of glycerine were displaced and injured on board, by the rolling, *The Frey*, 106 Fed. 319. Contact with sea water in the hold, *Neidlinger* v. *Ins. Co.*, 11 Fed. 514. Heavy cross seas though not uncommon, *Bullard* v. *Ins. Co.*, 1 Curt. (U. S.) 148 (*contra*, *Gulnare*, 42 Fed. 861). Taking ground in bad position, or striking hard substance on the harbor bottom as tide ebbs, *Hagar* v. *Ins. Co.*, 59 Me. 460 (cases cited); *McNally* v. *Ins. Co.*, 63 N. Y. Supp. 125, 31 Misc. 61; *Petrie* v. *Phœnix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380. Action of wind while the injured boat was being hauled to a railway, *Ellery* v. *New Eng. Ins. Co.*, 8 Pick. (Mass.) 14. Parting of a raft of logs caused by currents in a river, *Moores* v. *Louisville Underwriters*, 14 Fed. 226. Water entering a dead light left open, *The Silvia*, 68 Fed. 236; *Starbuck* v. *Phœnix Ins. Co.*, 19 App. Div. 139, 45 N. Y. Supp. 995, 47 App. Div. 621, 62 N. Y. Supp. 264, aff'd 166 N. Y. 593, 59 N. E. 1130. Injuries while making landings, *Seaman* v. *Enterprise F. & M. Ins. Co.*, 21 Fed. 778. Accident to a small boat from ordinary swell of a steamer, *Washington Mut. Ins. Co.* v. *Reed*, 20 Ohio, 199. Damage by sea water through hole in the vessel eaten by rats, *Garrigues* v. *Coxe*, 1 Binn. (Pa.) 592; *Hamilton* v. *Pandorf*, 12 App. Cas. 518. An escape of steam injured eight mules under a river policy, *Union Ins. Co.* v. *Groom*, 4 Bush. (Ky.) 289. Burden is on the insured to show that the damage was from perils of sea, *Coles* v. *Mar. Ins. Co.*, 6 Fed. Cas. 65; *Fleming* v. *Marine Ins. Co.*, 3 Watts & S. 144, 38 Am. Dec. 747. But as to burden of proof in case of unseaworthiness see § 183, *supra*. The term "perils of the seas" as occurring in a policy and in a bill of lading compared, *Wilson* v. *Xantho*, 12 App. Cas 503.

prevalence of unexpected winds or currents, then an extraordinary difficulty and danger is created and such obstruction and danger constitute a peril of the seas.[1]

In another English case twenty-six packages of dead pigs had been shipped at Hamburgh on board the *Leopard*. Thirty-two quarters of beef had been shipped at a later date for the same voyage on board the *Ostrich*. Both shipments were consigned to the plaintiff, the insured. All the meat so shipped became putrid and was necessarily thrown overboard, not because of any direct action of storms or seas affecting it, but solely on account of the unusual delay in the voyage which, however, was occasioned by tempestuous weather. The English court held that this was not a loss by perils of the seas, or within the words "all other perils, losses, and misfortunes," etc., in the policy.[2]

During a voyage of one of the ocean liners from New York to Liverpool the ship's carpenter and the deck hands erect a temporary structure on deck to protect passengers while dancing. The job is done so carelessly that the shelter with its heavy supports falls to the deck in calm weather. The collapse breaks certain cabin windows, damages the temporary structure and also injures one of the ladies who was engaged in dancing at the time. The injured passenger recovers compensation for her hurt and her fright from the steamship company. The steamship company, however, fails to recover from its underwriters for the damage sustained by the temporary erection and the ship; since the loss is not within the scope of the perils clause of the marine policy as construed by the courts.[3] Nor can the steamship company look to that policy to recover reimbursement for the amount of the judgment paid by it to the injured passenger; since the usual marine policy does not cover employers' liability, which forms the subject of another class of insurance.[4]

[1] *Popham* v. *St. Petersburg Ins. Co.*, 10 Com. Cas. 31 (ships rammed and driven aground by ice in Kara Sea; underwriters liable).

[2] *Taylor* v. *Dunbar*, L. R. 4 C. P. 206, approved in *Thames & Mersey Mar. Ins. Co.* v. *Hamilton*, 12 App. Cas. 484. Damage to cargo by ordinary dampness of the hold is not covered by the policy though aggravated by the length of the voyage due to stress of weather, *Baker* v. *Mfrs. Ins. Co.*, 12 Gray (Mass.), 603. Damage to cargo by worms or climate, and extraordinary expenditure of provisions, whether by the seamen or by sentinels placed on board by a superior force, and loss of possible earnings of the vessel, prevented by embargo, are none of them within the usual policy, *Martin* v. *Salem Mar. Ins. Co.*, 2 Mass. 420.

[3] *Thames & Mersey Mar. Ins. Co.* v. *Hamilton*, L. R. 12 App. Cas. 493, 56 L. J. Q. B. 626 (so of damage to the ship's chronometer, if the master, through a fit of giddiness, should drop it into the hold).

[4] See § 475, *infra*.

"Maritime perils" is a much broader phrase than "perils of the seas."[1]

§ 426. Foundering at Sea.—Foundering at sea is included among the perils of the sea if caused by the violence of the winds or waves or any other accidental occurrence, but not so if caused by overloading, original defect, or inherent weakness in the ship.[2]

§ 427. Grounding.—Grounding, whether arising from stress of weather, ignorance of the locality, blunder or stupidity, the desire to avoid some approaching vessel or other danger, in short, for any reason out of the ordinary course of things in the voyage, is considered one of the perils of the sea.[3]

§ 428. Collision.—Collision is also a peril,[4] and this whether the collision be the result of inevitable accident, or fault on the part of the ship insured, or of fault on the part of the other ship; for, on the principle of *causa proxima*, the underwriters must pay, be the fault whose it may.[5] The courts differ, however, as to whether the under-

[1] "'Maritime perils' means the perils consequent on, or incidental to the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy," Eng. Mar. Ins. Act (1906), § 3. "The policy enumerates many maritime perils, such as capture, seizure, fire, etc., which are incidental to marine adventure, but which are not perils of the seas," Chalmers & Owen Ins. (1907), 145.

[2] *Merchants' Trad. Co.* v. *Universal Mar. Ins. Co.*, L. R. 9 Q. B. 596; *Hamilton* v. *Pandorf*, 12 App. Cas. 524; *Gartside* v. *Orphans' Ben. Ins. Co.*, 62 Mo. 322. If a ship has not been heard of for so long a time after sailing that there remains no reasonable hope of her safety, she is presumed to have foundered at sea. There is neither in this country nor in England any fixed rule as to when that presumption arises, *Houstman* v. *Thornton*, Holt N. P. 242 (nine months); *Green* v. *Browne*, 2 Strange, 1199 (four years); *Brown* v. *Neilson*, 1 Caines, 525. In England, after an interval of time supposed to be sufficient to cover the reasonable chances of arrival, the ship is posted at Lloyd's as missing, and then the underwriters are expected to pay. As to proving loss see *Twemslow* v. *Oswin*, 2 Camp. 85; *Koster* v. *Reed*, 6 B. & Cr. 19.

[3] Running on a shoal, *Dent* v. *Smith*, L. R. 4 Q. B. 414. Malposition on bottom of tidal harbor, *McNally* v. *Ins. Co.*, 63 N. Y. Supp. 125, 31 Misc. 61. And §§ 425, 426, 428.

[4] *Peters* v. *Warren Ins. Co.*, 14 Pet. (U. S.) 99, 10 L. Ed. 371. Compare under bill of lading, *Woodley* v. *Mitchell*, 11 Q. B. D. 47 (collision without waves or wind, not a peril of the sea).

[5] *Richelieu Nav. Co.* v. *Boston Ins. Co.*, 136 U. S. 408, 421, 10 S. Ct. 934, 34 L. Ed. 398; *Matthews* v. *Howard Ins. Co.*, 11 N. Y. 9. Compare as to clause in bill of lading, *The Xantho*, 12 App. Cas. 503 (a sea peril though no extraordinary violence of winds and waves). Collision is defined in England to be the contact of two objects both of which are navigable, *Chandler* v. *Blogg* (1898), 1 Q. B. 32, 67 L. J. Q. B. (N. S.) 336, 77 L. T. Rep. 524 (barge was previously sunk but held navigable). Striking a wreck is not collision with another vessel, *Burnham* v. *China Mut. Ins. Co.*, 189 Mass. 100 (1905), 75 N. E. 74. *Held*, in Virginia, that collision does not in-

writers' liability extends to cover payments made by the insured for damages to the other ship.

The English and federal courts hold that such loss is too remote to be covered unless expressly insured.[1] The Massachusetts court adopts the opposite view and considers the loss within reach of the ordinary marine policy without specific mention.[2] It is usual, however, to provide for this liability by a distinct contract called the collision or running down clause.[3]

clude striking a sunken vessel or other sunken object, *Cline* v. *Western Assur. Co.*, 101 Va. 496, 44 S. E. 700 (cases cited). In New York it was held, reversing the court below (23 App. Div. 152), that while the above rule is perhaps too narrow, yet collision does not include an intentional forcing of a vessel through floating ice, though the injuries be unforeseen, *Newton Creek Towing Co.* v. *Ætna Ins. Co.*, 163 N. Y. 114, 57 N. E. 302. But the court admitted the tendency of modern decisions to broaden the protective effect of the policy, and perhaps public interests would be better, and quite as logically, served in such cases by holding, as many courts have held under the accident policy, that accidental and unforeseen results of a violent and destructive character, though due to intentional acts may be covered by the policy, § 385. This argument gathers force in construing the ordinary marine policy which insures even against barratry though the policy in the *Newtown Creek Towing Co.* case was not of that class. If the master drives the vessel into the ice floes with intent to scuttle her, the underwriters must pay, § 434. Why not if the violent impact of the ice and the consequent damage are unexpected and unintentional? Either ship in collision may be anchored or moored, *London Assur.* v. *Companhia de Moagens*, 167 U. S. 150, 17 S. Ct. 784, 42 L. Ed. 113; *The Granite State*, 3 Wall. 310. And an anchor though far from ship is part of ship, *In re Margetts* (1901), 2 K. B. 792, 70 L. J. K. B. 762, 85 L. T. 94, 9 Asp. 217. And a tug and ship may be regarded as one, *The Niobe* (1891), App. Cas. 401. Sometimes the policy clause expressly includes risk of striking wharves, ice, wreckage, etc., *The Munroe* (1893), Prob. 248; *Reischer* v. *Borwick* (1894), 2 Q. B. 548 (collision with snag held proximate cause of loss); *Union Mar. Ins. Co.* v. *Borwick* (1895), 2 Q. B. 279. As to what amount of impact amounts to a collision, see *London Assur.* v. *Companhia de Moagens*, 167 U. S. 150, 17 S. Ct. 784. By English law under clause "free from particular average unless" vessel be "in collision," underwriters are not relieved from liability for subsequent partial loss though not due to the collision itself. As to damages occasioned by two collisions, dock dues, and demurrage, etc., during repairs, see *The Haverham Grange* (1905), Prob. 307, 74 L. J. P. 115.

[1] *De Vaux* v. *Salvador*, 4 A. & E. 420; *The Barnstable*, 181 U. S. 464, 21 S. Ct. 684; *Gen. Mut. Ins. Co.* v. *Sherwood*, 14 How. (U. S.) 352.

[2] Massachusetts; *Whorf* v. *Equitable Mar. Ins. Co.*, 144 Mass. 68, 10 N. E. 513. As to right of subrogation in favor of insurer after paying a loss, see §§ 52 *et seq.*; and *New England Mut. Mar. Ins. Co.* v. *Dunham*, 18 Fed. Cas. 99; *Fox* v. *Blossom*, 9 Fed. Cas. 638; *Newell* v. *Norton*, 3 Wall. 257, 18 L. Ed. 271; *Atlantic Ins. Co.* v. *Storrow*, 1 Edw. Ch. (N. Y.) 621.

[3] *Tatham* v. *Burr* (1898), App. Cas. 382; *London Steamship Owners' Ins. Co.* v. *Grampian S. Co.*, L. R. 24 Q. B. D. 663, 59 L. J. Q. B. 549, 38 W. R. 651, 62 L. T. 784, 6 Asp. M. C. 506. See Appendix of Forms, ch. II. The principle of the collision clause is that the underwriters will relieve the insured of three-fourths of his liability to pay damages for loss of property in and on board the other ship. Scope of the clause, *Burger* v. *Indemnity, etc., Co.* (1900), 2 Q. B. 348, 69 L. J. Q. B. 838, 82 L. T. (N. S.) 831; *The North Britain* (1894), P. 77. Period of year for bringing suit on policy runs from date of fixing liability by judicial action, *Rogers* v. *Ætna Ins. Co.*, 95 Fed. 103. The insured is to take one-fourth

In New York the term "collision" seems not to be limited to an impact between vessels or navigable objects, but to include also an accidental striking of a vessel against ice or other foreign object.[1]

§ 429. Stress of Weather.—Under the head of sea perils must be classed, also, damages suffered through stress of weather;[2] as by blows of the seas carrying away bulwarks, boats, deck houses, and the like; loss of masts and yards in a gale; springing of a leak through violent straining; shifting or wetting of the cargo. The only difficulty in such cases consists in distinguishing between sea peril which is covered and wear and tear which is not covered by the policy.[3]

If there be a fortuitous grounding or stranding of the vessel, the underwriter will be liable for the loss thereby occasioned, although the action of the winds and waves may not be extraordinarily violent or tempestuous.

The steamer *Miles H.* insured by the defendant, while navigating Tug Fork of the Big Sandy river, was accidentally stranded on a rocky bar. The wind is frequently heavy in that bend of the river.

himself, as a check upon carelessness in the choice of servants; and his responsibility in respect of loss of life and personal injury, as well as for damage to the cargo in his own ship, is left untouched. There is a difference to the insured in the language of different collision clauses in respect to the matter of costs of litigation, a provision for which is sometimes omitted from the clause, in which case the underwriters are not responsible for their share of costs, *Fernald* v. *Prov. Washington Ins. Co.*, 27 App. Div. 137, 50 N. Y. Supp. 838; *McWilliams* v. *Home Ins. Co.*, 40 App. Div. 400, 57 N. Y. Supp. 1100; *Xenos* v. *Fox*, L. R. 3 C. P. 630, 4 C. P. 665, 38 L. J. C. P. 351, but the federal court allowed the expenses of successfully defending the suit exclusive of counsel fees, *Egbert* v. *St. Paul F. & M. Ins. Co.*, 92 Fed. 517. And compare *Westfield* v. *Mayo*, 122 Mass. 100. But see *Munson* v. *Standard Mar. Ins. Co.*, 156 Fed. 44. The liability under the collision clause is not particular average; consequently is not subject to the limitation of five per cent in the memorandum clause. A special collision clause given in *Whorf* v. *Equitable Mar. Ins. Co.*, 144 Mass. 68, 10 N. E. 513. The collision clause was adopted because of the decisions of the courts, *De Vaux* v. *Salvador*, 4 A. & E. 420; *Peters* v. *Warren Ins. Co.*, 3 Sumn. 389. The word "ship" as employed in the clause is given a very broad meaning, and embraces her launch, boats, etc., *The Devonian* (1901), Prob. 221; *M'Cowan* v. *Baine* (1891), App. Cas. 401; and anchor, *In re Margetts* (1901), 2 K. B. 792. But does not include a tug towing her, *Coastwise S. S. Co.* v. *Ætna Ins. Co.*, 161 Fed. 871; and see *Western Transit Co.* v. *Brown*, 161 Fed. 869. If both ships in collision belong to the same owner he cannot recover under the collision clause since he cannot sue himself, *Simpson* v. *Thomson*, 3 App. Cas. 279. As to removal of obstructions provision in collision clause, see *Tatham* v. *Burr* (1898), App. Cas. 382; *The North Britain* (1894), Prob. 77; *Burger* v. *Indemnity, etc., Co.* (1900), 2 Q. B. 348. As to what losses are recoverable under a collision clause, see *The Kate* (1899), Prob. 165; *The Argentino*, 14 App. Cas. 519; *The Consett*, 5 Prob. D. 229. Damages paid for loss of life are not recoverable, *Taylor* v. *Dewar*, 33 L. J. Q. B. 141.

[1] *Newtown Creek Towing Co.* v. *Ætna Ins. Co.*, 163 N. Y. 114, 57 N. E. 302 (in the briefs are cited many authorities).

[2] *Murray* v. *Receivers, etc.*, 58 Barb (N. Y.) 9, 17.

[3] § 444, *infra*.

On the day of the accident it was high and came in gusts and the accident was attributable to the wind, although it did not amount to a tornado, nor was there anything extraordinary about it. The policy provided that no claim would be made for damage resulting from stranding or grounding unless caused by stress of weather. The jury was allowed to find for the plaintiff and on appeal the judgment was sustained.[1]

§ 430. Fire.—Fire[2] may arise from a variety of causes—from lightning, the spontaneous combustion of the cargo, the negligence of the master or crew,[3] the acts of enemies, or the precautionary measures of rulers (as in case of a vessel burned by the municipal authorities for fear of being infected).[4]

Under the ordinary marine policy the underwriter is liable for loss occasioned by fire, whether its origin is inexplicable or whether it can be assigned to one of the causes mentioned above or some other kindred cause, with the exception of combustion generated through the inherent defect of the subject insured, or because the goods were shipped in a damaged state.[5] But if the combustion is originated by sea damage sustained by the goods after shipment, it is covered by the policy; and however the fire may have been occasioned, if it extend to other goods which are unconnected with the cause of the disaster, or to the ship herself, the insurance on such other goods is responsible for the fire loss to them, and the insurance on ship is responsible for the damage so sustained by it.[6]

The risk of fire is covered during the whole of the transit of goods,

[1] *Huntington, etc., Transp. Co.* v. *Western Ass. Co.* (W. Va., 1907), 57 S. E. 140. Usual freezing of water in pipes is not by "stress of weather" under an exception in a bill of lading, *C., C., C. & St. L. R. Co.* v. *Heath*, 22 Ind. App. 47, 53 N. E. 198.

[2] As to what is a hostile fire, see § 231, *supra*.

[3] *Busk* v. *Royal Exch. Assur. Co.*, 2 B. & Ald. 73; *Waters* v. *Merchants' Ins. Co.*, 11 Pet. (U. S.) 213.

[4] McArthur, 115, 116. Voluntary fire to avoid capture is covered, *Gordon* v. *Rimmington* (1807), 1 Camp. 123.

[5] *Boyd* v. *Dubbois*, 3 Camp. 133; *Prov. Wash. Ins. Co.* v. *Adler*, 65 Md. 162, 4 Atl. 121.

[6] *Montoya* v. *London Assur. Co.*, 6 Exch. 451. Imminent danger of fire disturbing the voyage may amount to a fire loss under a freight policy, *The Knight of St. Michael* (1898), Prob. 30, 67 L. J. P. D. & A. (N. S.) 19, 78 L. T. R. 90. Slacking of lime is a fire, *Singleton* v. *Phœnix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839. Damage to the interior of a boiler from lack of water is not a loss by hostile fire, *American Towing Co.* v. *German F. Ins. Co.*, 74 Md. 25, 21 Atl. 553. An insurance was against fire only by valued policy. Previous to the fire, the ship stranded with loss so great that repairing would have been unprofitable. *Held*, that the insured was entitled to recover for total loss on ship, *Woodside* v. *Globe Mar. Ins. Co.* (1896), 1 Q. B. 105, 73 L. T. R. 626, 65 L. J. Q. B. (N. S.) 117. Under policy "free from average unless general or the ship be burnt," ship must be substantially destroyed to give right of recovery, *The Glenlivet* (1894), Prob. 48.

on shore as well as on shipboard, provided the transit is for one entire or unbroken voyage.[1]

It was held in one case that an explosion of steam caused by the bursting of a marine boiler, though not identical with fire, is a peril of a sufficiently like kind to be covered by the clause of the policy specifying "all other perils, losses, and misfortunes."[2] But that case was subsequently criticised by the House of Lords and substantially overruled.[3]

If the word "fire" is omitted from the list of enumerated perils which the underwriters declare themselves "contented to bear," apparently the usual clause, with this omission, will not include losses by fire unless the fire be caused by some sea peril or other peril specified, as, for example, barratry, or the action of the winds or waves.[4]

§ 431. **Perils of War, etc.**—*Men of war, enemies, pirates, rovers, thieves, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detainments, etc.*

The common feature in this list of perils is violence at the hands of man. The underwriter takes upon himself the burden of all loss or damage thus occasioned,[5] whether it consist of injury to the vessel's hull, spars, and rigging by an enemy's shot or shell, or by other hostile acts, or the total destruction of the property insured by the operation of the same causes, and whether the insured is a belligerent or a neutral. As, however, merchant vessels are not, in general, able to offer a successful resistance to the attack of an armed ship, the casualty which most frequently results from hostilities is capture.

Capture, in the proper signification of the term, is the forcible appropriation of property by an enemy or belligerent with intent to keep it.[6] "Takings at sea" or "seizure" is a broader term[7] and in-

[1] *Pelly* v. *Royal Exch. Assur. Co.*, 1 Burr. 341. And see § 22, *supra*.

[2] *West India & P. Tel. Co.* v. *Home, etc., Marine Ins. Co.*, 4 Asp. Mar. L. C. 341, L. R. 6 Q. B. D. 51, 50 L. J. Q. B. 41.

[3] *Thames & Mersey Marine Ins. Co.* v. *Hamilton*, L. R. 12 App. Cas. 484, 6 Asp. M. C. 200, 56 L. J. Q. B. 626, 36 W. R. 337, 57 L. T. 695. And see *Louisville Underwriters* v. *Durland*, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399.

[4] *Thames & M. Ins. Co.* v. *Hamilton*, 12 App. Cas. 484; *Cullen* v. *Butler*, 5 M. & Sel. 461.

[5] *Levy* v. *Merrill*, 4 Me. 180. Unless expressly limited, *Straas* v. *Mar. Ins. Co.*, 23 Fed. Cas. 210, 1 Cr. C. C. 343; *Elting* v. *Scott*, 2 Johns. * 157.

[6] *Swinnerton* v. *Columbian Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560, 6 L. R. A. 248 (*held*, that the seizure and sinking of a vessel, if the act of the Southern Confederacy and not the act of a mob, were within the F. C. S. warranty); *Lovering* v. *Mercantile Mar. Ins. Co.*, 12 Pick. (Mass.) 348; *Dale* v. *New Eng. Mut. Mar. Ins. Co.*, 6 Allen (Mass.), 373; *Mauran* v. *Alliance Ins. Co.*, 6 Allen (Mass.), 384, note.

[7] *Cory* v. *Burr*, 8 App. Cas. 393; *Rodocanachi* v. *Elliott*, L. R. 8 C. P. 649.

cludes every forcible proceeding whereby the insured is deprived of the control or possession of his property, whether permanently or only temporarily,[1] whether the act be legal,[2] or illegal,[3] whether committed by regularly commissioned vessels of war, privateers, pirates,[4] or by a friendly power in consequence of mistake,[5] or by mutinous passengers or slaves.[6]

The phrase "capture, seizure, and detention" in its entirety as employed in a policy, is not to be confined to acts of an enemy or to acts of warfare.[7] For example, the taking may be by the government of the insured, and yet come within the clause.[8] This phrase, or one of modified import, is used on occasions to describe the sole risk insured against.[9] On the other hand it frequently follows the words "free from" or "free of" to denote not a liability, but an exception to the underwriters' liability which would otherwise be imposed upon them by the words of the general perils clause set forth at the head of this section.[10]

The words "men-of-war" and "enemies" obviously refer to those who, authorized by a prince or sovereign state, make war in the mode sanctioned by the law of nations as distinguished from "pirates," "rovers," and "thieves," who are unauthorized depredators.[11]

"Letters of mart" are commissions granted by the sovereign power to those persons whose property has been seized by subjects of other states, authorizing the former to indemnify themselves for the loss sustained by making reprisals. "Letters of countermart" are letters issued in favor of those threatened by such reprisals,

[1] *Savage* v. *Pleasants*, 5 Binn. (Pa.) 403, 6 Am. Dec. 424; *Johnston* v. *Hogg*, 5 Asp. Mar. L. C. 51, 10 Q. B. D. 432.

[2] *Goss* v. *Withers*, 2 Burr. 683.

[3] *Powell* v. *Hyde*, 5 E. & B. 607. As to exception of seizure for illicit trade, see *Carrington* v. *Merchants' Ins. Co.*, 8 Pet. (U. S.) 495.

[4] *Dean* v. *Hornby*, 3 E. & B. 180.

[5] *Powell* v. *Hyde*, *supra; Lozano* v. *Janson*, 2 E. & E. 160, 28 L. J. Q. B. 337.

[6] *Kleinwort* v. *Shepard*, 1 E. & E. 447, 28 L. J. Q. B. 147; *Naylor* v. *Palmer*, 8 Exch. 739, 10 Exch. 382. But compare *Greene* v. *Pac. Mut. Ins. Co.*, 9 Allen (Mass.), 217.

[7] *Miller* v. *Law Acc. Ins. Co.* (1903), 1 K. B. 712, 722; *Cory* v. *Burr*, 8 App. Cas. 393.

[8] *Robinson Gold Min. Co.* v. *Alliance Ins. Co.* (1902), 2 K. B. 489; *Green* v. *Young*, 2 Ld. Raym. 840; *Hagedorn* v. *Whitmore*, 1 Stark. 157.

[9] *Fowler* v. *English & Scot. Ins. Co.*, 34 L. J. C. P. 253.

[10] See § 453, *infra; Black* v. *Marine Ins. Co.*, 11 John. (N. Y.) 286.

[11] Emerigon, 413; Eldridge, Ins., 110; *Russell* v. *Niemann*, 34 L. J. C. P. 14 ("the 'king's enemies' means the enemies of the carrier's sovereign, whatever title he may enjoy—whether queen, emperor, president, duke, doge or aristocratic assembly"); *Fowler* v. *Eng., etc., Ins. Co.*, 34 L. J. C. P. 25. A mutinous crew who make off with the ship are pirates, *Brown* v. *Smith*, 1 Dow P. C. 349. So also a body of mutinous emigrants, *Naylor* v. *Palmer*, 8 Exch. 739, 10 Exch. 382; *Kleinwort* v. *Shepard*, 28 L. J. Q. B. 147. So also a plundering mob, *Nesbitt* v. *Lushington*, 4 T. R. 783. "The term 'pirates' includes passengers who mutiny and rioters who attack the ship from the shore," **Eng. Mar. Ins. Act (1906), 1** Sch. 8.

authorizing them to resist the privateers furnished with letters of mart.[1]

Captured property is not considered to have been divested from its original owner until it has undergone sentence of condemnation in a legally constituted court of the enemy.[2] But the assured may abandon to the underwriter, and claim for a total loss, on first hearing of the capture. If the abandonment is accepted by the underwriter, the matter is settled. If it is declined, the assured may take legal proceedings on the policy, and will recover by the English rule, provided the property is not restored before action is brought.[3] By the American rule, it is said that the right to recover is made absolute by the state of facts on which the abandonment is founded at the date of abandonment, and does not depend on subsequent events.[4]

Necessary expenses incurred in the redemption or recovery of captured property are, in general, recoverable under the policy.[5]

[1] Eldridge (1907), 116.

[2] *Barney* v. *Maryland Ins. Co.*, 5 Har. & J. (Md.) 139.

[3] *Ruys* v. *London Assur. Corp.* (1897), 2 Q. B. 135, 77 L. T. R. 23, 66 L. J. Q. B. (N. S.) 534 (recovery allowed in full though ship was returned pending action).

[4] *Maryland & Phœnix Ins. Co.* v. *Balhurst*, 5 Gill & J. 159; *Lee* v. *Boardman*, 3 Mass. 238, 3 Am. Dec. 134; and see *Lovering* v. *Mercantile Ins. Co.*, 12 Pick. (Mass.) 348; § 194, *supra*.

[5] *Havelock* v. *Rockwood*, 8 T. R. 268; *Parsons* v. *Scott*, 2 Taunt. 363. But not wages, provisions, or demurrage during capture, *Barney* v. *Maryland Ins. Co.*, 5 Har. & J. (Md.) 139. Also the following are held to be captures or seizures either within the general perils clause in favor of the insured or within the meaning of the exception "free from capture, seizure," etc., in favor of the underwriters, *Mauran* v. *Alliance Ins. Co.*, 6 Wall. 1, 18 L. Ed. 836 (by southern confederacy); *Dole* v. *Merchants' Mut. M. Ins. Co.*, 51 Me. 465; *Baltimore Ins. Co.* v. *McFadon*, 4 Har. & J. (Md.) 31 (capture, sale, and return of proceeds to insured); *Dole* v. *New Eng. Mut. M. Ins. Co.*, 6 Allen (Mass.), 373; *Swinnerton* v. *Columbian Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560; *Duval* v. *Commercial Ins. Co.*, 10 Johns. (N. Y.) 278; *Fifield* v. *Ins. Co.*, 47 Pa. St. 166, 86 Am. Dec. 523 (capture by confederacy); *Savage* v. *Pleasants*, 5 Binn. (Pa.) 403, 6 Am. Dec. 424 (voyage broken and delayed); *Merchants' Ins. Co.* v. *Edmond*, 17 Grat. (Va.) 138, citing many authorities; *St. Paul F. & M. Ins. Co.* v. *Morice* (1906), 11 Com. Cas. 153 (cattle disease on board. Bull seized and slaughtered by local authority); *Cory* v. *Burr*, 5 Asp. Mar. L. C. 109 (warranty covers seizure though the result of barratrous smuggling, and underwriters discharged); *Johnston* v. *Hogg*, 5 Asp. Mar. L. C. 51 (so of forcible detention by natives with intent to plunder); *Powell* v. *Hyde*, 5 E. & B. 607 (so of seizure by mistake supposing vessel Turkish); *Green* v. *Elmslie*, Peake N. P. C. 212; *Livie* v. *Janson*, 12 East, 648. Actual condemnation need not be proved, *Dorr* v. *Pope*, 8 Pick. (Mass.) 232. The master need not abandon the voyage because of a threat of illegal capture, *Williams* v. *Suffolk Ins. Co.*, 13 Pet. (U. S.) 415. The following are held not to be captures or seizures, *Patterson* v. *Mar. Ins. Co.*, 5 Har. & J. (Md.) 417 (ship stopped by blockade and sent back). So where master abandoned voyage because of hostilities, *Nickels* v. *London & P. Mar. Ins. Co.*, 70 L. J. K. B. 29, 6 Com. Cas. 15; *Greene* v. *Pac. Mut. Ins. Co.*, 9 Allen (Mass.), 217 (mutinous possession by the crew not a capture or seizure under the warranty). Mutinous possession by the crew may be

§ 432. **Arrests, Restraints of Kings, Princes, or People, etc.**—This clause refers only to acts of state, or acts authorized by the sovereign authority in the country.[1] An unauthorized seizure or detention, as by a mob in a meal riot, does not come within the clause, though the underwriter would be liable for it as a loss by pirates or thieves.[2] Nor does the peril specified embrace an arrest or detention occurring by virtue of ordinary legal process, as, for instance, where a vessel is libeled for non-payment of her debts.[3]

While capture, the peril described in the last section, is taking possession with intent to keep, arrest may be defined as a taking with intent ultimately to restore to the owner, and restraint, a prevention of the goods from going.[4] Restraints of princes comprehends every case of interruption by lawful authority.[5]

piracy, *Brown* v. *Smith*, 1 Dow. 349; or barratry, *Dixon* v. *Reid*, 5 B. & Ald. 597. Taking of vessel just outside port is not a seizure within port, *Watson* v. *Marine Ins. Co.*, 7 Johns. (N. Y.) 57, *Duval* v. *Commercial Ins. Co.*, 10 Johns. (N. Y.) 278, *Brown* v. *Tierney*, 1 Taunt. 517; *Mellish* v. *Staniforth*, 3 Taunt. 499. As to what is requisite to make condemnation valid, see *The Flad Oyen*, 6 C. Rob. 135; *Havelock* v. *Rockwood*, 8 T. R. 268; *Oddy* v. *Bovill*, 2 East, 475; *Smart* v. *Wolf*, 3 T. R. 283; *Schooner Sophie*, 6 C. Rob. 138.

[1] *Simpson* v. *Charleston F. & M. Ins. Co.*, Dudley (S. C.), 239; *Miller* v. *Law, etc., Ins. Co.* (1902), 2 K. B. 694, aff'd (1903) 1 K. B. 712. As where by order of Transvaal government, certain shipments of gold were seized on the eve of hostilities, *Janson* v. *Consolidated Mines* (1902), App. Cas. 484, 71 L. J. K. B. 857, 87 L. T. 372, 51 W. R. 142; *Robinson Gold M. Co.* v. *Alliance Assur. Co.* (1904), App. Cas. 359. Arrest and detention by a British privateer, *Gracie* v. *N. Y. Ins. Co.*, 13 Johns. 161. And see *Hurtin* v. *Phœnix Ins. Co.*, 12 Fed. Cas. 1047; *Shapley* v. *Tappan*, 9 Mass. 20. "The term 'arrests, etc., of Kings, princes and people' refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process," Eng. Mar. Ins. Act (1906), 1 Sch. 10.

[2] *Nesbitt* v. *Lushington*, 4 T. R. 783. Restraints and detainments of princes are synonymous in meaning, *Richardson* v. *Maine Ins. Co.*, 6 Mass. 102, [4] Am. Dec. 92. Loss by arrest by the government of an alien insured may be recovered against underwriters in this country if the arrest was not committed with hostile intent towards this country, *Aubert* v. *Gray*, 3 B. & S. 163. An unfounded fear of capture does not amount to restraint, *King* v. *Delaware Ins. Co.*, 6 Cr. 71, 3 L. Ed. 155; *Corp.* v. *United Ins. Co.*, 8 Johns. (N. Y.) 277. As to meaning of "unlawful restraint," see *McCall* v. *Marine Ins. Co.*, 8 Cr. 59, 3 L. Ed. 487; *Olivera* v. *Union Ins. Co.*, 3 Wheat. 183, 4 L. Ed. 365; *Thompson* v. *Read*, 12 Serg. & R. (Pa.) 440. Loss by danger of capture may be recoverable, *Knight of St. Michael* (1898), P. 30. And see *The San Roma*, L. R. 5 P. C. 301; *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q. B. 326. Wages, provisions, demurrage during detention are not recoverable, *Barney* v. *Maryland Ins. Co.*, 5 Har. & J. (Md.) 139; *Field S. S. Co.* v. *Burr* (1899), 1 Q. B. 590.

[3] *Finlay* v. *Liverpool, etc., Co.*, 23 L. T. (N. S.) 251. There must be some violent departure from the ordinary course of things, *Miller* v. *Land, etc., Ins. Co.* (1902), 2 K. B. 694, aff'd (1903) 1 K. B. 712 (diseased cattle were prohibited by municipal law from admission into port of destination; *held*, no arrest or detention).

[4] *Rodocanachi* v. *Elliott*, 28 L. T. Rep. 840.

[5] *Russell* v. *Niemann*, 34 L. J. C. P. 14. As where the government of which the assured was subject, being in need of transports laid an embargo on all ships in port, *Aubert* v. *Gray*, 31 L. J. Q. B. 50. And see *Smith* v. *Rosario Nitrate Co.* (1894), 1 Q. B. 174.

The species of arrest to which shipping has been most frequently subject is an embargo, which is a decree issued by the government of a state to prohibit the departure of vessels lying within its jurisdiction.[1] An embargo laid upon any vessel entitles the assured, in general, to give notice of abandonment as for a total loss;[2] but a mere rumor of a hostile embargo would not justify an abandonment to the underwriters;[3] nor an embargo which the insured knew would involve only a temporary and unimportant detention.[4]

A blockade operates as a restraint of princes with respect to property detained within its compass;[5] and if a blockade breaks up and terminates a voyage the insured may abandon to the underwriters, and claim a total loss.[6]

§ 433. Thieves.—The word "thieves," associated as it is with "enemies, pirates, rovers," has in England been held applicable only to persons outside the ship who enter and commit robbery, this conclusion being put upon the ground that the ship or master is liable in tort for goods stolen or embezzled by anyone on board.[7] But in America the clause is held applicable as well to a larceny or theft committed by passengers or those in the service of the ship.[8]

§ 434. Barratry.—The term "barratry" includes every wrongful act willfully committed by the master or crew to the prejudice of the

[1] *Walden* v. *Phœnix Ins. Co.*, 5 Johns. * 310.

[2] *Odlin* v. *Ins. Co.*, 18 Fed. Cas. 583; *Lorent* v. *South Car. Ins. Co.*, 1 Nott. & McC. (S. C.) 505 (cases cited).

[3] *Atkinson* v. *Ritchie*, 10 East, 534. So also where government official gave erroneous information regarding the law of the port, *Brunner* v. *Webster*, 5 Com. Cas. 167.

[4] *Rotch* v. *Edie*, 6 T. R. 413; *Foster* v. *Christie*, 11 East, 205.

[5] *Rodocanachi* v. *Elliott*, 28 L. T. (N. S.) 845.

[6] *Simonds* v. *Union Ins. Co.*, 22 Fed. Cas. 165, 1 Wash. C. C. 382, 4 Dall. 417; *Vigers* v. *Ocean Ins. Co.*, 12 La. (O. S.) * 362, 32 Am. Dec. 118; *Schmidt* v. *United Ins. Co.*, 1 Johns. (N. Y.) 249, 3 Am. Dec. 319; *Wilson* v. *United Ins. Co.*, 14 Johns. (N. Y.) 227. The mere fear or warning of blockade or of interdiction of trade is not sufficient to come within the terms of the policy, *Richardson* v. *Maine Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92; *Craig* v. *United Ins. Co.*, 6 Johns. 226, 5 Am. Dec. 222; *Hadkinson* v. *Robinson*, 3 B. & P. 388. As to warranty not to abandon in case of blockade, see § 462, *infra*.

[7] *Steinman* v. *Angier Line* (1891), 1 Q. B. 619 (and cases cited). So also Tennessee, *Marshall* v. *Nashville M. & F. Ins. Co.*, 1 Humph. 99. Same ruling as to bill of lading, *Steinman case*, *supra*, and *Taylor* v. *Liverpool, etc., Co.*, L. R. 9 Q. B. 546, 2 Asp. Mar. L. C. 277.

[8] *Spinetti* v. *Atlas S. Co.*, 80 N. Y. 71, 36 Am. Rep. 579 (cases cited); *Atlantic Ins. Co.* v. *Storrow*, 5 Paige (N. Y.), 285; *American Ins. Co.* v *Bryan*, 26 Wend. 563, 37 Am. Dec. 278. As to whether a destructive mob can be regarded as "assailing thieves," see *Babbitt* v. *Sun Mut. Ins. Co.*, 23 La Ann. 314. A seizure by consul without proof of felonious intent, *Paddock* v. *Commercial Ins. Co.*, 2 Allen (Mass.), 93. Seizure by sovereign of island Labonaga of goods purchased without paying or intending to pay for them, *Parsons* v. *Mass. F. & M. Ins. Co.*, 6 Mass. * 197. "The term

§ 435. **Jettison.**—This is the intentional throwing overboard of a part of the cargo, or any article on board of a ship, or the cutting or casting away of masts, spars, rigging, sails, or other furniture, usually for the purpose of lightening or relieving the ship in case of necessity or emergency.[1] For such losses, the underwriter of the goods jettisoned is in the first instance directly liable, but, having paid, he is subrogated to the claim of the insured in general average against that part of the venture, if any, saved by such a sacrifice for the common safety.[2]

A jettison, however, is not always made with the purpose of promoting the common safety, as, for instance, where the ship being in imminent danger of capture, the master dropped a bag of specie into the sea lest it should fall into the hands of the enemy, for which the underwriter was held liable under the head of jettison;[3] but where goods are thrown overboard on account of their inherent vice, the underwriters are not liable.[4]

§ 436. **All Other Perils, Losses, or Misfortunes.**—The terms of this clause are so comprehensive as at first sight to convey the impression that they embrace every kind of mishap, not already enumerated, to which property at sea can be subjected. Such, however, is not the case; for here the rule of construction applies that general terms following particular terms apply only to matters which are of the same kind with those specified.[5] Accordingly, the effect of the general undertaking, expressed as above, is to bring within the

as a "sea peril" unless specifically mentioned, *Waters* v. *Merchants' Ins. Co.*, 11 Pet. (U. S.) 213, 9 L. Ed. 69; *Mathews* v. *Howard Ins. Co.*, 11 N. Y. 11, 16; *Gazzam* v. *Ohio Ins. Co.*, Wright (Ohio), 202; *Citizens' Ins. Co.* v. *Marsh*, 41 Pa. St. 386; *Contra dictum*, *Atkinson* v. *Great West. Ins. Co.*, 65 N. Y. 531, 552. But barratry is included in the clause "usual marine risks," *Parkhurst* v. *Gloucester Mut. Fishing Ins. Co.*, 100 Mass. 301.

[1] *The Portsmouth*, 9 Wall. 682; *Merchants' & Mfrs. Ins. Co.* v. *Shillito*, 15 Ohio St. 559, 86 Am. Dec. 491 (jettison of goods on deck where such stowage was proper). A jettison of goods carried on deck is not covered by the ordinary policy, unless it is the custom so to carry them, *Da Costa* v. *Edmunds*, 4 Camp. 142; as usually is the case of inland river voyages, *Apollinaris Co.* v. *Nord Deutsche Ins. Co.* (1904), 1 K. B. 252. See *Royal Exch. S. Co.* v. *Dixon*, 12 App. Cas. 11; *Burton* v. *English*, 10 Q. B. D. 426, 12 Q. B. D. 218; *Johnson* v. *Chapman*, 35 L. J. C. P. 23; *Wright* v. *Marwood*, 7 Q. B. D. 62.

[2] *Dickenson* v. *Jardine*, L. R. 3 C. P. 639, 37 L. J. C. P. 321, 16 W. R. 1169, 18 L. T. 717. As to jettison in its relation to general average see, § 216, *supra*.

[3] *Butler* v. *Wildman*, 3 B. & Ald. 398 (not a general average act, see § 216).

[4] *Taylor* v. *Dunbar*, L. R. 4. C P. 206, 38 L. J. C. P. 178, 17 W. R. 382.

[5] *Thames & M. Ins. Co.* v. *Hamilton*, 12 App. Cas. 484, 17 Q. B. D. 195, 56 L. J. Q. B. 626, 57 L. T. 695, 6 Asp. M. C. 200 (reviewing many cases, injury to donkey engine in ordinary use not included); *Cullen* v. *Butler*, 5 M. & Sel. 461, 465. And see discussion of this clause, § 446, *infra*. "The term 'all other perils' includes only perils similar in kind to the perils specifically mentioned in the policy," Eng. Mar. Ins. Act (1906), 1 Sch. 12.

scope of the contract all casualties which, though not identical with, are similar to, the risks enumerated. Thus, the expression of "all other perils, losses, and misfortunes," has been held to include damage to a ship which had been heeled over by the wind in a graving dock;[1] the loss of dollars thrown overboard from a vessel on the point of capture, in order that they might not be taken possession of by the enemy;[2] the wrecking of a steamer through the bursting of the boiler, etc., if from the unusual action of the sea.[3]

§ 437. Proximate Cause.—Every event is the culmination of a series of numerous antecedent causes or influences[4] more or less intimately associated together, some operating successively, others in combination. Where a chain of causative forces or circumstances terminates in a loss, and only one of the causative links is a peril insured against, while the others are either without mention in the policy, or else are expressly warranted by the insured to be excluded from its operation,[5] the liability or exoneration of the underwriter may easily turn upon the correct answer to this inquiry, namely, in accounting for the effect, which cause ought to be selected as the significant or controlling cause?[6]

Difficult problems under the topic "proximate cause" are presented for solution, more frequently, perhaps, in connection with insurance than with any other class of contracts, and can only be mastered by a careful examination of many decisions. It will be profitable to consider this subject as related to the marine policy for two reasons, first, because that policy has to do with many perils, including fire, and, second, because the subject of proximate cause has been developed with marked thoroughness in this branch of insurance law.

As already shown in prior chapters the dominant, efficient cause is termed the proximate cause, though not always nearest to the loss either in time or place,[7] and it has often been declared generally that

[1] *Phillips* v. *Barber*, 5 B. & Ald. 161.

[2] *Butler* v. *Wildman*, 3 B. & Ald. 398.

[3] *West India & P. Tel. Co.* v. *Home & C. Mar. Ins. Co.*, 4 Asp. M. C. 341, L. R. 6 Q. B. D. 51, 50 L. J. Q. B. 41; but questioned in *Thames & Mersey Mar. Ins. Co.* v. *Hamilton, supra.* Loss of freight from imminent danger of fire is covered, *The Knight of St. Michael* (1898), P. 30, 67 L. J. P. D. & A. (N. S.) 19, 78 L. T. Rep. 90.

[4] "It were infinite for the law to consider the causes of causes and their impulsions one on another, therefore it contenteth itself with the immediate cause," Bac. Max. Reg. 1; *Devaux* v. *Salvador* (1835), 4 A. & E. 431.

[5] Thus, "free from capture and all consequences, of hostilities," etc.; or "excepting want of ordinary care and skill in navigation," etc.

[6] "Apt to lead into philosophical mazes," *Inman S. Co.* v. *Bischoff* (1882), 7 App. Cas. 683.

[7] The United States Supreme Court has repeatedly approved the rule, "The question is not what cause was nearest in time or place to the catastrophe.

the underwriter is liable for no loss which is not proximately caused by the perils insured against.[1]

§ 438. When Nearest Antecedent Cause held Responsible.—In examining this subject, it will be convenient first to consider the case where no operative cause is expressly excluded by the terms of the policy. Here if the peril insured against is to be found in the chain of cause and effect the law will not look back further for antecedent contributing causes, though without them the disaster would not have occurred.[2]

For example, in an English case a vessel insured "against capture only" was driven by a storm upon a hostile coast where, having received little damage from the stranding, she was captured by the enemy. This was held to be a loss, not by perils of the sea, but by capture and as such recoverable under the policy.[3] By like reasoning where rats gnawed a hole in a pipe communicating with the plaintiff's cargo of rice, which was damaged by sea water flowing in through the hole, sea damage, not the action of the rats, was held to be the proximate cause of the loss.[4] And so also in the case of an English time policy, which, under English decisions, carries no implied warranty of seaworthiness, though it was conceded that the ship's lack of seaworthiness prevented her from successfully battling with the perils of the sea, nevertheless stress of weather was held to be the sole proximate cause of her wreck.[5]

That is not the meaning of the maxim *causa proxima non remota spectatur.* The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster," *The G. R. Booth*, 171 U. S. 450, 457, 19 S. Ct. 9, 43 L. Ed. 234; *Lynn Gas & Electric Co.* v. *Meriden F. Ins. Co.*, 158 Mass. 570, 575, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. R. 540. See *Monahan* v. *Eidlitz*, 59 App. Div. (N. Y.) 224, 227.

[1] 2 Arn. § 783; Eng. Mar. Ins. Act (1906), § 55; *Pink* v. *Fleming* (1890), 25 Q. B. D. 396; *Cline* v. *Western Assur. Co.*, 101 Va. 496, 498, 44 S. E. 700. Of course any fraud on the part of the insured himself or breach of any warranty, for instance of seaworthiness of the ship, will discharge the insurer though the proximate cause of the loss be a sea peril, *Thompson* v. *Hopper*, 6 E. & B. 172, 191. The loss must be the direct not the remote consequence of the peril, *Shelbourne* v. *Law I. & I. Corp.* (1898), 2 Q. B. 626.

[2] *Louisville Underwriters* v. *Pence*, 93 Ky. 96, 102, 19 S. W. 10, 40 Am. St. R. 176. The Massachusetts court says: "The law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions," *Freeman* v. *Mercantile Acc. Assoc.*, 156 Mass. 351, 353, 30 N. E. 1013, 17 L. R. A. 753.

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The *Bawnmore* was insured by a valued time policy against loss or damage by fire or explosion only. She stranded on the coast of Oregon and sustained such injuries by sea perils that the cost of repairing her would have been greater than her value when repaired. Thirty-six hours afterwards she was completely destroyed by fire. The English court held that the insurer was liable for the full amount underwritten.[1]

In the light of the same doctrine are to be explained those many decisions, both English and American, by which the rule, formerly denied or questioned,[2] is now firmly established, that when the loss is caused directly by a peril insured against the underwriter will not be exonerated, though it appear that the disaster would not have occurred except for the neglect, or careless navigation, of the master, including the insured himself,[3] or the seamen or other agents of the insured.[4]

§ 439. Proximate Cause, how far Followed in its Results.—A peril insured against having been fastened upon as the proximate or responsible cause of loss, a secondary inquiry sometimes remains by which to determine how far it is legitimate, in estimating the liability of an underwriter, to follow the results occasioned by the cause.[5]

For example, as already shown, damage by smoke, by water from

which Lord Penzance says: "A long course of decisions in the courts of this country has established that *causa proxima et non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it."

[1] *Woodside* v. *Globe Mar. Ins. Co.* (1896), 1 Q. B. D. 105. And see *N. Y. etc. Exp. Co.* v. *Ins. Co.*, 132 Mass. 377.

[2] *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222, 7 L. Ed. 659; *Grim* v. *Phœnix Ins. Co.*, 13 Johns. (N. Y.) 451; *Lodwicks* v. *Ohio Ins. Co.*, 5 Ohio, 434 and cases cited.

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[4] List of cases, 3 Cooley, Ins. p. 2904; *Phœnix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S. 312, 323, 6 S. Ct. 750 (fire negligently caused); *Walker* v. *Maitland*, 5 B. & Ald. 171, 174 (sloop on rocks because seamen in charge were asleep); *Busk* v. *Royal Exch. Ass. Co.*, 2 B. & Ald. 73 (careless mate lighted a fire and left ship without watchman); *Bishop* v. *Pentland*, 7 B. & C. 219 (ship fell over on her side in harbor and bilged because a rope was not strong enough to hold her to the pier); *Smith* v. *Scott*, 4 Taunt. 126 (collison in calm weather through fault of lookout or helmsman). See list of instances in which negligence or misconduct was regarded the proximate cause of the loss, *Matthews* v. *Howard Ins. Co.*, 11 N. Y. 15.

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fire engines, by falling walls, by incidental explosions, even by depredations of thieves attributable to the conflagration, may be considered the natural and proximate results of fire as the moving and efficient cause;[1] while loss of profits or of use and occupancy and various other consequences, in the absence of stipulation to the contrary, are held to be too remote to fall within the probable contemplation of the parties.[2]

Loss of cargo by fire may include loss of goods by the sinking of the vessel containing them and though no fire touch them, provided the fire is the cause of the sinking.[3]

Apparently it is only on the ground of the remote and improbable character of the results of the fire, as matter of fact, that the much criticized decision in the *Tarrant* case, under the standard fire policy of New York, might possibly find justification. That case was tried on an agreed statement of facts. A conflagration, originating in the Tarrant building in New York City, in course of the burning, and within less than half an hour after starting, reached a large stock of explosive drugs and chemicals stored in the building. In consequence of their ignition a terrific explosion ensued, which wrecked neighboring buildings, including the building belonging to Hustace, the plaintiff, and insured by the defendant. This building was distant fifty-six feet, eleven inches from the Tarrant building, and was separated from it by two buildings and an alleyway, about eight feet wide. These two intervening buildings were also wrecked by the explosion, but the conflagration from the Tarrant building subsequently swept over this space and consumed the ruins of the plaintiff's building. Five judges below found for the plaintiff, but the majority of the Court of Appeals, in an opinion which fails to recognize the real object of the explosion clause contained in the standard policy, reversed, and held that the loss was not by fire but by explosion, and that the insurance company was not liable.[4]

[1] §§ 231, 276, *supra*. So where insurance was against collision only, and after a collision the motion of the vessel, while being towed away, opened leaks in her and she sank, collision was held to be the proximate cause of the loss by sinking, *Reischer* v. *Borwick* (1894), 2 Q. B. 548. A policy insured hides and tobacco. The hides were soaked as the result of a storm, and became putrid. Fumes from them injured the tobacco. The damage to the tobacco was proximately caused by sea peril, *Montoya* v. *London Assur.* (1851), 6 Exch. 451.

[2] See further instances of remote losses, § 443, *infra*.

[3] *N. Y. & B. Despatch Exp. Co.* v. *Traders' & M. Ins. Co.*, 135 Mass. 221.

[4] *Hustace* v. *Phœnix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592. See § 278, *supra*. Hustace should not have agreed to the facts, but should have claimed that at the very least he was entitled to go to the jury. It was a question of the natural spread of fire and its natural physical results. Explosives burn by exploding. In an unimproved meadow lot, the physical laws of nature operate precisely the

If the results of the peril specified are so indirect and improbable as to make it doubtful whether they should fairly be considered within the contemplation of the parties to the policy, the issue in general should be regarded as one of fact to be determined by the jury.[1] But especially in marine insurance the courts have shown a disposition to settle such issues as matter of law, in order to give greater uniformity to the meaning and effect of the contract.

§ 440. An Independent Intervening Cause.—Analogous with the last rule is another, which may be stated in connection with it. A new and wholly independent cause intervening between the peril insured against and the loss may break the chain of natural causation, in which event the damage is held to be remote and the underwriter is exonerated.[2]

This principle is illustrated by an English case in which a shipowner, owing to embargo, properly abandoned ship and freight to the underwriters. Contrary to expectation the voyage was completed and the underwriters who had accepted the abandonment received the freight. It was held that any loss of freight sustained by the insured was not by the peril insured against, but by the voluntary intervention of the assured himself.[3]

same, whether the lot happens to be owned by one man, or whether, by impalpable boundary lines of ownership, it is divided up into fifty lots. Likewise in the case of a block of city houses, whether they are all owned and insured by one man and one policy, or whether they are separately owned and separately insured, it matters not, so far as the spread of any conflagration among them and its physical effects are concerned.

[1] *Milwaukee, etc., R. Co.* v. *Kellogg*, 94 U. S. 469; *Russell* v. *German Fire Ins. Co.*, 100 Minn. 528, 111 N. W. 400.

[2] The United States Supreme court has repeatedly declared, "The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury," *The G. R. Booth*, 171 U. S. 450, 458, 19 S. Ct. 9, 43 L. Ed. 234 (quoting with approval from *Ins. Co.* v. *Boon*, 95 U. S. 117 and *Milwaukee & St. P. R.* v. *Kellogg*, 94 U. S. 469). Again the same court says: "That cause which set the other in motion and gave to it its efficiency for harm at the time of the disaster must rank as predominant. . . . One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote," *The G. R. Booth, supra.* And see *Niver Coal Co.* v. *Chironea S.S. Co.*, 142 Fed. 402, 410. "Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" *Milwaukee, etc., R. Co.* v. *Kellogg*, 94 U. S. 469, 475 (holding also that the question is often for the jury). A cause is proximate when the effects follow "by mere physical necessity," Bailey's definition, MacArthur, Ins. (2d ed.), 108, note. Thus where a vessel is lost by an explosion of gunpowder occurring after the ship is on fire, fire is the proximate and sole cause, *Waters* v. *Merchants' Ins. Co.*, 11 Pet. (U. S.) 213, 9 L. Ed. 69.

[3] *McCarthy* v. *Abel*, 5 East, 388. And

In another English case goods were insured against damage consequent on collision. The ship on which the goods were shipped came into collision with another vessel and had to go into port for repair. For the purpose of such repairs the goods, which were of a perishable nature, had to be discharged, and they were damaged by the handling necessary for their discharge and reshipment. It was held that the collision was not the proximate cause of the loss and that the underwriters were not liable.[1]

At this point, as in other respects, we find the courts somewhat more liberally disposed towards the insured in construing the fire policy, for instance, in the ruling that in the absence of an express exemption the insurer against fire is liable also for loss by consequential theft.[2]

§ 441. Joint Action of Peril Insured Against and Peril Excepted.— Where different causes commingle or combine to produce the loss, one a peril insured against, and the other a peril expressly excepted, the question arises, which is the significant or proximate cause.[3]

The rules adverted to in the last sections have an important bearing; but, in classifying perils or causes in this connection, a useful rule for guidance, recognized in most jurisdictions, is found in the proposition that an inevitable, or natural, physical incident or concomitant of the primary peril or cause should not be accounted in any respect a separate peril or cause, though separately mentioned in the policy, but merely one of the subordinate phenomena or results of the proximate and controlling force which will stand as the sole cause. Instances from several branches of insurance law may serve to illuminate this subject.

An English marine policy on living animals contained a warranty "free from mortality and jettison." The violence of a storm which was a peril insured against so injured some of the animals as to cause

see *Inman S.S. Co.* v. *Bischoff*, 7 App. Cas. 670. Similarly, in considering proximate cause for general average purposes where a steamer struck on a rock and was then intentionally stranded as an attempted salvage it was held that stranding was the proximate cause of loss because of the voluntary act intervening, *Norwich, etc., Transp. Co.* v. *Ins. Co.*, 118 Fed. 307. So also in an action for negligence an act of suicide and not the accident was held the proximate cause of death though occasioned by a preceding accident with ensuing sickness involving mental disorder, *Scheffer* v. *Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070. Compare *Ins. Co.* v. *Seaver*, 19 Wall. (U. S.) 531, 542; *Daniels* v. *R. R. Co.*, 183 Mass. 393.

[1] *Pink* v. *Fleming* (1890), 25 Q. B. D. 396, 59 L. J. Q. B. 559 (American law said to differ from English on this subject).

[2] See § 231, *supra*.

[3] "Always a difficult question to determine in the case of a conjunction of causes," *Brown* v. *St. Nicholas Ins Co.*, 61 N. Y. 332, 337.

their death. The insurer was held liable notwithstanding the exception embodied in the warranty.[1]

In another English case, under a bill of lading which excepted "accidents of the seas," the question arose whether an accident of the sea, or the resulting heat from the engine-room, which damaged the plaintiffs' cargo of grain, was to be regarded as the proximate or significant cause of the loss. During the voyage from Baltimore to Avonmouth, owing to exceptionally heavy weather, and for the safety of the ship, the ventilators of the steamship were closed for about a week, with the result that the air in the hold nearest the engine-room space became heated, and, not being able to escape through the ventilators, damaged a portion of the plaintiffs' grain. The court held that an accident of the sea was the proximate cause of the loss, and that, therefore, the exception in the bill of lading applied in favor of the defendants, the shipowners.[2]

In a New York case a marine policy upon the cargo of a canal boat contained an "ice clause" providing that if the boat "was prevented or detained by ice, or the closing of navigation, from terminating the trip," the policy should cease. The canal boat with others in a tow, was proceeding down the Delaware River, when, in consequence of a gale, the towing tugs were separated from the boats which were driven ashore and stranded. During the night, ice formed about them so that the tugs could not get at them. The boat remained thus frozen in until a thaw, when the wind and ice forcing her upon another boat, she broke in two, sank, and the cargo was injured. The court held that the primary, predominating, all-embracing cause to which all the ensuing loss must be attributed was the storm and not the ice, and that, therefore, the defendant was liable.[3]

In like manner, before the United States Supreme Court, the question arose whether a loss to part of a cargo was by explosion,

[1] *Lawrence* v. *Aberdein* (1821), 5 B. & Ald. 107.

[2] *The Thrunscoe* (1897), Prob. 301.

[3] *Brown* v. *St. Nicholas Ins. Co.*, 61 N. Y. 332 (Dwight, C., reviewing many cases). In referring to another case the court said at p. 340: "The vessel was never delivered from that peril until she was virtually destroyed and unable to perform the voyage. In such a case the insurers are liable though the loss is followed by the operation of a peril excepted from the policy." And at p. 338: "It is well settled that an insurer is liable for all the consequences directly resulting from a peril insured against, as where a boat is lost after a storm has ceased in consequence of damage done during a storm." So also where there was prospectively a total loss to owner of his cargo by stranding of ship, though goods were warranted free from capture, the underwriters were in no wise relieved because of a subsequent chance rescue and appropriation of a portion by an enemy, *Hahn* v. *Corbett*, 2 Bing. 205. Compare where carrier was responsible for negligence but exempt from fire loss, negligence was held to be proximate cause, *Deming* v. *Merchants', etc., Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

for which the defendant was responsible, or by a peril of the sea which was expressly excepted in the bill of lading. While the defendant's vessel was at the pier unloading detonating caps intended for blasting operations, one of them burst, though without negligence or fault on the part of the ship's hands, and the explosion blew a large hole in the ship's side, through which the sea water flowed to the injury of the plaintiff's cargo of sugar. The court held that the explosion alone was to be regarded the efficient and responsible cause of the loss. The influx of sea water was but an incidental result.[1]

By parity of reasoning the peril insured against may intervene and become the proximate and responsible cause. A policy excepted "consequences resulting from derangement of machinery." The mud valve needing repairs, steam was blown off. The captain, not knowing that steam was off, deliberately gave orders to start the boat, which, without steam to propel, was carried over the falls and sunk. *Held*, that the sea peril was proximate and the excepted cause remote, since the captain's act of volition intervened.[2]

The doctrine of proximate cause is frequently involved where a loss is occasioned by the joint operation of fire and explosion, the one agency being named in the policy as a peril insured against and the other as an exception. A conflagration is usually if not always attended by a series of explosions of greater or less violence as necessary physical results or concomitants of fire when in hostile action. Such incidental explosions, whether of dry wood, or gas, or gunpowder or other material, are to be regarded merely as effects and not as causes. So also an explosion, often though not always, results in a fire.

[1] *The G. R. Booth*, 171 U. S. 450, 19 S. Ct. 9, 43 L. Ed. 234 (on bill of lading, but court treated it as though it were an insurance case). Compare proximate cause under fire policy, § 231, and accident policy, § 387. Unlawful speed of ship was the sole cause of the loss, not the stranding, *Flint* v. *Marine Ins. Co.*, 71 Fed. 210. And see *Bensaude* v. *Thames & M. Ins. Co.* (1897), App. Cas. 609 ("free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise). Similarly if master barratrously bore holes in the ship causing her to fill and sink, barratry and not sea peril is the proximate cause, *Waters* v. *Merchants' Ins. Co.*, 11 Pet. (U. S.) 213, 9 L. Ed. 69 (but see *Heyman* v. *Parish*, 2 Camp. 149, *Arcangelo* v. *Thompson*, 2 Camp. 620); *Hutchins* v. *Ford*, 82 Me. 363, 19 Atl. 832. If negligence is expressly excepted and a negligent defect in the compass causes the vessel to succumb to the perils of the sea, the underwriter is relieved under the exception, *Richelieu & O. Nav. Co.* v. *Boston M. Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398.

[2] *Orient Ins. Co.* v. *Adams*, 123 U. S. 67, 8 S. Ct. 68, 31 L. Ed. 63. Policy on plate glass windows. During fire mob broke glass. Mob violence, not fire, held proximate cause, *Marsden* v. *City, etc., Ins. Co.*, L. R. 1 C. P. 232, 12 Jur. N. S. 76, 35 L. J. C. P. 60, 13 L. T. (N. S.) 465; *Ins. Co.* v. *Willard*, 164 Fed. 404 (fire, not earthquake, the cause).

By virtue of the doctrine here presented the law holds that the hostile agency first in operation gives character to the whole connected catastrophe, unless otherwise expressly defined by the terms of the policy. For example, if an explosion named as an excepted peril, causes a destructive fire, as well as breakage or displacement, explosion is taken as the predominant and exclusive cause of the entire loss.[1] And by the same logic if in the natural course of a conflagration insured against, incidental explosions occur, no matter how violent, the effects of combustion and explosion alike if not too remote and improbable are attributed to fire as the sole primary and all-embracing cause.[2]

The same doctrine finds copious and striking illustration in many court decisions, already adverted to, relating to the construction of the accident policy; for example, where the accidental injury, insured against, in turn results in blood poisoning, pneumonia, or some other form of disease, disease being expressly designated in the policy as an excepted risk.[3]

§ 442. Independent Causes, Producing Distinguishable Damages.—Where two perils, the one insured against, the other excepted, are in their nature really independent, for instance, shipwreck and capture by an enemy, and the losses produced by both are not so commingled as to be indistinguishable, it has been held that such losses will be apportioned between the perils producing them.

During the American civil war the light on Cape Hatteras having been extinguished by the Confederate troops for military reasons, the captain of a ship missed his reckoning, struck on a reef of rocks, and the ship became a wreck. The cargo consisted of 6,500 bags of coffee, of which 150 bags were saved and 1,000 more would have been

[1] *Ins. Co.* v. *Tweed*, 7 Wall. 44. Explosion started a conflagration which spread to an intermediate building thence to building containing cotton of the insured. *Held*, explosion to be proximate cause (approved, 171 U. S. 450); *Montgomery* v. *Firemen's Ins. Co.*, 16 B. Mon. (Ky.) 427; *Roe* v. *Columbus Ins. Co.*, 17 Mo. 301, 305 ("it is a single and continuous event"); *Strong* v. *Sun Mut. Ins. Co.*, 31 N. Y. 103, 109; *St. John* v. *American Mut. F. & M. Ins. Co.*, 11 N. Y. 516, 519 (a "very usual concomitant of the explosion of a steam boiler is that the place is set on fire"). And see *Insurance Co.* v. *Boon*, 95 U. S. 117, 131 (insurrection and not the resulting fire held to be the sole cause).

[2] *Mitchell* v. *Potomac Ins. Co.*, 183 U. S. 42, 52, 22 S. Ct. 22, 46 L. Ed. 74 ("a loss occurring solely from an explosion not resulting from a preceding fire is covered by the exception"); *Hall* v. *National F. Ins. Co.*, 115 Tenn. 513, 92 S. W. 402; *The G. R. Booth*, 171 U. S. 450, 19 S. Ct. 9, 43 L. Ed. 234; *Contra*, *Hustace* v. *Phœnix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592 (a heavy explosion, a mere incident to a preëxisting conflagration, was held to be the proximate cause and the insurer was exonerated). See that and many other cases, § 278, *supra*.

[3] See §§ 387, 396, *supra*.

saved if Federal salvors had not been interrupted by Confederate troops. This coffee was insured "free from all consequences of hostilities." On these facts the English court held that the underwriters were liable for the loss of the 5,350 bags left on the ship. The case was to be dealt with, the court said, as if there were two policies, one on the war risk and the other on the sea risk, and the question here was, which of the two was the proximate cause of each loss? One hundred and fifty bags were actually recovered. As to the 1,000 bags remaining aboard, it was the Confederate forces which directly prevented the rescue, and hence caused the loss. But the extinguishing of the light was only the remote cause of the loss of the remainder, the proximate cause being the striking on the reef, which could not be said to follow as a natural or ordinary, still less as a necessary, consequence of the extinguishing of the light.[1]

§ 443. Proximate Cause as Limiting Insurers' Liability.—The rule looking only to the proximate cause of loss sometimes, it will be observed, operates in favor of the insurers.

For example, when a ship is damaged by sea peril the insurer is liable for the cost of repairing but not for the shipowner's loss because the ship is laid up and unable to earn freight while being repaired.[2] Nor, again, supposing that during that period it is necessary to retain the ship's crew, or any portion of them, is he liable for the owner's loss in having to pay and feed them while the ship is so unemployed,[3] unless, indeed, the crew actually worked on the repairs, having been kept for that purpose after they would otherwise have been discharged.[4] These losses result not from the damage, but from the delay incidental to the damage, so that the damage suffered by the ship, it may be argued, is only the remote cause of them. So if fruit, meat, or any other article of like perishable nature putrifies by reason of delay springing out of sea peril, the insurer of these articles is not liable.[5] In like manner,

[1] *Ionides* v. *Universal Marine Ins. Co.*, 14 C. B. (N. S.) 259, 10 Jur. (N. S.) 18, 32 L. J. C. P. 170, 8 L. T. 705. So also the damages by fire and collision were held apportionable in *Howard Fire Ins. Co.* v. *Norwich, etc., Transp. Co.*, 12 Wall. 194, 20 L. Ed. 379. But see comment in later case in the line of restriction and reaffirming principal rule as to sole proximate cause (171 U. S. 456). Damages held apportionable in *Rice* v. *Homer*, 12 Mass. 230.

[2] See § 439.

[3] *Field S.S. Co.* v. *Burr* (1898), 1 Q. B. 821 (1899), 1 Q. B. 579 (cost of dealing with cargo after collision); *DeVaux* v. *Salvador*, 4 Ad. & Ell. 420, 1 H. & W. 751, 6 N. & M. 713, 5 L. J. K. B. 134; *Martin* v. *Salem M. Ins. Co.*, 2 Mass. 420.

[4] *Hall* v. *Ocean Ins. Co.*, 21 Pick. (Mass.) 472. Compare the different rule applicable in the United States in case of general average, § 221, *supra*.

[5] *Pink* v. *Fleming* (1890), 25 Q. B. D. 396 (fruit); *Taylor* v. *Dunbar*, L. R. 4 C. P. 206, 38 L. J. C. P. 178 (meat). Death of slaves from failure of pro-

as already shown, the insurer of goods, in the absence of specific agreement to the contrary, is not liable for loss of prospective profits;[1] in other words, the anticipated selling price of the goods is in no sense the criterion for estimating the loss under the policy.[2]

§ 444. Wear and Tear.—No ship can engage in navigation for any length of time without suffering a certain amount of injury and depreciation from the ordinary action of wind and wave, called wear and tear. For this the underwriter is never liable.[3]

§ 445. Original Defect.—Underwriters are not liable for any loss which is the immediate result of an original defect in any part of the hull or materials.[4]

visions because of delay in stormy weather, *Tatham* v. *Hodgson*, 6 D. & E. 656. So sale or consumption of cargo for repair of ship or preserving lives of passengers is not within terms of policy, *Dyer* v. *Piscataqua, etc., Ins. Co.*, 53 Me. 118; *Ruckman* v. *Ins. Co.*, 12 N. Y. Super. Ct. 342; *Powell* v. *Gudgeon*, 5 M. & S. 431. See § 209, notes. Loss of voyage because of blockade at port of destination not covered, *Hadkinson* v. *Robinson*, 3 B. & P. 388; *Nickels* v. *London & P. Ins. Co.*, 6 Com. Cas. 15. Nor loss by fall of market during unexpected delay in voyage, *Cator* v. *Great West. Ins. Co.*, L. R. 8 C. P. 552, 2 Asp. Mar. L. C. 90, 42 L. J. C. P. 266, 29 L. T. 136, 21 W. R. 850. Nor loss by bottomry on cargo for benefit of ship, *Greer* v. *Poole*, 5 Q. B. D. 272, 49 L. J. Q. B. 463, 42 L. T. R. 687, 28 W. R. 582. Nor statutory salvage or reward for saving life from wreck, *Nourse* v. *Liverpool, etc., Assoc.* (1896), 2 Q. B. 16, 74 L. T. R. 543, 65 L. J. Q. B. (N. S.) 507. Nor forfeiture of freight, arising from the exercise of a power of mulct or canceling option by the charterer, etc., *Inman S.S. Co.* v. *Bischoff*, 5 Asp. Mar. L. C. 6, 52 L. J. Q. B. 169, 31 W. R. 141, 7 App. Cas. 670, 47 L. T. 581; *Mercantile S.S. Co.* v. *Tyser*, 5 Asp. Mar. L. C. 6, note, 7 Q. B. D. 73, 29 W. R. 790. See instances of remote damage in *Mathews* v. *Howard Ins. Co.*, 11 N. Y. p. 15.

[1] See § 439, *supra*.

[2] See §§ 201, 202, 205, *supra*.

[3] *Soelberg* v. *Western Assur. Co.*, 119 Fed. 23, 32, 55 C. C. A. 601; *Dupeyre* v. *Western Mar. & F. Ins. Co.*, 2 Rob. (La.) 457, 38 Am. Dec. 218; *The Xantho*, 12 App. Cas. 509; *Magnus* v. *Buttemar*, 11 C. B. 875. Thus a policy does not cover the chemical action of the sea on the Atlantic cable coiled in a ship, there being no influx of sea water, *Paterson* v. *Harris*, 1 Best. & S. 336, 101 E. C. L. 336. Nor damage to the subject insured caused by climate, *Martin* v. *Salem Mar. Ins. Co.*, 2 Mass. 420. Nor injuries to boilers or machinery on ship board occasioned by their ordinary operation, unaffected by sea peril, *Thames & M. Ins. Co.* v. *Hamilton*, L. R. 12 App. Cas. 484, 56 L. J. Q. B. 626, 6 Asp. M. C. 200, 57 L. T. R. 695. Nor the explosion of boiler, unless specifically mentioned in the policy, *Miller* v. *Cal. Ins. Co.*, 76 Cal. 145, 18 Pac. 155, 9 Am. St. R. 184. But as to explosion of boilers, see *Citizens' Ins. Co.* v. *Glasgow*, 9 Mo. 411; *Perrin* v. *Protection Ins. Co.*, 11 Ohio St. 147, 38 Am. Dec. 728. Bilging of ship by the rising tide during repairs was held not covered by the policy, *Thompson* v. *Whitmore*, 3 Taunt. 227. But compare *The Natchez*, 42 Fed. 169.

[4] *Fawcus* v. *Sarsfield*, 6 E. & B. 192. For instance, where a chain parts owing to a defective link, the consequent loss of the anchor and chain is not recoverable under the policy. Again, there may be an original flaw in the welding of a sternpost, shaft, or other part of the hull or machinery, which, though at first so slight as to be imperceptible, gradually reveals itself and becomes enhanced by the working of the vessel at sea, until it culminates in a breakdown of the part affected. In such a case the cost of making good the injury will not form the subject of

Thus the court said that the question for the jury's determination was as follows: Was the leak from which the vessel foundered attributable to injury or violence from without or to weakness from within? For if it was not attributable to perils of the seas—that is, to the violent action of the elements from without, or any other casualty involved in perils of the seas,—the jury could come to no other conclusion than that it was due to an inherent infirmity in the ship itself.[1]

§ 446. Inherent Vice.—A loss occasioned by an inherent defect or vice in the insured article is not within the terms of the policy,[2] although it may be aggravated by the prolongation of the voyage occurring because of sea perils.[3]

Loss by inherent vice includes, for example, natural and ordinary diminution by leakage or evaporation, natural and ordinary disease, decay, fermentation or other deterioration in the subject insured.[4] Thus if an insured cargo of hemp effervesced because put on board in a damp state and generated fire which consumed it, Lord Ellenborough said that the underwriters would not be liable.[5] But on the other hand, if leakage from casks is occasioned by the shifting of the casks in the ship's hold caused by a gale of wind the loss must be attributed to a peril of the seas.[6]

a claim under the policy, *Thames & Mersey Marine Ins. Co.* v. *Hamilton*, L. R. 12 App. Cas. 484, 56 L. J. Q. B. 626, 6 Asp. M. C. 200, 57 L. T. 695, 36 W. R. 337.

[1] *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. D. 596; *Swift* v. *Union Mut. Mar. Ins. Co.*, 122 Mass. 573.

[2] *Providence Wash. Ins. Co.* v. *Adler*, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314; *Boyd* v. *Dubois*, 3 Camp. 133.

[3] Thus where fish and meat becomes putrid, rice or flour heated, fruit rotten, wine sour, or hides tainted, not by contact with sea water, but by natural decomposition, *Taylor* v. *Dunbar*, L. R. 4 C. P. 206, 38 L. J. C. P. 178, 17 W. R. 382; *Koebel* v. *Saunders*, 17 C. B. (N. S.) 71; *Baker* v. *Mfrs. Ins. Co.*, 12 Gray, 603; *Perry* v. *Cobb*, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389 ("the policy does not secure against a protracted voyage. . . . Insurance is not on the voyage but for the voyage.") Death of slaves insured caused by lack of provisions owing to prolongation of voyage due to sea perils is not covered, *Tatham* v. *Hodgson*, 6 D. & E. 656. Nor loss of a slave leaping overboard, *Jones* v. *Schmole*, cited 1 T. R. 130. Nor injury to ship directly or proximately occasioned by rats, *Hunter* v. *Potts*, 4 Camp. 203. Or by worms or vermin, *Hazard* v. *Ins. Co.*, 8 Pet. 557, 8 L. Ed. 1043; *Rohl* v. *Parr*, 1 Esp. 444. But otherwise if, as a consequence of the action of rats, sea water enters and proximately causes the damage, *Garrigues* v. *Coxe*, 1 Binn. (Pa.) 592; *Hamilton* v. *Pandorf*, 12 App. Cas. 518.

[4] *Cory* v. *Boylston F. & M. Ins. Co.*, 107 Mass. 140, 9 Am. Rep. 14; Eldridge (1907), pp. 94, 95. Willes, J., says: "By the expression 'vice' is meant only that sort of vice which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result," *Blower* v. *Gt. W. R. Co.*, L. R. 7 C. P. 662.

[5] *Boyd* v. *Dubois*, 3 Camp. 13.

[6] *Crofts* v. *Marshall*, 7 C. & P. 597. So also in case of injury to cattle caused by rolling of the vessel, *Lawrence* v. *Aberdein*, 5 B. & Ald. 107. Leakage by stranding may be ex-

Accordingly, it will be clearly seen by a perusal of this and the preceding sections of this chapter that, to fasten liability upon a marine underwriter, it is not enough merely to show a loss to the insured occasioned by a misfortune or casualty happening *on* the sea, or aboard a ship. The insured must go further than this, and prove that the loss to his insured interest was caused by a peril *of* the sea, or by some agency or force for the action of which, under the decisions of the courts, the underwriter is held responsible. And some of these decisions are technical.

In a famous case tried in England, the steamer *Inchmaree* with her machinery, including a donkey-engine, was insured by the defendant. For purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when, owing to a valve having been inadvertently closed, water was forced into and split open the air-chamber of the donkey-pump, damaging it to the extent of about £72, 10*s*. The closing of the valve was not due to ordinary wear and tear, nor had the action of the sea, waves, or winds anything to do with it. The House of Lords, reversing the court below, held that whether the injury occurred through negligence, or accidentally without negligence, the loss was not covered by the policy, either under the words "perils of the seas," or under the general words "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of insurance." [1]

According to the doctrine of this and other cases, if the crew, during an adventure insured, intentionally and maliciously smash a donkey-pump in the ship, their act is barratrous and the loss is covered by the ordinary marine policy,[2] but if in connection with the navigation of the ship they inadvertently cause the same damage, the loss is not covered. Such a narrow interpretation of the general words "all other perils, losses," etc., though in accord with other decisions relating to marine insurance, seems somewhat in contrast with the inclusive rule of construction usually applied to the fire policy,[3] and materially diminishes the commercial value of the instrument containing them. It is not improbable that the

pressly covered, *De Farconnet* v. *Western Ins. Co.*, 110 Fed. 405.

[1] *Thames & Mersey Mar. Ins. Co.* v. *Hamilton*, 12 App. Cas. 484 (reviewing many cases; itself cited in 171 U. S. 461, 202 U. S. 397.) In consequence of this decision the Inchmaree or machinery clause was devised, see Appendix, ch. II. As to construction of Inchmaree clause see *Oceanic S. Co.* v. *Faber*, 11 Com. Cas. 179 (latent defect, breakage of shafts); *Cleveland & B. Transit Co.* v. *Ins. Co. of N. A.*, 115 Fed. 431.

[2] See § 434, *supra*.

[3] See § 90, *supra*.

original framers of the marine policy intended that it should carry with it a broader scope than has been given to it by the established views of the courts of England and of this country. The ancient Florentine policy in the perils clause, after the words "robbery by friend or foe," contains the sweeping expression "and every other chance, peril, misfortune, disaster, hindrance, misadventure, though such as could not be imagined or supposed to have occurred, or be likely to occur," etc. So far as the intention of the insuring public is concerned, when they pay their premiums for marine insurance, their aim and purpose are, in general, to procure full protection to the insured interest during the specified adventure. They do not have in mind philosophical distinctions relating to causes and effects by means of which certain classes of accidental injuries occurring in connection with the adventure are to be excluded from the operation of the usual policy.

With the *Inchmaree* case may be compared another English case in which the policy words "all risks by land and by water," though used in conjunction with an enumeration of certain risks by many special clauses, were held not to be limited in meaning by association with the special clauses, but to signify "all risks whatsoever," and "to cover all losses by any accidental cause of any kind." [1]

§ 447. Application of Principles to Particular Average.—The practical application of the foregoing principles to the adjustment of particular average, that is of partial loss, under the usual policy of marine insurance, is a matter of delicacy and gives employment to professional adjusters.[2]

§ 448. The Sue and Labor Clause.—The sue and labor clause,[3]

[1] *Schloss Bros.* v. *Stevens* (1906), 11 Com. Cas. 270; and see *Jacob* v. *Gaviller* (1902), 7 Com. Cas. 116.

[2] MacArthur, Mar. Ins. (2d ed.), 212–273; Arnould, Mar. Ins. (7th ed.), §§ 1008–42. To distinguish what is wear and tear or ordinary deterioration from sea damage in particular cases is often a complicated matter, *Phillips* v. *Nairne*, 4 C. B. 343, 11 Jur. 455, 16 L. J. C. P. 194; and must, to a great extent, be left to the trained judgment of experts in such matters.

[3] "And, in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the said vessel [or goods and merchandises, etc.] or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers in saving, recovering, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured." Although the sue and labor clause has been part of the conventional English and American marine policy from time immemorial, Phill., Ins., § 43, *Munson* v. *Standard Mar. Ins. Co.*, 156 Fed. 44, the decisions

though part of the policy, is to be treated as wholly distinct from the engagement to indemnify for losses caused by the perils insured against,[1] and, therefore, in exceptional cases this collateral agreement may impose upon the underwriter an obligation to make payment to the insured even in excess of the entire amount for which the policy is underwritten.[2] For example, in case of expenses paid by the master in an unsuccessful attempt to recover captured property, in addition to a total loss of the property by the capture.

For the same reason liability under the sue and labor clause is not a liability for particular average, and is not subject to the percentage

under it in this country have not been very numerous, due in a measure, perhaps, to the presence in the usual American policy of the warranty "free from any expense in consequence of capture, seizure, detention, or blockade." See § 462, *infra*.

[1] *Lohre* v. *Aitchison*, 2 Q. B. D. 509. The English codification provides as follows: "(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage. (2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause. (3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause. (4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimizing a loss," Eng. Mar. Ins. Act (1906), § 78. The last subdivision is supposed to be based upon *Benson* v. *Chapman* (1849), 2 H. L. C. 496; *Notara* v. *Henderson* (1872), L. R. 7 Q. B. 225; see Chalmers & Owen, Ins. (1907), 118. But it has been said, "If this subsection means that the right to recover is to be conditional on the performance of this duty, it seems to be new law, imposing a most serious obligation on the assured, and inconsistent with *Trinder & Co.* v. *Thames and Mersey Mar. Ins. Co.* (1898), 2 Q. B. 114; 67 L. J. Q. B. 666; and with § 55 (2) (a), which gives effect to the decision in that case," De Hart & Simey, Ins. (1907), 87.

[2] *Aitchison* v. *Lohre*, 2 Q. B. D. 502, 3 Q. B. D. 553, 566, 4 App. Cas. 755; *Gilchrist* v. *Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43. Temporary repairs to vessel safe in port to make her seaworthy are not covered by the sue and labor clause, *Alexander* v. *Sun Mut. Ins. Co.*, 51 N. Y. 253, 262. In the last case, Lott, Ch. J., says at p. 257: "That provision has reference to charges not covered by the insurance and does not embrace losses caused by damage to the property insured. Its object was to secure diligence in its preservation and protection, and thereby prevent a loss or reduce its amount and to provide compensation for the labor done and expenses incurred in accomplishing that end." And see *Providence & S. S.S. Co.* v. *Phœnix Ins. Co.*, 89 N. Y. 559; *Francis* v. *Boulton*, 73 L. T. R. 578, 65 L. J. Q. B. (N. S.) 153; *Meyer* v. *Ralli*, 1 C. P. D. 358. Such expenses, however, must be reasonable, *Lee* v. *Southern Ins. Co.*, L. R. 5 C. P. 397. The United States Supreme Court uses these words: "The public interest requires both the assured and assurer to labor for the preservation of the property, and to that end this provision is made so that it may be done without prejudice," *Washburn & M. Mfg. Co.* v. *Reliance Mar. Ins. Co.*, 179 U. S. 1, 18, 21 S. Ct. 1, 45 L. Ed. 49. Independent of this clause it has been held that where a partial loss of a vessel has been repaired and a subsequent total loss happens the underwriter must pay both, though exceeding amount of policy, *Matheson* v. *Equitable Mar. Ins. Co.*, 118 Mass. 209. See § 208, *supra*.

restrictions contained in the memorandum clause,[1] but is to be met in due proportion whatever the amount.[2] This provision of the policy has reference to expenditures not covered by the general perils clause;[3] and in England general average losses including contributions are not recoverable under the sue and labor clause;[4] nor in England does the clause include the reward payable by maritime law to voluntary salvors; but if compensation is payable to salvors under contract with the insured the rule is otherwise.[5] In the latter event the expense becomes recoverable either under the sue and labor clause, or as general average according to circumstances.[6]

Two reasons are offered by the English court to explain why the words of the sue and labor clause should not be held to include the extraordinary recompense paid to voluntary salvors. In the first place voluntary salvors cannot be regarded as the agents of the insured,[7] since they intervene of their own accord to save ship and cargo from impending disaster and act independently of contract. In the second place their compensation is not based upon a *quantum meruit*, but in case of success they receive a large reward and in case of failure they get nothing.[8]

In the United States the view seems to prevail that where an expense has been properly incurred in order to avert a loss insured against and the measure for relief has been rendered by direction of the master of the ship or other agent of the insured, the expenditure is recoverable under the sue and labor clause regardless of whether it belongs to general average or not.[9] But in case of the salvage or

[1] See § 456, *infra*.

[2] *Kidston* v. *Empire Marine Ins. Co.*, L. R. 1 C. P. 535. In estimating the proportionate liability for such expenses under a valued policy, the policy valuation and not the actual value controls, though the sum so computed equal the entire amount insured, *Standard Mar. Ins. Co.* v. *Nome, etc., Co.*, 133 Fed. 636.

[3] *Alexander* v. *Sun Mut. Ins. Co.*, 51 N. Y. 253.

[4] Mar. Ins. Act (1906), § 78 (2); *Montgomery* v. *Indemnity Mut. Mar. Ins. Co.* (1901), 1 Q. B. 147; *Aitchison* v. *Lohre*, 4 App. Cas. 755, 49 L. J. Q. B. 123.

[5] *Aitchison* v. *Lohre*, 4 App. Cas. 755, in which Lord Blackburn, with the approval of other judges, says, "I think that general average and salvage do not come within either the words or the object of the suing and laboring clause, and that there is no authority for saying that they do."

[6] *Peters* v. *Warren Ins. Co.*, 14 Pet. (U. S.) 99; *International Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 Fed. 304; Eng. Mar. Ins. Act (1906), § 65; De Hart & Simey, Ins. (1907), 76.

[7] The English law does not recognize the doctrine of "agents of necessity," Chalmers & Owen, Ins. (1907), 96.

[8] *Aitchison* v. *Lohre*, 4 App. Cas. 755, 49 L. J. Q. B. 123, criticized by Mr. Maclachlan in Arnould (6th ed.), 793. The reward to volunteer salvors is often very large, *The Glengyle* (1898), App. Cas. 519; *The Inca*, 12 Moo. P. C. 189. For thorough discussion of rules relating to salvage contracts see *The Elfrida*, 172 U. S. 186, 19 S. Ct. 146, 43 L. Ed. 413.

[9] *International Nav. Co.* v. *Atlantic*

remuneration payable to volunteer salvors by maritime law independent of contract, the English rule has been applied by a federal court as the law of this country.

The bark *Samuel Welsh*, owned and insured by Buzby, was driven ashore on the rocks on the coast of Nova Scotia. The master and crew left the vessel to save their lives. Wreckers got possession of her afloat, brought her into the port of Yarmouth and libeled both vessel and cargo for their salvage reward. To release the lien of the salvors Buzby sent an agent to Yarmouth at considerable expense, and contended in his suit on his policy that the defendant, one of the insurers, was liable for its share of the salvage charges and expenses of the agent connected therewith, by virtue of the usual sue and labor engagement of the underwriters. A federal district judge, however, decided that these charges and expenses were not recoverable under that clause, and hence under the warranty of that particular policy they were not recoverable at all.[1]

The object of the clause is to furnish compensatory encouragement to the insured, to put forth diligent and prudent effort towards a prevention or diminution of the underwriters' loss, without prejudice to the rights of either party under the policy of insurance.[2]

Two conditions are requisite to constitute a valid claim under the sue and labor clause: the apprehended loss must be something for which the underwriters would have been liable, and the measure for safety which gives rise to the expense claimed must be the act of the assured himself or of his agent or servant.[3] If, for example, goods are insured "free of capture," it is clear that an expense incurred to prevent a capture could not be claimed under this clause; nor, if "against total loss only,"[4] an expense incurred merely to diminish damage or avert a loss other than total.[5]

Mut. Ins. Co., 100 Fed. 313, 322 (Brown, J.); *Alexander* v. *Sun Mut. Ins. Co.*, 51 N. Y. 253; *Jumel* v. *Marine Ins. Co.*, 7 John. (N. Y.) 412; Phill., Ins., § 1742. If no other agent is appointed the master of the ship is the agent to represent all interests under the sue and labor clause, *Hume* v. *Frenz*, 150 Fed. 502. An original insurer is not the agent or factor of his reinsurer within the meaning of this clause, *Uzielli* v. *Boston Mar. Ins. Co.* (1884), 15 Q. B. D. 11, 54 L. J. Q. B. 142.

[1] *Buzby* v. *Phœnix Ins. Co.*, 31 Fed. 422 (on the authority of *Aitchison* v. *Lohre*, 4 App. Cas. 755). And see *International Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 Fed. 313.

[2] *Munroe* v. *Ins. Co.*, 52 Fed. 777, 3 C. C. A. 280 (encouragement); *Soelberg* v. *Western Assur. Co.*, 119 Fed. 23 (without prejudice).

[3] *Aitchison* v. *Lohre*, 4 App. Cas. 755; *Uzielli* v. *Boston Mar. Ins. Co.*, 15 Q. B. D. 11.

[4] Or "free from average unless general," etc.

[5] *Kidston* v. *Empire Ins. Co.*, L. R. 1 C. P. 543, Exch. L. R. 2 C. P. 357; *Booth* v. *Gair*, 15 C. B. (N. S.) 291, 33 L. J. C. P. 99. Where salvors pick up a ship derelict at sea, or as volunteers, and bring the property to port in safety, without being in any sense hired by an agent of the assured, the payment for salvage is not a claim under the sue and

The advantage to the insured in being able to assign expenditures to the sue and labor clause lies in the circumstance, already mentioned, that it contains a promise of payment by the underwriters which is supplementary to their contract of insurance. Therefore recovery under this special promise is not limited to the face amount of the policy, and the supplementary engagement is still operative although the insurer may have paid for a total loss,[1] and although the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.[2] In the majority of cases, however, it is wholly immaterial to the parties whether expenses incurred for the purpose of averting or diminishing a loss insured against are or are not assignable to the sue and labor clause;[3] but there cannot be more than one recovery on the same item of loss by its repetition under different heads or counts.[4]

labor clause, *Aitchison* v. *Lohre*, 4 App. Cas. 755. An award to salvors for saving Egyptian obelisk on way to London not covered, *Dixon* v. *Whitworth*, 4 Asp. Mar. L. C. 327. The cost of repairs to ship in safety is not a claim under that clause, *Alexander* v. *Sun Mut. Ins. Co.*, 51 N. Y. 253; while the cost of becoming entitled to charter freight by a justifiable transshipment into another's vessel is; because in the latter case there is a worse evil averted, while in the former case there is not, *Kidston* v. *Empire Mar. Ins. Co.*, L. R. 1 C. P. 535, Exch. Ch., 2 C. P. 357. The expense of sending out a tug to look up insured scows, erroneously supposed to be adrift, is not recoverable under the sue and labor clause, *Barney Dumping Boat Co.* v. *Niagara F. Ins. Co.*, 67 Fed. 341, 14 C. C. A. 408, 35 U. S. App. 100. This clause did not justify insured in moving a vessel warranted to be safely moored in the harbor, *Ryan* v. *Prov. Wash. Ins. Co.*, 79 App. Div. 316, 79 N. Y. Supp. 460. Nor has the sue and labor clause anything to do with the collision clause so as to include costs of defending a collision suit, *Xenos* v. *Fox*, L. R. 3 C. P. 630, 4 C. P. 665. And see *Fernald* v. *Ins. Co.*, 27 App. Div. (N. Y.) 137. Compare § 428. Where the carrier's insurance was not on a cargo of mules but only on his liability as carrier it was held that his expenses for saving some of them after a stranding of the ship were not recoverable, since the sue and labor clause has no application to such an insurance, though not erased in the policy, *Cunard S. Co.* v. *Marten* (1903), 2 K. B. 511. Policy was for total loss only. The loss turned out not to be total. *Held*, that the underwriters, thus relieved from liability, could not get back salvage expenses voluntarily paid by them, though resulting in benefit to the assured, *Crouan* v. *Stanier* (1904), 1 K. B. 87. The costs of an unsuccessful suit against a lighterman for negligence were apportioned between the insurer and assured where the suit was brought by consent and for joint benefit of both, *Brown* v. *Binning* (1906), 11 Com. Cas. 190.

[1] *Alexander* v. *Sun Mut. Ins. Co.*, 51 N. Y. 253 (many cases cited by court and counsel). And see *Buzby* v. *Phœnix Ins. Co.*, 31 Fed. 422.

[2] *The Indianapolis Ins. Co.* v. *Mason*, 11 Ind. 171; *Shultz* v. *Ohio Ins. Co.*, 1 B. Mon. (Ky.) 336. And see *Biays* v. *Chesapeake Ins. Co.*, 7 Cranch (U. S.), 415.

[3] Arn., Mar. Ins. § 864. Such expenses are recoverable either on the theory of the express agreements contained in the policy or on the theory of an implied obligation of the underwriters analogous to the case of general average, Arn. § 863; *International Nav. Co.* v. *Atlantic Mut. Ins. Co.*, 100 Fed. 304; *Sewall* v. *United States Ins. Co.*, 11 Pick. (Mass.) 90. In the case of certain expenditures the insured may have the option of pleading on either the general perils clause or the sue and labor clause, Arn. § 869; *Levie* v. *Janson* (1810), 12 East, 648.

[4] *Alexander* v. *Sun Mut. Ins. Co.*, 51

Familiar instances of the operation of the sue and labor clause are found in the case of expenditures for the rescue and removal of a wrecked or submerged vessel from the strand or other position of danger to a place of safety;[1] expenses for unloading, drying, warehousing, packing and forwarding required for the preservation of the cargo from injury or destruction;[2] charges for expense of litigation or otherwise incurred, usually in a foreign land, in the endeavor to recover back property seized or captured.[3] As to the form that the expenditure may take, it is said that there is no restriction so long as it is directed to saving interests in peril at the time the expense is incurred.[4]

Thus it will be observed that this clause is strictly confined to the cost of efforts made to save the thing insured from damage by the perils insured against in the policy.[5]

N. Y. 253 ("the two provisions, as I have stated, relate to different subjects, and the right to compensation and payment under one of them necessarily excludes a right to a claim or demand under the other," by Lott, Ch. C.).

[1] *Soelberg* v. *Western Assur. Co.*, 119 Fed. 23; *Ellicott* v. *Alliance Ins. Co.*, 14 Gray (Mass.), 318; *Perry* v. *Ohio Ins. Co.*, 5 Ohio, 305.

[2] *Cory* v. *Boylston Ins. Co.*, 107 Mass. 140, 9 Am. Rep. 14.

[3] *Jumel* v. *Mar. Ins. Co.*, 7 Johns. (N. Y.) 412; *Watson* v. *Mar. Ins. Co.*, 7 Johns. (N. Y.) 57; *McBride* v. *Mar. Ins. Co.*, 7 Johns. (N. Y.) 431; *Lawrence* v. *Van Horne*, 1 Caines (N. Y.), 276; *Bordes* v. *Hallett*, 1 Caines (N. Y.), 444.

[4] Eldridge (1907), 129. But the expense to fall within this particular clause must have been incurred to prevent impending loss when the subject insured is actually in peril, *Great Indian Peninsular R. Co.* v. *Saunders*, 31 L. J. Q. B. 206 (iron rails not in peril). And see *Frichette* v. *State, etc., Ins. Co.*, 3 Bosw. (N. Y.) 190 (ship being launched).

[5] Eldridge (1907), 127. If the goods are in no danger at the time, the expense of forwarding them by other ships, the original ship being a constructive total loss, is not recoverable under the sue and labor clause, *Great Indian Pen. Ry.* v. *Saunders*, 2 B. & S. 266, 31 L. J. Q. B. 206; *Booth* v. *Gair*, 33 L. J. C. P. 99. But particular charges for drying, warehousing, and packing, incurred to save the insured goods are recoverable under this clause, *Francis* v. *Boulton*, 73 L. T. R. 578. The insured, however, is only bound to pay salvage expenses reasonably incurred, see *Anderson* v. *Ocean S. S. Co.*, 10 App. Cas. 107. For such reasonable charges the insured is entitled to be reimbursed in proper proportion by his underwriters though exceeding the whole amount underwritten, *Watson* v. *Mar. Ins. Co.*, 7 Johns. (N. Y.) 57; *Lohre* v. *Aitchison* (1878), 3 Q. B. D. 558; *Dixon* v. *Whitworth*, L. R. 4 C. P. D. 371, reversed 4 Asp. M. L. C. 327. An English policy insured live cattle against all risks, including mortality from any cause whatsoever. While the vessel in which they were shipped was detained in a port of refuge for necessary repairs due to perils of the sea, extra cost for fodder supplied to the cattle was incurred. For this expense, incurred to avert danger of loss of the cattle, the underwriters were held liable under the sue and laboring clause, *The Pomeranian* (1895), Prob. 349. The New York court says, but without express reference to the sue and labor clause: "That all losses, charges and expenses necessarily, prudently or reasonably incurred in respect to the property saved, from the time of the shipwreck to the time when the property could be directly transported to its ultimate destination, are proper charges upon the property so transported, and ought to be borne by the assurers. That the sums paid for transporting the master and crew, for their support, board, and lodging and passages during the same

A case in the federal court furnishes a good illustration of the reasonable application of the sue and labor clause. There the insured, a storage company, was engaged in the business of selling, in Alaska, certain refrigerated supplies. Its policy covered a cargo of refrigerated meats, canned goods, etc., on a voyage from Tacoma Wash., to Dawson, Yukon Territory. Owing to the very low water there was a stranding of the refrigerating vessel on the Yukon river causing a delay of several days. Part of the cargo was thereupon transferred to a lighter steamer without refrigerating plant. Both vessels reached Circle City in October. The river above had become partially closed by ice and navigation was dangerous. The refrigerating vessel was then laid up and the lighter steamer proceeded until frozen in seventy miles from Dawson. Both vessels were in danger of being crushed or disabled by the ice and their cargoes lost by the spring freshets. To avert this peril, both cargoes were transported to Dawson by land during the winter. The court held that the expense of this transportation was within the sue and labor clause of the policy.[1]

The plaintiff Munson had a liability policy attaching on his steamtug *Carbonero* and indemnifying against liability to her tows or other vessels by collision or stranding. A barge in her tow was lost and to recover damages the plaintiff's tug was libeled, but the libel was ultimately dismissed. In obtaining this successful result of the litigation against him Munson of course was put to the expense of counsel fees and other disbursements. He brought action against his insurer to reclaim his expenses under the sue and labor clause. The court held that there was no liability on the part of the insurer when there was no liability on the part of the tug or its owner, and that there could be no recovery under the sue and labor clause for the expense of determining judicially that the tug was free from liability to the tow.[2]

It will also be remembered that if the total amount of insurance, except in case of a liability policy,[3] is short of the value of the prop-

period, are also proper charges upon the property, and ought to be borne by the assurers. That the master and seamen also, after becoming disconnected from the vessel by the shipwreck, are entitled to compensation as laborers, or salvors for their services in transporting and in saving the cargo; to be allowed according to the nature of the services," *Lewis* v. *Williams*, 1 Hall (N. Y.), 429.

[1] *St. Paul Fire & Mar. Ins. Co.* v. *Pacific Cold Storage Co.*, 157 Fed. 625.

[2] *Munson* v. *Standard Mar. Ins. Co.*, 156 Fed. 44. For libel suit see 122 Fed. 753, 58 C. C. A. 553, 106 Fed. 329, 45 C. C. A. 314.

[3] *Ursula Bright* v. *Amsinck*, 115 Fed. 243. The possible extent of future liability cannot be estimated.

erty insured,[1] the assured is himself a coinsurer for the deficiency.[2] The assured in such a case will have to bear his proportion of the expenses under the sue and labor clause.[3] And by virtue of the same doctrine, if anything is realized by way of net salvage, the insured is entitled to receive his proper share, as a coinsurer, unless he has assigned away his rights, for example, by instrument of cession to the underwriters.

The plaintiffs Duffield and others were owners of the steamboat *Sam Cloon*. The value of the vessel as agreed upon in the policies was $20,000, the total insurance $15,000, leaving the owners insurers to one-fourth the value. The steamboat was sunk in the Mississippi river, and abandoned to the insurers, who accepted the abandonment and proceeded to raise the wreck. The net amount of salvage recovered by the underwriters as a result of their operations was $3,000. Under the phraseology of the sue and labor clause of the policy the insurers contended that they were entitled to keep the whole of the proceeds, but the court held that the plaintiffs were entitled to recover from them one-fourth of the net amount of salvage realized.[4]

§ 449. Exemption under Five Per Cent.—*No partial loss or particular average shall in any case be paid unless amounting to five per cent.*

The purpose of this restriction is to relieve the insurers from such small injuries as may very probably be caused by the natural deterioration of perishable articles, and to exempt them from trifling losses often arising more from wear and tear than from perils insured against.[5]

[1] If the policy is valued, that value controls, *Standard Mar. Ins. Co.* v. *Nome Beach, etc., Co.*, 133 Fed. 636; *The Potomac* v. *Cannon*, 105 U. S. 630, 26 L. Ed. 1194. The rule applies likewise to unvalued policies, *Chicago Ins. Co.* v. *Graham, etc., Trans. Co.*, 108 Fed. 271; *Soelberg* v. *Western Assur. Co.*, 119 Fed. 33; 2 Phill., Ins., § 1435; and cases below.

[2] See § 50, *supra; Hood Rubber Co.* v. *Atlantic Mut. Ins. Co.*, 161 Fed. 788; *Fay* v. *Alliance Ins. Co.*, 16 Gray (Mass.), 455; *Whiting* v. *Independent Mut. Ins. Co.*, 15 Md. 297; Eng. Mar. Ins. Act (1906), § 81; *The Commonwealth* (1907), Prob. 216.

[3] *Egan* v. *Brit. & For. Mar. Ins. Co.*, 88 Ill. App. 552, aff'd 193 Ill. 295, 61 N. E. 1081, 86 Am. St. R. 342; *Phillips* v. *St. Louis P. Ins. Co.*, 11 La. Ann. 459; *Cunard S. Co.* v. *Marten* (1902), 2 K. B. 629 (criticising *The Livingston*, 130 Fed. 746); *Lohre* v. *Aitchison* (1878), 3 Q. B. D. 558; Chalmers & Owen (1907), p. 117. And see *The Commonwealth* (1907), Prob. 216; *Brown* v. *Binning* (1906), 11 Com. Cas. 190.

[4] *Cincinnati Ins. Co.* v. *Duffield*, 6 Ohio St. 200. And see *Gilchrist* v. *Chi. Ins. Co.*, 104 Fed. 566. But if the insured had made no claim to a share of the salvage the salvage expenses of the underwriters would have been of no concern to him, nor would he have been obligated to reimburse the underwriters for any part of such expenses.

[5] See § 444. By the English view successive losses may be added to

§ 450. **Other Assurance Clause.**—*If the assured shall have made other assurance prior in date to this policy, this company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured, and this company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from; and in case of any assurance upon said premises subsequent in date to this policy, this company shall nevertheless be answerable for the full extent of the sum by them subscribed without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made.*

This is the American clause [1] which differs from the ordinary provision of the English marine policy under which subsisting policies are liable for loss irrespective of the dates of subscription.[2] Under the clause priority is determined by reference to the time of effecting the insurance, not to the time of the inception of the risk,[3] and for this purpose the written date of the policy is not conclusive.[4]

If the property is fully covered by the prior insurance, the subsequent insurance does not attach; but it has been held that if the prior insurance terminates during the term of the subsequent insurance, the latter will then attach,[5] but not if the prior insurance becomes unavailing because of the insolvency of the underwriter,[6] or because of cancellation by agreement of the parties.[7]

gether to make up the required percentage, *Blackett* v. *Royal Exchange Ass. Co.*, 2 Cr. & J. 244, 1 L. J. Ex. 101, 2 Tyr. 266. And in this country as to cargo, *Donnell* v. *Columbian Ins. Co.*, 7 Fed. Cas. 889. But not as to ship, *Luma* v. *Atlantic Mut. Ins. Co.*, 15 Fed. Cas. 1109; *Hagar* v. *Eng. Mut. Mar. Ins. Co.*, 59 Me. 460; *Brooks* v. *Oriental Ins. Co.*, 7 Pick. (Mass.) 259; (question left open as to cargo); *Paddock* v. *Commercial Ins. Co.*, 104 Mass. 521. If hull and machinery are separately valued they are to be regarded as separate insurances, *American S.S. Co.* v. *Indem. Mut. Mar. Ins. Co.*, 108 Fed. 421, 118 Fed. 1014, 56 C. C. A. 56.

[1] History and object of this clause set forth in *Ryder* v. *Phœnix Ins. Co.*, 98 Mass. 185.

[2] *American Ins. Co.* v. *Griswold*, 14 Wend. (N. Y.) 399. Under the English rule in case of overinsurance, the insured might enforce indemnity against one or more underwriters within the limit of their subscription, leaving it to the underwriters to secure equitable contribution among themselves, *Ryder* v. *Phœnix Ins. Co.*, 98 Mass. 185, 190 (cases cited). Fractions of a day in general are not regarded, *Isaacs* v. *Royal Ins. Co.* (1870), L. R. 5 Exch. 296, 39 L. J. Exch. 189. But if two or more policies are made on the same day, insuring the same property against the same risks, and the question of priority is material, this priority will be determined by ascertaining at what time on that day the first was made, *Potter* v. *Marine Ins. Co.*, 2 Mason (U. S. C. C.), 475.

[3] *Carleton* v. *China Mut. Ins. Co.*, 174 Mass. 28, 54 N. E. 559, 46 L. R. A. 166.

[4] *Lee* v. *Mass. Ins. Co.*, 6 Mass. 208.

[5] *Kent* v. *Manufacturers' Ins. Co.*, 18 Pick. (Mass.) 19.

[6] *Ryder* v. *Phœnix Ins. Co.*, 98 Mass. 185.

[7] *Seamans* v. *Loring*, 21 Fed. Cas. 920, 1 Mason, 127.

If all the policies, or several of them, of different dates do once attach, and the property is diminished below their aggregate amount during their life, it has been held that the insurance abates first on the latest policies.[1]

§ 451. Warranted Uninsured.—A warranty of "uninsured" or of no other insurance is not broken if the other insurance is void by statute.[2] This warranty is analogous to the clause of the fire policy prohibiting other insurance without written consent from the insurer.[3]

§ 452. Warranted Uninsured beyond a Specified Amount.—The purpose of such a warranty is to compel the insured to retain a personal interest in the preservation of the subject and thus to encourage the exercise of care on his part.

The amount named is construed to refer to effective insurance, not to that which is unavailable because of its invalidity or because the underwriter is irresponsible.[4]

§ 453. Warranted Free of Capture, etc.—The phrase "warranted free of," etc., as sometimes employed in the marine policy means that the underwriter is relieved of responsibility for any loss caused by the peril thus excepted.[5]

The ordinary free of capture, seizure and detention clause, known as the F. C. S. warranty, materially curtails the general liability of the underwriter.[6]

[1] *American Ins. Co.* v. *Griswold*, 14 Wend. (N. Y.) 399. As to what is other or double insurance, see *Ryder* v. *Phœnix Ins. Co.*, 98 Mass. 185; *Kent* v. *Mfrs. Ins. Co.*, 18 Pick. (Mass.) 19; *Columbian Ins. Co.* v. *Lynch*, 11 Johns. (N. Y.) 233 (same person subject and risk essential); *Wells* v. *Phila. Ins. Co.*, 9 Serg. & R. (Pa.) 103; *Peters* v. *Delaware Ins. Co.*, 5 Serg. & R. (Pa.) 473. And see § 252, *supra*. But the other policy must be taken out by one having authority to act, *Palmer* v. *Great Western Ins. Co.*, 10 Misc. 167, aff'd 153 N. Y. 660. The American clause construed in *Gnoss* v. *N. Y. & T. S. S. Co.*, 107 Fed. 516.

[2] *Roddick* v. *Indemnity Mut. M. Ins. Co.* (1895), 2 Q. B. 380, 72 L. T. R. 860, 8 Asp. M. C. 24.

[3] See § 252, *supra*.

[4] *General Ins. Co.* v. *Cory* (1897), 1 Q. B. 335, 66 L. J. Q. B. (N. S.) 313. As to what is other insurance, see *Merchants' Mut. Ins. Co.* v. *Allen*, 122 U. S. 376, 7 S. Ct. 1248, 30 L. Ed. 1209; *St. Paul F. & M. Ins. Co.* v. *Knickerbocker, etc., Co.*, 93 Fed. 931, 36 C. C. A. 19; *Perkins* v. *New Eng. Mar. Ins. Co.*, 12 Mass. 214; *Davis* v. *Boardman*, 12 Mass. 80; *Mussey* v. *Atlas Mut. Ins. Co.*, 14 N. Y. 79; *Van Alstyne* v. *Ætna Ins. Co.*, 14 Hun (N. Y.), 360. And see § 252, *supra*.

[5] As to what is capture, arrest, seizure, detention, etc., see §§ 431, 432.

[6] *Miller* v. *Law Acc. Ins. Co.* (1903), 1 K. B. 712; *Tuill* v. *Robson* (1908), 1 K. B. 270. Sometimes it is worded, "warranted not to abandon in case of capture, seizure or detention until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to the assurers."

The policy issued by the defendant insured the English steamship *Romulus* against perils of the sea, but in case of total loss only, and contained a warranty "free from capture, seizure and detention and the consequences of hostilities, piracy and barratry excepted." During the Russo-Japanese war the ship sailed for Vladivostock with a cargo of coal, which had been declared contraband of war. She was captured by the Japanese, and while being navigated towards a Court of Prize was wrecked and became a total loss, but afterwards, however, she was condemned in the Prize Court. The House of Lords held that, while the loss was total, the proximate cause of the whole loss was not the wreck but the capture, and, therefore, that the owner could not recover on the policy.[1]

In another English case the policy contained a warranty against "capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." A few days before declaration of war between the United Kingdom and the Transvaal Government, the insured gold was seized by a Boer official, during land transit, because of the anticipation of war. The underwriters were relieved from liability.[2]

On the other hand, where for lack of a pilot the ship was stranded and wrecked, the court held that, in spite of the F. C. S. warranty, the underwriters were liable, since the proximate cause of the loss was a sea peril and not a confiscation of the wreck subsequently made by the commander seizing it.[3]

A seizure of a vessel by the mutinous acts of the crew is not within the warranty, but constitutes an act of barratry.[4]

§ 454. **Want of Ordinary Care and Skill.**—An exception not infrequently found in marine policies relates to losses occasioned by want of ordinary care and skill in navigation. Such an act of negligence, if the cause of the loss, will relieve the underwriter whose policy contains this restriction;[5] thus, for example, where the

[1] *Andersen* v. *Marten* (1908), App. Cas. 334 (insurance was on disbursements, but the case was determined as though it had been on hull and machinery; *held* that change of property related back to time of capture); *Goss* v. *Withers*, 2 Burr. 683 (by Lord Mansfield). Persons do not come within the phrase "contraband of war," *Yangtsze Ins. Ass.* v. *Indemnity Mut. Mar. Ass. Co.* (1908), 2 K. B. 504.

[2] *Robinson Gold Min. Co.* v. *Alliance Ins. Co.* (1904), App. Cas. 359. Compare *Nickels* v. *London, etc., Ins. Co.*, 6 Com. Cas. 15.

[3] *Hahn* v. *Corbett*, 2 Bing. 205.

[4] *Greene* v. *Pacific Mut. Ins. Co.*, 8 Allen (Mass.), 217.

[5] *Richelieu & O. Nav. Co.* v. *Boston*

engineer of the steamship intending to open the valve of a ballast tank, negligently and by mistake opened the valve of a tank in which the insured goods were being carried.[1]

In another case the policy excepted losses caused by the wilful act of the master. In spite of the exception the master deliberately forced his tug through the ice floes and thereby caused the loss. The court held that the insurers were exonerated.[2]

§ 455. **Other Perils Sometimes Excepted.**—Various other perils are sometimes expressly excepted from the scope of the insurance; for example, losses and misfortunes caused by ice [3] or all claims consequent upon loss of time.[4]

Some policies contain the cattle clause "free of mortality and jettison." The word "mortality," as so used, refers to death from natural causes as distinguished from death occasioned by the perils insured against. Thus if a horse were injured by the pitching of the vessel during a storm, the underwriter would be liable notwithstanding the cattle clause in the policy; but if the storm drove the ship far out of her course, so that the supply of fodder was exhausted and the horse died for lack of food the exception would apply in favor of the underwriter.[5]

Very frequently a warranty is inserted in the policy not to go to certain ports, or regions or waters, or not to visit them at certain

Mar. Ins. Co., 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398; *Flint, etc., Co.* v. *Mar. Ins. Co.*, 71 Fed. 210 (excessive speed in fog and no lookout); *Empire, etc., Co.* v. *Union Ins. Co.*, 32 La. Ann. 1081 (pumps not ready to work); *Levi* v. *New Orleans Mut. Ins. Assn.*, 15 Fed. Cas. 418 (negligent collision). In the following the underwriters were held liable in spite of the exception, *Northwest Transp. Co.* v. *Boston Mar. Ins. Co.*, 41 Fed. 793 (negligent speed, but not the proximate cause of loss); *The Natchez*, 42 Fed. 169 (running on the bar was justifiable); *Penn. R. Co.* v. *Manheim Ins. Co.*, 56 Fed. 301 (striking unknown obstruction); *Savage* v. *Corn Exch., etc., Ins. Co.*, 17 N. Y. Super. Ct. 1 (method of towing vessel); *Hays* v. *Phœnix Ins. Co.*, 57 N. Y. Super. Ct. 199, 6 N. Y. Supp. 3, aff'd 127 N. Y. 656, 28 N. E. 254 (conduct of mate when master became incompetent); *Lawton* v. *Royal Canadian Ins. Co.*, 50 Wis. 163, 6 N. W. 505 (whether master is bound to imperil the crew to save the vessel). And see *Rogers* v. *Ætna Ins. Co.*, 95 Fed. 103, 35 C. C. A. 396. Any question of negligence is usually one of fact, *Jones* v. *Western Assur. Co.*, 198 Pa. St. 206, 47 Atl. 948.

[1] *Blackburn* v. *Liverpool, etc., Navigation Co.* (1902), 1 K. B. 290.

[2] *Standard Mar. Ins. Co.* v. *Nome Beach, etc., Co.*, 133 Fed. 636.

[3] *Schuyler* v. *Phœnix Ins. Co.*, 134 N. Y. 345, 48 N. Y. St. R. 213, 32 N. E. 25; *Brown* v. *St. Nicholas Ins. Co.*, 61 N. Y. 332 (ice clause). Or, on the other hand, liability may be limited to damage in consequence of ice, *Huntley* v. *Prov. Wash. Ins. Co.*, 77 App. Div. 196, 79 N. Y. Supp. 35.

[4] *Turnbull, Martin & Co.* v. *Hull Underwriters*, L. R. (1900) 2 Q. B. D. 402; *Bensaude* v. *Thames & M. M. Ins. Co.* (H. L.), 66 L. J. Q. B. (N. S.) 666, 77 L. T. R. 282, (1897) A. C. 609.

[5] *Lawrence* v. *Aberdein*, 5 B. & Ald. 107; and see *Gabay* v. *Lloyd*, 3 B. & C. 793; *St. Paul F. & M. Ins. Co.* v. *Morice* (1906), 11 Com. Cas. 153.

seasons of the year. A violation of such a warranty, though unconnected with the loss, forfeits the insurance.[1]

A mere intention, however, to commit a breach of warranty does not itself constitute a breach. Thus, for example, in an English case the insured "warranted not to proceed east of Singapore." The insured vessel started on a voyage from Cardiff to Kiao-chau, a place east of Singapore. It never navigated east of Singapore because it went aground off the coast of Tunis and was totally lost there by perils of the sea. The court held that there was no breach of warranty and that the underwriters were liable.[2]

Likewise the policy often contains a warranty that the vessel shall not be loaded beyond her registered capacity,[3] or with certain cargo beyond a percentage of her registered capacity under tonnage deck, or shall not be loaded with lime under deck, or shall not be allowed to carry grain in bulk.[4] And a certificate of proper loading from an inspector may also be required.

§ 456. **Memorandum Clause.**—*Warranted free from average unless general: warranted free from average under a certain percentage unless general.*

Certain articles are in their nature perishable, or peculiarly susceptible to change. A list of such articles is made subject to the restrictions of the modern memorandum clause.[5]

The phrase "free from average unless general," as here used, though obscure, has a well-established signification. It means that the underwriter is exempt on memorandum articles from liability for anything less than a total loss, except where the loss is of the nature of general average.[6] But if the loss belongs to general average he is liable for it however small it may be.[7] "Free of particular

[1] P. 143, note, and § 424, *supra; Whiton* v. *Albany City Ins. Co.*, 109 Mass. 24; *Odiorne* v. *New Eng. Mut. M. Ins. Co.*, 101 Mass. 551, 3 Am. Rep. 401.

[2] *Simpson S. Co.* v. *Premier, etc., Association* (1905), 10 Com. Cas. 198. Compare cases where the underwriters were exonerated because of change of voyage, *Colledge* v. *Harty*, 6 Exch. 205, 20 L. J. Exch. 146; *Simon Israel & Co.* v. *Sedgwick* (1893), 1 Q. B. 303, 62 L. J. Q. B. 163.

[3] *Howard* v. *Great Western Co.*, 109 Mass. 384. The warranty applies only to cargo and not to cannel coal taken for dunnage, *Thwing* v. *Great Western Ins. Co.*, 103 Mass. 401, 4 Am. Rep. 567.

[4] *Sawyer* v. *Coasters Mut. Ins. Co.*, 6 Gray (Mass.), 221.

[5] *Washburn & M. Mfg. Co.* v. *Reliance Ins. Co.*, 179 U. S. 1, 21 S. Ct. 1, 45 L. Ed. 49; *Devitt* v. *Prov. Wash. Ins. Co.*, 173 N. Y. 17, 65 N. E. 777. The function of the memorandum clause is to limit not to extend the liability of the underwriter, *Potter* v. *Suffolk Ins. Co.*, 19 Fed. Cas. 1186, 2 Sumn. 197.

[6] "The term 'average unless general' means a partial loss of the subject-matter insured other than a general average loss, and does not include 'particular charges,'" Eng. Mar. Ins. Act (1906), 1 Sch. 13.

[7] *Wadsworth* v. *Pacific Ins. Co.*, 4

average" has the same meaning.[1] Accordingly, it will be observed that the restrictions of this clause are not applicable to total losses nor to partial losses if exceeding the restrictive percentages,[2] nor to any losses, no matter how small,[3] if the subject of general average contribution. For general average losses, in spite of the clause, the underwriters are liable.[4]

Wend. (N. Y.) 33. For general average losses the underwriter is liable notwithstanding the restriction, *Wilson* v. *Smith*, 3 Burr. 1550, 1 W. Blackstone, 507. Different meanings of word "average" defined in last case and in *Coster* v. *Phœnix Ins. Co.*, 6 Fed. Cas. 611, 2 Wash. C. C. 51. As to general average contribution, see § 212. Lord Esher says: " 'Average' as used in this connection is clearly a technical expression, and it has a well-established mercantile signification. It means a partial as distinguished from a total loss. If there is a total loss of the whole of the things mentioned, or of the whole of any one of them, or a total loss of any part which is so put on board as that there can be a total loss of that part, the clause will not apply to that loss. Taking 'average' then to mean average or partial loss, the meaning is that certain articles mentioned are warranted free from partial loss, or partial loss under a certain percentage, unless it be a general average loss, that is to say, a loss voluntarily occasioned for the safety and benefit of the common enterprise," *Price* v. *A 1 Ships, etc., Assoc.*, 22 Q. B. D. 580, 584.

[1] *Firemen's Ins. Co.* v. *Fitzhugh*, 4 B. Mon. (Ky.) 160, 164; *Riley* v. *Ocean Ins. Co.*, 11 Rob. (La.) 255. The New York court says: "There is no dispute that free from particular average exempts the insurer from liability for partial damage or for anything else than a total loss," *Devitt* v. *Prov. Wash. Ins. Co.*, 173 N. Y. 17, 21, 65 N. E. 777; *Booth* v. *Gair*, 15 C. B. (N. S.) 291; *Francis* v. *Boulton*, 73 L. T. R. 578, 65 L. J. Q. B. (N. S.) 153. But the phrase "free from average," or "of all average" means free from all partial losses whether particular average or general average, and limits the liability to a total loss of the subject-matter, *Woodside* v. *Canton Ins. Office*, 84 Fed. 283; *Coster* v. *Phœnix Ins. Co.*, 6 Fed. Cas. 611, 2 Wash. C. C. 51; *Price* v. *Maritime Ins. Co.* (1901), 2 K. B. 412. The memorandum clause was introduced into policies for the protection of the insurer from liability for any partial loss whatever on certain enumerated articles regarded as perishable in their nature and on certain others, none under a given rate per cent. This was about 1749, and since then, in the growth of commerce, the list of articles freed by the stipulation from particular average has been enlarged so as to embrace many which, though they may not be inherently perishable, are in their nature peculiarly susceptible to change, *Washburn & M. Mfg. Co.* v. *Reliance Ins. Co.*, 179 U. S. 1, 21 S. Ct. 535, 45 L. Ed. 49. The House of Lords, overruling *Angel* v. *Merchants' Mar. Ins. Co.* (1903), 1 K. B. 811, has decided that in determining whether a ship is a constructive total loss by English law, the test is whether a prudent uninsured owner would repair her having regard to all the circumstances, and that in this calculation the assured is entitled to add the break-up value of the ship to the estimated cost of repairs, *Macbeth* v. *Maritime Ins. Co.* (1908), App. Cas. 144. The Macbeth policy was issued prior to the codification of English law, which seems to follow the *Angel* case, Mar. Ins. Act (1906), § 60. And see § 192, *supra*.

[2] The damage may be sustained at different times; the sum total at time of arrival determines whether the given percentage is reached, *Stewart* v. *Merchants' Mar. Ins. Co.*, 16 Q. B. D. 619; *Blackett* v. *Royal Exch. Assur.*, 2 Cr. & J. 244. Dock dues are part of the cost of repairing a ship, *The Acanthus* (1902), Prob. 17; *The Mar. Ins. Co.* v. *China T. Co.*, L. R. 11 App. Cas. 573. Wages and provisions of crew during repairs to ship are not included, *The Lectrim* (1902), Prob. 256. General average contribution and particular average loss cannot be added together to make up the given percentage, *Price* v. *A 1 Ships, etc., Assoc.*, 22 Q. B. D. 580.

[3] *Firemen's Ins. Co.* v. *Fitzhugh*, 4 B. Mon. (Ky.) 160, 163.

[4] The term "particular average" is

The English marine insurance code contains the following provisions: "Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.[1] Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.[2] For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded." [3]

§ 457. Whether Constructive or only Actual Total Loss will Satisfy the Warranty.—As shown in the last section, on certain memorandum articles, the underwriters are relieved from liability unless the loss is total. The question remains whether a constructive total loss,[4] or only an actual or absolute total loss will satisfy the warranty of the memorandum clause. On this point the authorities differ.

The United States Supreme and other courts hold that to satisfy this warranty the loss must be actually total. The courts of New York, Massachusetts, and other jurisdictions have adopted the more liberal rule that a constructive, as well as an actual, total loss is covered by a policy containing such a warranty.[5]

confined to the deterioration or actual loss of part of the subject insured, *Kidston* v. *Empire Mar. Ins. Co.*, L. R. 1 C. P. 535, 2 Mar. L. C. (O. S.) 400; *Price* v. *Ins. Ass.*, L. R. 22 Q. B. D. 580 (1889). But in Ohio it has been held that expenses for unloading, or loading, rescuing and reconditioning the property are included, *Hall* v. *Rising Sun Ins. Co.*, 1 Disn. 308, 12 Ohio Dec. 639. As to expense for unloading cargo for examination of damage, see *Lysaght* v. *Coleman* (1895), 1 Q. B. 49, 64 L. J. Q. B. (N. S.) 175.

[1] "Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average," Mar. Ins. Act (1906), § 64 (2). But see *Hall* v. *Rising Sun Ins. Co.*, 1 Disn. (Ohio) 308.

[2] The same rule adopted in this country, *Padelford* v. *Boardman*, 4 Mass. 548.

[3] Mar. Ins. Act (1906), § 76 (2) (3) (4); *Brooks* v. *Oriental Ins. Co.*, 7 Pick. (Mass.) 258.

[4] See § 193, *supra*.

[5] Certain courts still adhere to the severe rule that the loss must be actually total to be recoverable under the warranty of the memorandum clause. Thus the United States Supreme Court says: "The general rule is firmly established in this court that the

§ 458. **Total Loss of Part.**—Where the subject-matter insured is warranted free from particular average the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but if the contract be apportionable, the assured may recover for a total loss of any apportionable part.[1]

Accordingly, under the exemption, "free from average unless general," or liable "for total loss only," there can be no recovery for a partial loss of any one species of goods, except for general average,

insurers are not liable on memorandum articles except in case of actual total loss, and that there can be no actual total loss where a cargo of such articles has arrived in whole or in part *in specie*, at the port of destination, but only when it is physically destroyed, or its value extinguished by a loss of identity," *Washburn & M. Mfg. Co.* v. *Reliance Mar. Ins. Co.*, 179 U. S. 1, 9, 21 S. Ct. 535, 45 L. Ed. 49 (citing many authorities, English and American). Such also appears to be the rule adopted in other jurisdictions, Louisiana, *Skinner* v. *Western Ins. Co.*, 19 La. * 273; *Gould* v. *Louisiana Mut. Ins. Co.*, 20 La. Ann. 259; Maine, *Williams* v. *Kennebec Mut. Ins. Co.*, 31 Maine, 455; Missouri, *Willard* v. *Mfrs. Ins. Co.*, 24 Mo. 561; Pennsylvania, *Waln* v. *Thompson*, 9 Serg. & R. 115, at all events as applied to articles inherently perishable. On the other hand, in Massachusetts and New York while the decisions in the past have not been uniform the latest views of the courts would seem to hold the underwriter liable for a constructive as well as an actual total loss of articles warranted free from particular average. Thus the New York court says: "Much as we hesitate to place our view of the law even in apparent opposition to that of the Supreme Court of the United States, we feel constrained to adhere to the doctrine in *Chadsey* v. *Guion*, 97 N. Y. 333, that for a constructive loss on the whole of the articles insured the underwriter is liable," *Devitt* v. *Prov. Wash. Ins. Co.*, 173 N. Y. 17, 24, 65 N. E. 777, aff'g 61 App. Div. 390, 70 N. Y. Supp. 654 (important line of authorities cited in lower court). This view seems in harmony with *Wallerstein* v. *Columbian Ins. Co.*, 44 N. Y. 204, 4 Am. Rep. 664, in which it was held that a total physical loss is not necessary to constitute an actual total loss, a total loss of value to the owner being enough to satisfy the requirement. And see *Poole* v. *Protection Ins. Co.*, 14 Conn. 47; *Adams* v. *M'Kenzie*, 32 L. J. C. P. 92, 94 ("a constructive loss is as much a total loss as if the ship went to the bottom"); Phillips, Ins., § 1769. A *dictum* in *Carr* v. *Security Ins. Co.*, 109 N. Y. 504, 509, 17 N. E. 369, looks the other way as follows: "The cases in this state, in respect to memorandum articles, where the insurer is only liable for an actual total loss, in the main sustain the view that total loss in value of memorandum articles, so long as they remain *in specie*, is not an actual total loss of such articles within a policy of marine insurance." This view was sustained by the early New York case, *Saltus* v. *Ocean Ins. Co.*, 14 Johns. 138. Massachusetts has held that a policy "free of partial loss" on fertilizers covers a constructive total loss, but the court refused to decide whether the same indulgence would be extended in the case of articles named in the memorandum, if inherently perishable, *Mayo* v. *India Mut. Ins. Co.*, 152 Mass. 172, 25 N. E. 80, 9 L. R. A. 831, 23 Am. St. R. 814. And see *Heebner* v. *Eagle Ins. Co.*, 10 Gray (Mass.), 131, 69 Am. Dec. 308; *Kettell* v. *Alliance Ins. Co.*, 10 Gray, 144.

[1] *Silloway* v. *Neptune Ins. Co.*, 12 Gray (Mass.), 73; *Kettel* v. *Alliance Ins. Co.*, 10 Gray (Mass.), 144; *Hills* v. *London Assur.*, 5 M. & W. 569. But see contrary ruling where part was transshipped into one vessel and part into another, *Pierce* v. *Columbian Ins. Co.*, 14 Allen (Mass.), 320. So also where each craft was a separate risk, *The Gen. Ins. Co.* v. *Royal Exch. Assur.*, 2 Com. Cas. 144. The text follows the English codification, § 76 (1).

although separate boxes or packages of such species may be totally lost.[1]

§ 459. **Unless Ship be Stranded.**—Often a memorandum clause qualifies the restriction by the phrase "unless the ship be stranded."

"Free of average unless general or the ship be stranded," is an obscure and awkward expression meaning "Free of partial losses except general average losses, or unless the ship be stranded;" that is to say, under this frequent form of exemption the underwriter is relieved from liability for a loss less than total on the articles named, unless it be a general average loss or unless the ship has stranded. But if the ship has stranded, or if the loss is general average, in either event the liability of the underwriter is established.[2]

The courts have been disposed to interpret these phrases with liberality towards the insured. Thus it is decided in England that a stranding at any time during the term insured has the effect of effacing the exception of the memorandum and making operative the words of general liability, regardless of whether the stranding has contributed to the loss.[3] The damage may even have been dis-

[1] *Biays* v. *Chesapeake Ins. Co.*, 11 U. S. 415, 3 L. Ed. 389; *Hernandez* v. *N. Y. Mut. Ins. Co.*, 12 Fed. Cas. 34; *Chadsey* v. *Guion*, 97 N. Y. 333; *Ralli* v. *Janson*, 6 E. & B. 422. Rules to govern liability of underwriters are laid down in *Mowat* v. *Boston Mar. Ins. Co.*, 26 Can. S. C. 47. But see *Canton Ins. Office* v. *Woodside*, 90 Fed. 302, 33 C. C. A. 63, 61 U. S. App. 214 (where the clause was applied distributively to personal effects). Similarly in *Duff* v. *Mackenzie*, 3 C. B. (N. S.) 16, 29; *Wilkinson* v. *Hyde*, 3 C. B. (N. S.) 30, 44. And the percentage restriction was applied separately where cargo was divided at intermediate port and transshipped in two vessels, *Pierce* v. *Columbian Ins. Co.*, 14 Allen (Mass.), 320. In order to mitigate the severity of the rule, it is usual to insert what are called "average clauses," the effect of which is to subdivide the subject-matter insured, whether ship or cargo, into smaller parcels, so as to give the assured a chance of recovery in case this or that portion be seriously damaged while the bulk is uninjured. For example, with cotton a clause may be inserted, "average payable on every ten bales running landing numbers." This means that if in any parcel of ten bales, as they are entered in the dock landing book, there is a damage above the memorandum restriction, the insured may recover, although the damage on the entire bulk of that species of goods named in the policy would fall below the memorandum percentage of its value. And see *Chicago Ins. Co.* v. *Graham, etc., Transp. Co.*, 108 Fed. 271, 109 Fed. 352. As to the application of the general rule to separate species of property, see *Humphreys* v. *Union Ins. Co.*, 12 Fed. Cas. 876 (cargo of lemons and oranges); *Silloway* v. *Neptune Ins. Co.*, 12 Gray (Mass.), 73; *Wadsworth* v. *Pacific Ins. Co.*, 4 Wend. (N. Y.) 33.

[2] *Burnett* v. *Kensington*, 7 T. R. 210.

[3] *London Assur. Co.* v. *Companhia De, etc.*, 167 U. S. 149, 17 S. Ct. 785, 42 L. Ed. 113 (the court reviews the many English decisions, but refuses to determine whether the American rule is the same). "Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods be on board," Eng. Mar. Ins. Act (1906), 1 Sch. 14.

covered and repaired before the stranding takes place, nevertheless the underwriters will not be relieved from liability by the memorandum clause if there has been a stranding.[1] The law and the practice in the United States appear to be the same,[2] although, on this point, the Federal Supreme Court declined to commit itself;[3] and the question in this country is not so pressing, because in the usual American policy either the words "or the ship be stranded" are omitted, or else it is expressly provided that the loss in such a case must be by stranding.[4]

It obviously becomes important, however, under the English form of policy and policies resembling it to determine what is stranding.[5]

§ 460. **What Constitutes Stranding.**—A vessel is stranded within the meaning of the memorandum clause, "free of average unless the ship be stranded," when, in consequence of some unusual or accidental occurrence, she comes in contact with the ground or other obstruction, and remains hard and fast upon it. If "she touches and goes," she is not stranded, but if "she touches and sticks" in places in which, in the ordinary course of her navigation, she is not suffered to touch, or in a manner fortuitous, she is stranded.[6]

A voluntary stranding *bona fide*, however, may be a stranding within the memorandum, under certain circumstances.[7] But the vessel must be on the strand under extraordinary circumstances,

[1] "The policy after the stranding must be construed as if no such warranty had been written on the face of it," *Roux* v. *Salvador*, 1 Bing. N. C. 526, 536. Stranding of a lighter conveying the goods, however, is not a stranding of the ship, *Hoffman* v. *Marshall*, 2 Bing. N. C. 383.

[2] *The Liscard*, 56 Fed. 44, 1 Pars. Mar. Ins., 630.

[3] *London Assur. Co.* v. *Companhia De, etc.*, 167 U. S. 149, 17 S. Ct. 785, 42 L. Ed. 113.

[4] *Lake* v. *Columbus Ins. Co.*, 13 Ohio, 48, 42 Am. Dec. 188.

[5] See next section. After the word "stranded" in the memorandum clause, the words "sunk or burnt" are often added and sometimes the words "or the damage caused by collision," *London Assur.* v. *Companhia, etc.*, 167 U. S. 149, 17 S. Ct. 785, 42 L. Ed. 113. As to what constitutes a sinking see *Bryant* v. *London Assur.*, 2 Times L. R. 591; *Anderson* v. *Royal Exch.*, 7 East, 38; *Doyle* v. *Dallas*, 1 Moo. & Rob. 48; *Kemp* v. *Halliday*, L. R. 1 Q. B. 520. As to when a ship is "burnt" see *London Assur.* v. *Companhia, etc.*, 167 U. S. 149; *The Glenlivet* (1894), Prob. 48. Collision with another ship, *London Assur.* v. *Companhia, etc.*, 167 U. S. 149; *The Niobe* (1891), App. Cas. 401 (a launch of the ship); *Chandler* v. *Blogg* (1898), 1 Q. B. 32 (a sunken barge); *The Munroe* (1893), Prob. 248 (projecting wreck).

[6] *London Assur.* v. *Companhia De, etc.*, 167 U. S. 149, 158, 17 S. Ct. 785, 42 L. Ed. 113; *McDougle* v. *Royal Exchane Assurance*, 4 Camp. 283, 4 Maule & S. 503, 1 Stark. 130 (a minute and a half on a rock not enough to constitute stranding); *Baker* v. *Towry*, 1 Stark. 436 (fifteen to twenty minutes on a rock held sufficient).

[7] *Bowring* v. *Elmslie*, 7 T. R. 216, note. A mere collision, however, with a pier or similar structure is not stranding, *Union Mar. Ins. Co.* v. *Borwick* (1895), 2 Q. B. 279.

whether put there voluntarily or otherwise.[1] Accordingly, it will be observed that two factors must combine, to constitute a stranding, (1) Something unusual must happen to the ship, and (2) she must remain fast for some considerable or appreciable time.[2] And it will also be observed that the amount of damage sustained is no sure criterion for determining whether, on the one hand, there is a stranding, or, on the other, a grounding in usual course or a collision in unusual course.[3]

The voluntary stranding of a ship in the presence of an extreme peril is not, by the practice prevailing in England, a general average act which calls for general contribution from the other interests; but, as before shown, the rule is otherwise in the United States.[4]

§ 461. Cargo on Deck.—*Cargo on deck is not covered by this policy unless specially indorsed hereon; in all cases to be free from loss by wet, breakage, leakage, or exposure.*

The general rule in regard to deck load, and the effect of custom upon it, have been already considered.[5] A learned English judge says, "goods on deck are always assumed to be at more than ordinary risk." [6]

Of course, damage by damp, wet, worms, insects, abnormal delay, robbery or any other accidental injury may be covered by special clauses added to the policy in return for an additional premium.[7]

§ 462. Blockade.—*Warranted not to abandon in the case of blockade, and free from any expense in consequence of capture, seizure, detention,*

[1] *Potter* v. *Suffolk Ins. Co.*, 19 Fed. Cas. 1186, 2 Sumn. 197. As where a ship at low tide took the ground violently, breaking timbers, *Carruthers* v. *Sydebotham*, 4 Maule & S. 77. Or grounded on unknown piles, *Rayner* v. *Godmond*, 5 Barn. & Ald. 225. Or grounded after striking the fluke of an anchor, *Barrow* v. *Bell*, 4 Barn. & Cr. 736, 7 Dowl. & Ryl. 244. Or fell over by parting of a rope fastened to a pier, *Bishop* v. *Pentland*, 7 Barn. & Cr. 219, 1 Man. & Rye, 49. Or rested on a bank of stones and rubbish because of an accidental stretching of a rope, *Wells* v. *Hopwood*, 3 Barn. & Ad. 20. Or took the ground at low water being driven into harbor by stress of weather, *Corcoran* v. *Gurney*, 1 Ell. & B. 456, 16 Eng. L. & Eq. 461. Or on grounding pitched into an unknown hole caused by the paddles of steamers at low tide, *Letchford* v. *Oldham*, L. R. 5 Q. B. D. 538. But taking the ground in the ordinary manner at ebb of tide is not stranding, *Kingsford* v. *Marshall*, 8 Bing. 458; *Hearn* v. *Edmunds*, 1 B. & B. 388; *Magnus* v. *Buttemer*, 11 C. B. 876.

[2] *Lake* v. *Columbus Ins. Co.*, 13 Ohio 48, 42 Am. Dec. 188.

[3] *London Assur.* v. *Companhia De, etc.*, 167 U. S. 149, *supra*, 17 S. Ct. 785; *Harman* v. *Vaux*, 3 Camp. 429; *Hearne* v. *Edmunds*, 1 Brod. & Bing. 388.

[4] See § 220, *supra*.

[5] See §§ 416, 435, *supra*.

[6] *Daniels* v. *Harris*, L. R. 10 C. P. 1 (loss by jettison of wine loaded on deck after the ship's hold had been filled up with other cargo).

[7] *Schloss Bros.* v. *Stevens* (1906), 11 Com. Cas. 270. And see *Cory* v. *Boylston F. & M. Ins. Co.*, 107 Mass. 140, 9 Am. Rep. 14.

or blockade, but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

This expressly limits a liability which would otherwise be imposed upon the insurers by the general terms of the body of the policy.[1] When the master of the ship finds the port of destination blockaded, it is often difficult to determine what course of action is most expedient for him to adopt. A ship attempting to run a blockade exposes itself to the penalty of capture and confiscation by the power establishing the blockade.[2] Without this special warranty it has been held that if, on arrival at a port, the captain finds it blockaded, he may not on that account abandon his voyage, but is at liberty, so far as insurance is concerned, to sail to a near port and await the raising of the blockade.[3] But it has also been held that where a ship has been ordered off by a blockading force and compelled to give up the voyage and return to the home port, the loss is covered by the policy.[4]

By the warranty the insured agrees not to abandon to the underwriter, as for a total loss, on the ground that the voyage has been interrupted by a blockade.[5]

The warranty free from capture, seizure, or detention, etc., has already been considered.[6]

§ 463. Warranty of Neutrality.—Where ship or merchandise is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.[7]

Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter,

[1] *Radcliff* v. *United Ins. Co.*, 7 Johns. (N. Y.) 38, 9 Johns. (N. Y.) 277. In general if blockade, etc., breaks up the voyage the insured may abandon and claim total loss, §§ 432, 193. As to privilege to go to a "neighboring port," see *Ferguson* v. *Phœnix Ins. Co.*, 5 Binn. (Pa.) 544.

[2] *The Columbia*, 1 C. Rob. 154; *The Panaghia Rhomba*, 12 Moo. P. C. 168. If a blockade is by sea only, goods may be sent around by land to the blockaded port without violating the blockade, *The Ocean*, 3 C. Rob. 297. In case of extreme necessity, from motives of humanity, a ship may enter a blockaded port, *The Fortuna*, 6 C. Rob. 27.

[3] *Blackenhagen* v. *London Assur.*, 1 Camp. 454.

[4] *Vigers* v. *Ocean Ins. Co.*, 12 La. 362, 32 Am. Dec. 118; *Thompson* v. *Read*, 12 Serg. & R. (Pa.) 440. And see *Wilson* v. *United Ins. Co.*, 14 Johns. (N. Y.) 227. An unauthorized warning to the ship not to proceed does not render the insurer liable for a breaking up of the voyage, *King* v. *Delaware Ins. Co.*, 6 Cranch, 71, 3 L. Ed. 155. And see § 432, *supra*.

[5] *Radcliffe* v. *United Ins. Co.*, 7 Johns. (N. Y.) 38, 9 Johns. 277.

[6] See § 453.

[7] *Cleveland* v. *Union Ins. Co.*, 8 Mass. 308.

she shall be properly documented; that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition the insurer may avoid the contract.[1] But it is said that the application of this implied condition is limited to the insurance of vessels.[2]

Akin to the warranty of neutrality is the warranty of nationality.[3]

§ 464. **Riders.**—A variety of forms of policies are in use both in ocean marine and inland marine insurance, and a great number of special clauses have been framed to be attached to the policy in the form of riders or indorsements, sometimes for the purpose of restricting, and sometimes for the purpose of extending, the liability of the underwriters for special purposes.[4]

Many of these special clauses have already been considered in this chapter. Others are the warranty to sail on or before a certain date,[5] and the warranty of the condition or location of the vessel on the date specified.[6]

[1] *Trinder* v. *Thames, etc., Ins. Co.* (1898), 2 Q. B. 128; *Stocker* v. *Merrimack M. & F. Ins. Co.*, 6 Mass. 220.

[2] *Carruthers* v. *Gray*, 3 Camp. 142; *Hobbs* v. *Henning*, 34 L. J. C. P. 117.

[3] *Geyer* v. *Aguilar*, 7 T. R. 681 ("warranted American property"); *Kindersley* v. *Chase*, Marsh. 426 ("warranted Swedish property"); *Tabbs* v. *Bendelack*, 4 Esp. 108 ("warranted to be American property"); *Atherton* v. *Brown*, 14 Mass. 152; *Lewis* v. *Thatcher*, 15 Mass. 431; *Coolidge* v. *Brigham*, 1 Metc. (Mass.) 552.

[4] Warranted no iron or ore in excess of registered tonnage, *Hart* v. *Standard Mar. Ins. Co.* (1889), 22 Q. B. D. 499. Warranty of watchman on a canal boat, *Snyder* v. *Home Ins. Co.*, 133 Fed. 848. Insurance general average and salvage loss only, *Munich Assur. Co.* v. *Dodwell*, 128 Fed. 410, 63 C. C. A. 152. Lighterman's or Tower's liability, *Munson* v. *Stand. Mar. Ins. Co.*, 145 Fed. 957, 92 Fed. 517; *Joyce* v. *Kennard* (1871), L. R. 7 Q. B. 78. See English clauses and warranties, Arnould, Ins. (7th ed.), 1505–15. All parts of the policy including a rider are to be harmonized if possible, *Jackson* v. *Brit.-Am. Assur. Co.*, 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636. If irreconcilable the special rider controls the general form, *Washburn & M. Mfg. Co.* v. *Reliance Ins. Co.*, 179 U. S. 1, 21 S. Ct. 1, 45 L. Ed. 49; *Chicago Ins. Co.* v. *Graham, etc., Co.*, 108 Fed. 271, 47 C. C. A. 320. And see § 87, *supra*.

[5] "Sailing" is thus defined: "That period of time when the vessel breaks ground, being at that time fully fit for sea, having the cargo on board which she intends to carry, with a competent crew, and having permission to leave by having the Custom House clearances on board," *Roelandts* v. *Harrison*, 23 J. L. Exch. 173. To comply with the warranty (Eldridge, 147), first, the ship must be ready and properly equipped, *Ridsdale* v. *Newham*, 4 Camp. 111; *Bouillon* v. *Lupton*, 23 L. J. C. P. 37; second, the ship must actually break ground and proceed on her voyage, *Nelson* v. *Salvador*, 1 M. & M. 309; *Wood* v. *Smith*, L. R. 5 P. C. 451; *The Cachapool*, 7 P. D. 217; third, when the captain unmoors, or weighs anchor and leaves port he must intend to proceed on the contemplated voyage, *Sea Ins. Co.* v. *Blogg* (1898), 1 Q. B. 27, 31. A warranty "to depart from," means to be out of port on or before the day named, *Moir* v. *Royal Exch. Assur.*, 3 M. & S. 461. So also "to sail from," *Lang* v. *Anderdon*, 3 B. & C. 495.

[6] *Blackhurst* v. *Cockell*, 3 T. R. 360; *Colby* v. *Hunter*, 1 M. & M. 81.

The brig *Helen* was insured "at and from Calais, Maine, on the 16th day of July, at noon, to, at and from all ports and places, in the coasting business, for six months." Neither party knew that the vessel had already sailed from Calais. It was the intention of both parties to insure on time without regard to the place where the vessel might be. The court held that the policy attached and that the underwriters were liable.[1]

Yet other special provisions are the warranty, in time of war, to sail under the protection of an armed convoy;[2] the cancellation of charter clause in policies on freight;[3] the negligence clause in favor of the insured;[4] the privilege to deviate from the voyage named either for a premium to be agreed upon or at tariff rates,[5] and honor clauses, sometimes called P. P. I. clauses, meaning in substance that the mere production of the policy is proof of an insurable interest.[6]

§ 465. Adjustment.—Adjustments of marine losses between the insurers and the insured are frequently a matter of great complication and usually the task of working out such an adjustment is put into the hands of professional experts called average adjusters.

The adjusters make up an account, apportioning the loss according to the respective rights of the different interests.[7] If there are general average losses, these must be included; but if there has been a general average adjustment in the proper foreign port between the parties primarily interested in it, to wit, the owners of ship, cargo,

[1] *Martin* v. *Fishing Ins. Co.*, 20 Pick. (Mass.) 389, 32 Am. Dec. 220.

[2] *Sanderson* v. *Busher*, 4 Camp. 54 (stress of weather, no excuse for breach); *Anderson* v. *Pitcher*, 3 Esp. 124. The vessel may sail without convoy to place of rendezvous to meet convoy, *Warwick* v. *Scott*, 4 Camp. 62.

[3] *Jackson* v. *The Union Mar. Ins. Co.*, L. R. 10 C. P. 125; *The Alps* (1893), Prob. 109; *In re Jamison, etc., Assoc.* (1895), 2 Q. B. 90.

[4] The object of the clause primarily is to hold the underwriter where the proximate cause of the loss is negligence and not one of the perils specified, *Price & Co.* v. *Union Lighterage Co.* (1903), 1 K. B. 750. For instance, where the ship's spars had to be used as fuel because, through negligence, the supply of coal was insufficient, *Greenock S. S. Co.* v. *Maritime Ins. Co.* (1903), 1 K. B. 367. The stowage of cargo may be negligent, *The Duero*, L. R. 2 A. & E. 393. Instances of errors of navigation: port hole or hatches open, *Carmichael* v. *Liverpool Sailing S. Owners*, 19 Q. B. D. 242; sea cock open, *Good* v. *London, etc., Assoc.*, L. R. 6 C. P. 563; pin of stearing gear out of place, *The Warkworth*, 9 P. D. 20.

[5] *Hyderabad Co.* v. *Willoughby* (1899), 2 Q. B. 530; *Lincoln* v. *Boston Mar. Ins. Co.*, 159 Mass. 337, 34 N. E. 456. But this privilege does not permit an absolute change of voyage, since deviation means departure from a voyage begun, *Simon Israel & Co.* v. *Sedgwick* (1893), 1 Q. B. 303.

[6] An honor clause renders the insurance illegal. Payment is discretionary with the insurer, *Berridge* v. *Man. On. Ins. Co.*, 18 Q. B. D. 346; *Gedge* v. *Royal Exch. Assur.* (1900), 2 Q. B. 214.

[7] *International Nav. Co.* v. *Sea Ins. Co.*, 129 Fed. 13; *De Farconnet* v. *Western Ins. Co.*, 110 Fed. 405.

and freight, or other insured interest, respectively, then, it has been held, the results arrived at in that adjustment should be taken as conclusive and incorporated into the adjustment between the insurers and the insured.[1]

The professional adjuster is supposed to act in a judicial rather than in a partisan capacity, but his adjustment is not binding upon any of the parties unless by special agreement.[2] In practice the adjustment is generally made the basis of an amicable settlement among the different interests.[3]

If a settlement is not fraudulent, defenses under the policy become merged in the settlement.[4] But in certain jurisdictions, by virtue of the doctrine of indemnity, the insured may be called upon, after a settlement, to account to the underwriters for any receipts

[1] *Strong* v. *N. Y. Firemen's Ins. Co.*, 11 Johns. 323; *Mavro* v. *Ocean Mar. Ins. Co.*, L. R. 9 C. P. 595; *Depan* v. *Ocean Ins. Co.*, 5 Cowen (N. Y.), 63; *The Mary Thomas* (1894), Prob. 108. Sometimes general average is expressly payable as per foreign statement, *The Mary Thomas* (1894), Prob. 108; *Harris* v. *Scaramanga*, L. R. 7 C. P. 481; *The Brigalla* (1893), Prob. 201; *International Nav. Co.* v. *Sea Ins. Co.*, 129 Fed. 13.

[2] *Bordes* v. *Hallet*, 1 Caines (N. Y.), 444.

[3] On the arrival of the ship partially damaged, the master or owner of the ship advertises for bids for repairs. Bids are accepted, the survey of damage is made, and contracts for rebuilding executed, *Johnston* v. *Columbian Ins. Co.*, 7 Johns. (N. Y.) 315. These, with the protest, bills of lading, invoices, *Allegre* v. *Maryland Ins. Co.*, 6 Har. & J. (Md.) 408, 14 Am. Dec. 289, the freight manifest, the charter party, the policies of insurance, and any other proofs of loss, furnish the adjusters with material for making up the accounts. Insured must furnish the underwriter with reasonable notice and proof of their loss, *Walsh* v. *Washington Mar. Ins. Co.*, 32 N. Y. 427; *Rodee* v. *Detroit F. & M. Ins. Co.*, 74 Hun, 146, 26 N. Y. Supp. 242; *Savage* v. *Corn Exch., etc., Ins. Co.*, 4 Bosw. (N. Y.) 1, aff'd 36 N. Y. 655; *Lawrence* v. *Ocean Ins. Co.*, 11 Johns. (N. Y.) 241. Need not in proof of loss apportion loss among different insurers, *Fuller* v. *Detroit & M. Ins. Co.*, 36 Fed. 469, 1 L. R. A. 801. Sometimes policy provides how claims shall be adjusted as "according to usages of Lloyd's," *London Assur.* v. *Companhia De, etc.*, 167 U. S. 149, 17 S. Ct. 785. A cancellation of a policy made in ignorance of a loss already sustained is not binding, *Duncan* v. *N. Y. Mut. Ins. Co.*, 138 N. Y. 88, 33 N. E. 730, 20 L. R. A. 386.

[4] *Smith* v. *Glens Falls Ins. Co.*, 62 N. Y. 85; *Stache* v. *St. Paul F. & M. Ins. Co.*, 49 Wis. 89, 5 N. W. 36, 35 Am. Rep. 772. Until actual payment there is no merger of defenses. But settlement will be opened for fraud or misrepresentation, *Faugier* v. *Hallett*, 2 Johns. Cas. (N. Y.) 233. Thus if proofs of loss are fraudulent, *McConnel* v. *Delaware M. S. Ins. Co.*, 18 Ill. 228; *Hartford L. S. Ins. Co.* v. *Matthews*, 102 Mass. 221. Compromise and payment of the compromise amount in life insurance on the mistaken supposition that the insured has been dead more than seven years, when in fact he has not died, are binding, and will not be disturbed, *N. Y. Life Ins. Co.* v. *Chittenden* (Ia., 1907), 112 N. W. 96; *Sears* v. *Grand Lodge*, 163 N. Y. 374, 57 N. E. 618. If the insured has given a release, it constitutes a complete defense, unless impeached for fraud or mistake, and the proof must be clear and convincing beyond reasonable controversy before it will be opened, *Steffen* v. *Supreme Assembly* (Wis., 1907), 110 N. W. 401 (citing cases). So also in marine insurance a settlement as of partial losses and cancellation of policy were held binding where both parties were ignorant of the fact that the loss was total, *Soper* v. *At. Mut. F. & M. Ins. Co.*, 120 Mass 267.

subsequently obtained from extraneous sources tending to diminish the loss under the policies.[1]

[1] See § 54. Limitation of time for suit, *Rogers* v. *Ætna Ins. Co.*, 95 Fed. 103, 35 C. C. A. 396; *Harvey* v. *Detroit F. & M. Ins. Co.*, 120 Mich. 601, 79 N. W. 898; *McWilliams* v. *Home Ins. Co.*, 40 App. Div. 400, 57 N. Y. Supp. 1100. If upon the adjustment it appears that the insured interest is short, for instance, where only one-half of the insured cargo was in fact shipped, the insured is entitled to a return of premium proportionate to the shortage, § 62, *supra; Forbes* v. *Aspinall*, 13 East, 323; *Rickman* v. *Carstairs*, 5 B. & Ald. 651; *The Main* (1894), Prob. 320; *Fisk* v. *Masterman*, 8 M. & W. 165 (over-insurance). As already shown, if the risk does not attach, the premium is returnable, § 61, *supra; Tyrie* v. *Fletcher*, 2 Cowp. 666; *Stevenson* v. *Snow*, 3 Burr. 1240. For example, where by mistake goods were insured on the wrong ship, *Martin* v. *Sitwell*, 1 Shower, 156. So also if for misrepresentation of the insured without his fraud the contract is rendered void *ab initio*, the premium is returnable provided no clause of the policy prevents, *Tyler* v. *Horne*, 1 Park, 455; *Colby* v. *Hunter*, 3 C. & P. 7. The same rule obtains in other branches of insurance, *Jones* v. *Ins. Co.*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. R. 706; *Joel* v. *Law Union, etc., Ins. Co.* (1908), 2 K. B. 431. But if the policy is avoided for fraud on the part of the insured he cannot recover back the premium, *Blasser* v. *Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747; *Feise* v. *Parkinson*, 4 Taunt. 640; *Anderson* v. *Thornton*, 8 Exch. 425. If the underwriter is guilty of fraud the insured may rescind the contract and recover the premium, *Duffell* v. *Wilson*, 1 Camp. 401, § 61, *supra*. In general, if the risk attaches even for a short time the premium is not apportionable or returnable in the absence of express provision to that effect, § 61, *supra; Mailhoit* v. *Met. Life Ins. Co.*, 87 Me. 374, 32 Atl. 989, 47 Am. St. R. 336; *Stone* v. *Mar. Ins. Co.*, 1 Exch. 81; *Bradford* v. *Symondson*, 7 Q. B. D. 456. Even though by early deviation followed by a loss, the insurance becomes of no value to the insured, *Bermon* v. *Woodbridge*, 2 Doug. 781. If the premium for a portion of the time is returned pursuant to special clause in a time policy the insurance is canceled for that period, *Baines* v. *Woodfall*, 6 C. B. (N. S.) 657. If the contract is void for illegality and both parties are in *pari delicto* the court will assist neither, *Andree* v. *Fletcher*, 3 T. R. 266; *Lowry* v. *Bourdien*, 2 Doug. 468; *Wheeler* v. *Association*, 102 Ill. App. 48. But the insured if innocent may recover his premiums, *Am. Mut. L. Ins. Co.* v. *Bertram*, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935; *Oom* v. *Bruce*, 12 East, 225. In practice, any common-law question relating to the return of unearned premium arises more frequently in connection with the marine policy than in connection with any other. The fire policy contains a special provision on this subject, and the claimant under the life policy is usually striving to collect his insurance money.

CHAPTER XXI

Title, Guarantee, and Liability Insurance

§ 466. Introductory.—Besides the leading branches of insurance, constituting the subject of the preceding chapters, contracts in the form of insurance have been employed, both in earlier times and in modern times, for many and varied purposes of a more special character.[1] Some of these special kinds of insurance have

[1] Among the familiar modern instances may be mentioned insurance against loss by hail, *Barrett* v. *Des Moines, etc., Assn.*, 120 Iowa, 184, 94 N. W. 473; loss by tornado or storm, *Mut. F. Ins. Co.* v. *Dehaven* (Pa., 1886), 5 Atl. 65; *Kennedy* v. *Agricultural Ins. Co.* (So. Dak.), 110 N. W. 116; breaking of plate glass windows, doors, etc., *Vorse* v. *Jersey Plate Glass Ins. Co.*, 119 Iowa, 555, 93 N. W. 569, 60 L. R. A. 838, 97 Am. St. R. 330; *Munk* v. *Maryland Casualty Co.*, 122 App. Div. (N. Y.) 487; *Munk* v. *Maryland Casualty Co.*, 116 App. Div. 756; damage to property from steam boiler explosions, *Chicago Sugar R. Co.* v. *Am. Steam Boiler Co.*, 48 Fed. 198, aff'd 57 Fed. 294, 6 C. C. A. 336; *Embler* v. *Hartford Steam B., etc., Co.*, 158 N. Y. 431, 53 N. E. 212; loss of packages in the mail, *Banco de Sonora* v. *Bankers' Mut. Cas. Co.* (Iowa), 95 N. W. 232; accident to, or death of, live stock, *State* v. *Vigilant Ins. Co.*, 30 Kan. 585, 2 Pac. 840; *State* v. *Northwestern Mut. Live Stock Assn.*, 16 Neb. 549, 20 N. W. 852; *Kells* v. *Ins. Co.*, 64 Minn. 390, 67 N. W. 215, 58 Am. St. R. 541; *Lathers* v. *Mut. Fire Ins. Co.* (Wis., 1908), 116 N. W. 1; burglaries, *Bankers' Mut. Cas. Co.* v. *State Bank*, 150 Fed. 78 (insurer had no right to replace damaged safe as part payment); *U. S. Fidelity & G. Co.* v. *Linehan* (N. H.), 58 Atl. 956; *Bankers' Mut. Cas. Co.* v. *First Nat. Bank*, 131 Ia. 456, 108 N. W. 1046; *Mt. Eden Bank* v. *Ocean Acc. & Guar. Co.* (Ky., 1906), 96 S. W. 450 (loss by fire, not by burglary); *Pearlman* v. *Metropolitan Surety Co.*, 127 App. Div. (N. Y.) 539; *Reich* v. *Maryland Cas. Co.*, 54 Misc. (N. Y.) 585; *Schindler* v. *U. S. Fidelity & Guar. Co.*, 58 Misc. (N. Y.) 532 (sufficiency of evidence to prove burglary); thefts, *People* v. *Fidelity & Cas. Co.*, 153 Ill. 25, 38 N. E. 752; *State* v. *Vigilant Ins. Co.*, 30 Kan. 585, 2 Pac. 840; *Re George & Burglary Ins. Assn.* (1898), 2 Q. B. 136; insurance guaranteeing crop returns, *In re Hogan*, 8 N. D. 301; 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. R. 759. Prior to the passage of the statutes, 19 Geo. II, c. 37, and 14 Geo. III, c. 48, requiring an insurable interest to support the contract of marine and life insurance, transactions at English Lloyd's and elsewhere had often degenerated into the rankest kind of gambling. The climax was reached by the organization of a scheme to insure female chastity and another against divorces. It is reported that, upon the successful termination of a certain venture, large sums of money were paid out by some of the underwriters at Lloyd's, who had wagered that a young man could not go to Lapland and bring back within a specified time two reindeer and two Lapland women. An issue of the London *Chronicle* in 1768 contains the following statements: "The introduction and amazing progress of illicit gaming at Lloyd's Coffee-house is, among others, a powerful and very melancholy proof of the degeneracy of the time. Though gaming in any degree is perverting the original and useful design of that Coffee-house, it may in some measure be excusable to speculate on the following subjects: Mr. Wilkes being elected member for Lon

assumed a commercial importance so great that they must receive more than passing notice.

§ 467. Title Insurance.—In the larger cities, corporations are now organized to search real estate titles and, if desired, to issue a policy insuring the title, at the instance most frequently of a would-be purchaser or mortgagee.

The facilities of such permanent organizations for utilizing, arranging, and recording the past results of their extensive and multiplied examinations of titles are so great that it is becoming more and more difficult for individual attorneys to compete with their prices in this branch of legal work. Indeed, the title company, either by taking every block or every lot in the city as a separate unit, keeps a book account showing every title to date.[1]

Under the contract for merely searching the title, the title company may be held liable for any damages which its negligence may have imposed upon its customer.[2] But where the company issues its policy of insurance guaranteeing that the title is not unmarketable or defective, no question of negligence in searching can arise. The guarantee is absolute, subject only to the conditions of the policy.[3]

The Title Guarantee & Trust Co. of New York by its policy obligates the insurer, in substance, to do three things for the protection of the insured: (1) to defend suits against the title at the expense

don; which was done from 5 to 50 guineas per cent; Mr. Wilkes being elected member for Middlesex, from 20 to 70 guineas per cent; Alderman Bond's life for one year, now doing at 7 per cent; on Sir J. H. (mark the modesty!) being turned out in one year, now doing at 12 guineas per cent; on John Wilkes' life for one year, now doing at five per cent. (N. B. Warranted to remain in prison for that period); on a declaration of war with France or Spain in one year, 8 guineas per cent. But, when policies come to be opened on two of the first peers in Britain losing their heads at 10s. 6d. per cent, or on the dissolution of the present parliament within one year at 5 guineas per cent, which are now actually doing, and underwritten chiefly by Scotsmen, at the above Coffee-house, it is surely high time to interfere."

[1] The New York court says: "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens or incumbrances that may affect or burden his title when he takes it. It must follow as a general rule, therefore, that when the insured get a good title the covenant of the insurer has been fulfilled and there is no liability," *Trenton Potteries Co.* v. *Title Guar. & Trust Co.*, 176 N. Y. 65, 68 N. E. 132.

[2] *Ehmer* v. *Title Guar. & Trust Co.*, 156 N. Y. 10, 50 N. E. 420.

[3] *Trenton Potteries Co.* v. *Title Guar. & Trust Co.*, 176 N. Y. 65, 68 N. E. 132. And see *Purcell* v. *Land Title Guarantee Co.*, 94 Mo. App. 5, 67 S. W. 726; *Wheeler* v. *Equitable Trust Co.*, 206 Pa. St. 428, 55 Atl. 1065. Deeds and incumbrances not of record are not covered, *Bothin* v. *California Title Ins. & T. Co.* (Cal., 1908), 96 Pac. 500.

of the insurer; (2) to pay adverse judgments therein rendered; (3) and, if the insured contracts to sell or if he negotiates a loan and the title is refused, to test its validity in court at the expense of the insurer, and, if defeated, either to pay damages, or else to take the property at the contract price where the insured has contracted to sell it, or to make the loan where he has negotiated a loan.

The contract, however, is one of indemnity.[1] It is not enough in order to establish a right of recovery on the policy that the insured is able to prove the title to be defective or unmarketable; he must go further and show that he has actually suffered loss thereby.[2]

§ 468. Fidelity and Guarantee Insurance.—Persons acting in a fiduciary character, or occupying positions of public or private trust, are often obliged to give bonds or undertakings with sureties, conditioned on the faithful performance of their official duty. Familiar instances are testamentary trustees, when not expressly relieved by the terms of the instrument appointing them, administrators, guardians, receivers, government and court officials, contractors engaged in public works, cashiers, treasurers, and other agents employed in handling considerable sums of money for which they must give account.[3]

So also in certain court proceedings bonds or undertakings are required, for example, in prosecuting appeals from judgments, and in procuring injunctions or attachments.

Individual sureties generally act gratuitously and as matter of favor to the party concerned, but usually are extremely reluctant to do so, especially if the amount of the undertaking is large or its term long or of indefinite duration. Not infrequently, in order to

[1] *Banes* v. *N. J. Title Guarantee & T. Co.*, 142 Fed. 957, 74 C. C. A. 127.

[2] *Wheeler* v. *Equitable Trust Co.* (Pa., 1908), 70 Atl. 750. The doctrine of warranty applies to title insurance, *Stensgaard* v. *St. Paul Real Est. Title Ins. Co.*, 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575. Also the doctrine of waiver, *Quigley* v. *St. Paul Title Ins. & Trust Co.*, 60 Minn. 275, 62 N. W. 287. Also the doctrine of subrogation, *St. Paul Title Ins. & Trust Co.* v. *Johnson*, 64 Minn. 492, 67 N. W. 543. As to doctrine of representations, see case where the insured represented, in good faith, that he held the fee, but the court subsequently found that he had only one-half interest, *Folhrenbach* v. *German Am. Title & Trust Co.* (Pa., 1907), 66 Atl. 561. Also the rule of liberal construction in favor of the insured applies, *Minn. Title Ins. & Trust Co.* v. *Drexel*, 70 Fed. 194, 17 C. C. A. 56; *Place* v. *St. Paul Title Ins. & Trust Co.*, 67 Minn. 126, 69 N. W. 706, 64 Am. St. R. 404 ("tenancy of present occupants" as an exception to liability construed, also the existence of a contract to sell as a condition precedent to recovery construed). And see *Wheeler* v. *Real Est. Title Ins. & Trust Co.*, 160 Pa. St. 408, 28 Atl. 849 (future liens not covered).

[3] A guardian mingled the trust funds with his own and the surety was held liable, *U. S. Fidelity & Guar. Co.* v. *State* (Ind. App., 1907), 81 N. E. 226.

qualify, the individual surety has to make a disclosure regarding his assets and obligations, which it is not agreeable to render. Indeed, in former times, such an appointee was often compelled to refuse the coveted position because unable to induce his friends to execute the requisite undertaking as his sureties.

Modern fidelity or surety companies are now of indispensable convenience to the business world, and have largely superseded individual sureties in connection with bonds and undertakings; not because the guaranty of such a corporation, with its extensive and uncertain obligations, is of necessity more reliable than an individual guaranty, but because it is more easily obtained.

In its scope the usual fidelity bond is aimed only at dishonest acts of the employee. Losses due merely to his carelessness, incompetence, or bad judgment are not covered by its terms.[1] But sometimes fidelity bonds are framed to insure the employer against loss sustained through the negligence of the employee as well as through his dishonesty.[2]

The plaintiffs, Matthews & Co., held a fidelity bond to indemnify them for pecuniary loss sustained by reason of any "fraud or dishonesty" on the part of their travelling salesman, Connolly, which should amount "to embezzlement or larceny." Of the sum of $960.31 collected in Connecticut for goods sold by him, Connolly remitted to his employers only $457.86, claiming that they owed him the balance for arrears of salary and expenses. On the trial the referee found that Connolly's claim and his retention of collections, excepting the amount of $95.05, were characterized by bad faith on his part. On appeal it was held that under the New York Penal Code the employee was guilty of larceny and the judgment against the surety company was affirmed.[3]

§ 469. Contract One of Insurance Rather Than Suretyship.—The bond of the surety company differs in two important particulars from the usual simple obligation of the individual surety: First, it is issued not gratuitously or as a friendly act, but for full compensation received by the surety, the premium, moreover, being fixed by the company. Second, prepared by the company and in its

[1] *Reed* v. *Fidelity & Cas. Co.*, 189 Pa. St. 596, 42 Atl. 294.

[2] *U. S. Fidelity & G. Co.* v. *Des Moines Nat. Bank*, 145 Fed. 273, 74 C. C. A. 553; *In re Citizens' Ins. Co.*, 16 U. C. Law J. 334.

[3] *Matthews* v. *Employers' L. Assur. Corp.*, 127 App. Div. 195, 111 N. Y. Supp. 76; N. Y. Penal Code, §§ 528, 548.

interest, the contract contains numerous clauses restrictive of the company's liability.[1]

These conspicuous differences have induced the courts to construe the contract of the surety company as one of insurance rather than as one of suretyship, and to establish the rule that all ambiguities in the language employed must be resolved in favor of the insured and against the insurer.[2]

The written statements accompanying the application for a guaranty bond usually amount to warranties, and the doctrine of warranty then applies.[3]

The defendant issued to the plaintiff, an investment company, a fidelity bond to indemnify the plaintiff against loss occasioned by the larceny or embezzlement of its general manager, Miller. In procuring the bond, Burke, the plaintiff's president, erroneously warranted the truth of the following answers in the application regarding Miller: "When were his accounts last examined? A. April. Were they at that time in every respect correct, and proper securities, funds and values on hand to balance? A. Yes. Is there now to your knowledge, any shortage due you by the applicant? A. No. Has he ever been short with you? A. No." As matter of fact Miller was at that time indebted to the plaintiff and had been in default for several weeks. On appeal the judgment obtained by the plaintiff was reversed.[4]

The American Bonding Company executed in favor of the Bank

[1] The law of insurance is very different from that of individual suretyship, *Munson* v. *Standard Mar. Ins. Co.*, 156 Fed. 44, 46. As to law of fidelity insurance, see notes to *American Credit Ind. Co.* v. *Wood*, 19 C. C. A. 273; *American Credit Indemnity Co.* v. *Athens Woolen Mills*, 92 Fed. 581, 34 C. C. A. 165.

[2] *American Surety Co.* v. *Pauly*, 170 U. S. 144, 18 S. Ct. 552, 42 L. Ed. 977; *Mechanics' Savings Bank & Tr. Co.* v. *Guarantee Co.*, 68 Fed. 459; *Bryant* v. *American Bonding Co.* (Ohio St., 1907), 82 N. E. 960; *Bank of Tarboro* v. *Fidelity & Deposit Co.*, 126 N. C. 320, 35 S. E. 588, 83 Am. St. R. 682, *S. C.*, 128 N. C. 366, 38 S. E. 908, 83 Am. St. R. 682 ("the object of an indemnifying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one"), *Cowles* v. *U. S. Fidelity & Guar. Co.*, 32 Wash. 120. A federal court says: "It would be contrary to public policy to inconsiderately allow the protection afforded by this new insurance to the vast business interests of the country, in public administration as elsewhere, to be endangered by any lesser indemnity than that of the old form by bond, which is being so rapidly displaced, the new contracts being offered by the companies as superior to the old in safety," *Guarantee Co. of N. A.* v. *Trust Co.*, 80 Fed. 766, 26 C. C. A. 146. But see *Howard County* v. *Hill*, 88 Md. 111, 41 Atl. 61; *Harrisburg S. & L. Assn.* v. *U. S. Fidelity & Cas. Co.*, 197 Pa. St. 177. The ordinary surety is protected by the principle *strictissimi juris*, *Ulster Co. Savings Inst.* v. *Young*, 161 N. Y. 23, 55 N. E. 483.

[3] *Livingston* v. *Fidelity & Deposit Co.* (Ohio, 1907), 81 N. E. 330.

[4] *American Bonding & Trust Co.* v. *Burke* (Colo., 1906), 85 Pac. 692 (citing many cases).

of Devall's Bluff a surety bond in the sum of $5,000, undertaking to indemnify the bank against any loss sustained on account of larceny or embezzlement committed by its cashier, Strong, during a term of one year. The bond provided, "That all the representations made by the employer, his or its officers, to the surety are warranted by the employer to be true." Among the warranties of the application were the following: "Is the applicant now or about to be engaged or intrusted in any other business or employment than the bank's service? A. No. In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts and vouchers, and by whom? A. The auditing committee, monthly." During a period of three years, covered by the bond and its noncumulative renewals, Strong's defalcations amounted to over $10,000. Besides his regular occupation at the bank, he acted as secretary of a building and loan association and wrote a little fire insurance, but without interfering with his duties as cashier. Sometime in each calendar month, the committee made examinations and audits, but these were not always on the same date in the month. On these facts the court held that there was no breach of warranty, and that, since the renewals were noncumulative, the liability of the surety company was limited to $5,000 in the aggregate.[1]

A contract of fidelity or guaranty is not to be regarded as invalid on grounds of public policy because tending to encourage carelessness in the selection of faithful and honest employees.[2]

[1] *American Bonding Co.* v. *Morrow*, 80 Ark. 49, 96 S. W. 613, citing as to the non-cumulative feature, *First Nat. Bank* v. *U. S. Fidelity & Guar. Co.* (Tenn.), 75 S. W. 1076, and as to sufficiency of audits, though the committee were not expert accountants, *Guarantee Co.* v. *Mechanics' Bank*, 26 C. C. A. 146. In the following case the examination of accounts was held insufficient and the policy avoided for breach of the warranty, *U. S. Fidelity & Guar. Co.* v. *Downey* (Colo., 1907), 88 Pac. 451. As to occupation, see § 390, *supra*.

The doctrine of subrogation applies in favor of the insurer who has paid on its guaranty bond, *London Guar. & Acc. Co.* v. *Geddes*, 22 Fed. 639; *City Trust, Safe Dep. & Surety Co.* v. *Haaslocher*, 101 App. Div. 415, 91 N. Y. Supp. 1022 (an appeal bond); *Farmers' & T. Bank* v. *Fidelity & Dep. Co.*, 108 Ky. 384. The liberal statutes making warranties in effect mere representations apply to this class of insurance, but under them the employer in answering the questions as to the honesty of his employee in his services in the past must not only state what he honestly believes, but before answering must have taken reasonable precaution and used at least ordinary care to have acquainted himself with the facts, *Fidelity & Guar. Co.* v. *Western Bank* (Ky., 1906), 94 S. W. 3. Evidence held insufficient to prove larceny of the employee, *Williams* v. *U. S. Fidelity & Guar. Co.* (Md., 1907), 66 Atl. 495.

[2] *Fidelity & Cas. Co.* v. *Eickhoff*, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. R. 464; *Royle Min. Co.* v. *Fidelity & Cas. Co.* (Mo. App., 1907), 103 S. W. 1098.

§ 470. A Contract of Highest Good Faith.—As in the case of other insurance contracts, the utmost good faith must be observed by the parties towards each other.[1] Therefore it would be fatal concealment for the insured employer, when procuring a surety bond, to omit to disclose the fact, if known to him, that his employee had previously been guilty of dishonesty.[2] But mere suspicion need not be disclosed,[3] nor a knowledge of mere irregularities not amounting to dishonesty or bad faith on the part of the employee.[4]

§ 471. Period of Risk.—Defalcations often are not discovered until long after they are committed; nevertheless, surety bonds usually provide that the company will be liable only when claim is made upon it during the stated term of the bond or within ninety days or other specified period thereafter. Some bonds allow a period of six months after termination of the bond, for discovery and giving notice to the insurer.[5]

[1] See § 94, *supra*.

[2] *Capital Fire Ins. Co.* v. *Watson*, 76 Minn. 387, 79 N. W. 601, 77 Am. St. R. 657; *Railton* v. *Mathews*, 10 Clark & F. 934. But sometimes only "wilful misstatements or suppressions" are prohibited, *Fidelity & Cas. Co.* v. *Bank of Timmonsville*, 139 Fed. 101, 71 C. C. A. 299. If a statement is known to be false an intent to deceive is inferred, *Claflin* v. *Assur. Co.*, 110 U. S. 81, 95, 3 S. Ct. 507, 28 L. Ed. 76.

[3] *American Surety Co.* v. *Pauly*, 170 U. S. 144, 18 S. Ct. 552, 42 L. Ed. 977.

[4] *Atlantic & P. Tel. Co.* v. *Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *Supreme Council* v. *Fidelity & Cas. Co.*, 63 Fed. 48, 11 C. C. A. 96. In the case of individual suretyship, usually gratuitous, the employer, it has been said, must on discovery promptly disclose to the surety any dishonest acts of the employee committed during the term of suretyship, *Saint* v. *Wheeler & W. Mfg. Co.*, 95 Ala. 362, 10 So. 539, 36 Am. St. R. 210; *Lancashire Ins. Co.* v. *Callahan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. R. 475; *Sanderson* v. *Aston*, L. R. 8 Exch. 73; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666. How far such an obligation, if not expressed, would be read into the voluminous bond of the surety company prepared by it and issued for a premium (see *Watertown Fire Ins. Co.* v. *Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *McKecknie* v. *Ward*, 58 N. Y. 541) is doubtful and is perhaps largely an academic question, since the corporation bond almost always contains one or more stipulations on this subject, § 472, *infra*. The corporate surety, except as controlled by statute, is wont to insert in its bond whatever clauses it deems desirable. If, in competition with other companies and for purposes of advertisement, a company should omit the clause requiring an immediate disclosure of known acts of dishonesty committed by the employee during the term of the bond, for a court to infer that the obligation still remained in the contract and that its violation would still produce forfeiture would seem to be a construction unusually indulgent towards the insurer. If the act of the employee fell short of a defalcation insured against, the insurer might deem its disclosure unnecessary. If, on the other hand, the act was within the scope of the policy and damnified the insured, the insured would be likely in his own interest to present his claim without delay. The general rule in insurance law relating to the doctrine of concealments is that the duty of disclosing material facts terminates with the closing of the contract, § 100, *supra*.

[5] A bond by its provision terminated if the insured cashier quitted service

If a bond procured by a state officer guaranteeing the faithful performance of his duties, is indefinite as to the period of risk, the court will infer that it is to continue during his present term of office.[1]

§ 472. Stipulation to Give Immediate Notice of Misconduct.—*On the discovery of any fraudulent or dishonest act on the part of the employee, the employer shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company.*[2]

Immediate notice means with reasonable promptness under the circumstances of the case.[3] With the aid of prompt notice the insurer might be enabled to recover embezzled property which otherwise would be squandered or dissipated; or to anticipate the flight of an absconding defaulter and, by his arrest, to enhance the chances of pecuniary restitution.

The insured employer is not under obligation, however, to watch or investigate the conduct of the employee or to use due diligence to detect dishonesty in the absence of express agreement to do so, but only to disclose the pertinent facts, when discovered and known.[4] Apparently the doctrine that "when a person has sufficient information to lead him to a fact he shall be deemed conversant with it," applied at times against insurers,[5] is not in this connection, at least, to be applied in their favor.[6] And a federal court has decided that where loss by embezzlement or larceny is insured against, the em-

of the bank. The bank suspended, but the cashier continued to do certain acts of service for it. *Held*, that the suspension did not set the period of six months running, *American Surety Co.* v. *Pauly*, 170 U. S. 144, 18 S. Ct. 552, 42 L. Ed. 977.

[1] *Bryant* v. *American Bonding Co.* (Ohio St., 1907), 82 N. E. 960.

[2] The provision is varied in its wording in different bonds, for instance, "If at any time during the term of this bond the employer learn or be informed that the employee is unreliable, dishonest, intemperate, gambling or indulging in other vices, the employer shall immediately notify the surety." In other bonds immediate disclosure of any act causing loss under the policy is called for with right of cancellation to the company as to future acts.

[3] See § 479, *infra; Remington* v. *Fidelity & Dep. Co.*, 27 Wash. 429 (delay of 45 days, issue for jury). "If a notice is given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, it will answer the requirements of the contract," *Fidelity & Deposit Co.* v. *Courtney*, 186 U. S. 342, 22 S. Ct. 833, 46 L. Ed. 1193.

[4] *Guarantee Co.* v. *Trust Co.*, 80 Fed. 766, 26 C. C. A. 146; *Fidelity & Cas. Co.* v. *Bank*, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. R. 440. Irregularities on the part of the employee falling short of the contract requirement of course, need not be disclosed, *Atlantic & P. Tel. Co.* v. *Barnes*, 64 N. Y. 385, 21 Am. Rep. 621.

[5] *Skinner* v. *Norman*, 165 N. Y. 565, 571.

[6] But it has also been held that the employer must use reasonable diligence to ascertain the facts, *Fidelity & Guar. Co.* v. *Western Bank* (Ky., 1906), 94 S. W. 3; *U. S. Fidelity & Guar. Co.* v. *Blackley*, 25 Ky. Law. Rep. 1271 77 S. W. 709.

ployer is not bound to give the notice until he has acquired knowledge sufficient to justify a reasonable man in making a charge of felony against his employee.[1]

In construing a somewhat similar clause the United States Supreme Court drew a distinction between "becoming aware" of gambling operations and "knowing" of them, and, under the former phraseology, held that the insurance was avoided because the president of the insured bank omitted to notify the insurer of information regarding the teller's speculations, though the president honestly believed that the teller had discontinued such practices.[2]

§ 473. Knowledge of What Agents Is Imputed to the Employer.—In construing the meaning of the clause obligating the employer to give immediate notice of misconduct on the part of the employee, as soon as the employer has knowledge of it, the question at once arises, knowledge by what agents is to be counted as knowledge of the employer. A corporation can possess knowledge only through its agents, and indeed many individual employers, also, transact their business through agents.

The rule is clear that the knowledge of the guilty employee is not to be imputed to the employer, since a defaulter is not likely to publish information regarding his own misdeeds.[3] Nor is the principal charged with the knowledge of any employee who is in collusion with the wrongdoer,[4] nor with the knowledge of a coemployee of the same rank as that of the wrongdoer,[5] but by the better authority the employer is chargeable with the knowledge of those superior officers or agents whose duty it is to become acquainted with such facts in the usual conduct of the business.[6]

In the case of fidelity bonds issued to trust companies, banks and other institutions of a fiduciary character, so far as the phrase-

[1] *Ætna Indemnity Co.* v. *J. R. Crowe Coal & M. Co.*, 154 Fed. 545, 83 C. C. A. 431. Compare *U. S. Fidelity Co.* v. *Rice*, 148 Fed. 206, 78 C. C. A. 164; *National Surety Co.* v. *Long*, 125 Fed. 887, 60 C. C. A. 623. And see 28 Cent. Dig. §§ 196, 198. A bond insuring against loss through "fraud or dishonesty" is broader in its scope, *U. S. Fidelity & G. Co.* v. *Egg Shippers', etc., Co.*, 148 Fed. 353, 78 C. C. A. 345.

[2] *Guarantee Co.* v. *Mechanics' Sav. Bk.*, 183 U. S. 402, 22 S. Ct. 124, 46 L. Ed. 253.

[3] *American Surety Co.* v. *Pauly*, 170 U. S. 144, 18 S. Ct. 552, 42 L. Ed. 977.

[4] *Fidelity & Deposit Co.* v. *Courtney*, 186 U. S. 342, 360, 22 S. Ct. 833, 46 L. Ed. 1193 (cases cited); *Pittsburg, Ft. W. & C. Ry. Co.* v. *Shaeffer*, 59 Pa. St. 350.

[5] See § 479, *infra*.

[6] See § 479, *infra*. The surety bonds provide that proofs of loss must be served on the company within a specified time after discovery of the dishonesty, in some bonds, thirty days, in others, three months, *Fidelity & Cas. Co.* v. *Bank*, 71 Fed. 116, 17 C. C. A. 641.

ology of the instruments is susceptible of such a result, powerful reasons exist in favor of an interpretation which will hold the surety to the full measure of its responsibility, undisturbed and undiminished by acts of omission or commission, whether fraudulent or merely inadvertent, on the part of any of the representatives of the insured.

This subject has received consideration by the United States Supreme Court in connection with the alleged embezzlement of nearly $20,000 of the bank funds for purposes of personal speculation by one McKnight, during his incumbency in the offices of vice-president and president. The bond, with renewals, insuring his fidelity contained a provision "that the employer shall observe, or cause to be observed, due and customary supervision over the employee for the prevention of default, and if the employer shall at any time during the currency of this bond condone any act or default upon the part of the employee which would give the employer the right to claim hereunder, and shall continue the employee in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employee which may occur subsequent to such act or default so condoned." The court said "manifestly, this stipulation is not fairly subject to the construction that it was the intention that the neglect or omission of a minority in number of the board of directors or the neglect or omission of subordinate officers or agents of the bank should be treated as the neglect or omission of the bank." And the court concluded that the things forbidden to be done or agreed to be done by the stipulation were to be either done or left undone by the bank in its corporate capacity, speaking and acting through the representative agents empowered by the charter to do or not to do the things pointed out. Such a representative the court suggested might be the governing body, the board of directors, or a superior officer, for instance, the president, having a general power of supervision over the business of the corporation, and vested with the authority to condone the wrongdoing or to discharge a faithless employee.[1]

On the strength of the case last cited, the Circuit Court of Appeals has gone further and has held that under a state code vesting corporate management in the trustees, knowledge on the part of a single officer, trustee or even the president will not be imputed to

[1] *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 S. Ct. 833, 46 L. Ed. 1193 (knowledge by a director and by the vice-president of a bank of the president's default is not imputable to the bank).

the corporation to effect a breach of warranty based upon misstatements in the application.[1]

§ 474. **Credit Insurance.**—It is difficult to bring mercantile failures within exact laws of average. For this reason and because the terms and conditions of an insurance against loss, accruing from giving credit to customers, elude precise definition, this class of insurance is apt to be unsatisfactory either to the insurer or to the insured, and is not very extensively practiced.[2] Such a contract is to be construed as one of insurance rather than of guaranty.[3]

The policy in usual form covers only mercantile accounts of the insured with persons having satisfactory ratings by specified mercantile agencies at the time of its issuance,[4] and a limit of credit to each debtor of the insured is imposed, usually in terms of a percentage of the mercantile rating of his capital. If credit is given by the insured to a customer in excess of this stipulated percentage or amount, only the excess will be excluded from the operation of the policy. The stipulated amount will be covered.[5] But usually, in order to stimulate the exercise of prudence on the part of the insured, it is provided that the insured shall himself be a coinsurer and shall sustain a certain percentage or amount of initial loss before the insurer's liability attaches.[6] A specified percentage of such initial loss is to be computed as of the date of the expiration of the bond and not as of the date of the failure first occurring.[7]

[1] *American Bonding Co.* v. *Spokane Bldg., etc., Soc.*, 130 Fed. 737, 65 C. C. A. 121. The court made no reference to the case of *Guarantee Co.* v. *Mechanics' Sav. Bk.*, 183 U. S. 402, 22 S. Ct. 124, 46 L. Ed. 253.

[2] *Tebbets* v. *Mercantile Credit G. Co.*, 73 Fed. 95, 19 C. C. A. 281. A patent was refused on a plan for insurance against losses from bad debts, *U. S. Credit S. Co.* v. *American Ind. Co.*, 51 Fed. 751.

[3] *Am. Credit Ind. Co.* v. *Athens W. Mills*, 92 Fed. 581, 34 C. C. A. 161; *State* v. *Phelan*, 66 Mo. App. 548; *People* v. *Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124. A contract to purchase for a fixed price, accounts against insolvent debtors, is a contract of insurance, *Claflin* v. *U. S. Credit System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. R. 528 (contract void, insurer not being authorized to do business).

[4] *Robertson* v. *U. S. Credit System Co.*, 57 N. J. L. 12, 29 Atl. 421; *Shakman* v. *Credit System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. R. 920. A bond given in full and construed in *Talcott* v. *Gray*, 59 N. J. Eq. 595, 42 Atl. 603.

[5] *Shakman* v. *Credit System Co.*, 92 Wis. 366, *supra*.

[6] *Jackel* v. *Am. Credit Ind. Co.*, 54 N. Y. Supp. 505, 34 App. Div. 565, aff'd 164 N. Y. 598; *Rice* v. *National Credit Ins. Co.*, 164 Mass. 285, 41 N. E. 276. The court construing the 75% limit in favor of the insured held that it did not apply to the face amount of the policy but only to the amount payable on account of any one debtor, *Peden Iron & Steel Co.* v. *Ocean Acc. & G. Co.*, 151 Fed. 992, 81 C. C. A. 178.

[7] *Strouse* v. *Am. Credit Ind. Co.*, 91 Md. 244, 46 Atl. 328. The doctrine of misrepresentations and concealment of material facts, in general, applies to this class of insurance, *Am. Credit Ind. Co.* v. *Wimpfheimer*, 14 App. Div.

It is not necessary that a debtor of the insured should be adjudicated a bankrupt in order to be "insolvent" within the meaning of the policy; nor that his assets in fact should be less than his liabilities. It is enough if he is shown to be unable to meet his obligations in the usual course of business.[1]

Insolvency of the insurer, evidenced by an assignment for the benefit of creditors under an insolvency law, operates to terminate the policy as to future losses, and the insured is then entitled to recover back the unearned portion of the premium.[2]

Although the legal status of insolvency on the part of the insurer, evidenced, for example, by the appointment of a receiver and the sequestration of the assets of the company, cancels the insurance as to future losses,[3] nevertheless, because of the breach of contract

498, 43 N. Y. Supp. 909. The doctrines of warranty and waiver by agents also apply, *Carrollton, etc., Mfg. Co.* v. *Am. Credit Ind. Co.*, 124 Fed. 25, 59 C. C. A. 545; *Baer* v. *Am. Credit Ind. Co.*, 116 App. Div. 233, 101 N. Y. Supp. 672, aff'd 191 N. Y. 540 (knowledge of breach by mere solicitor affects no waiver). The changing of the copartnership name of the insured without a change of membership will not forfeit the policy, *Am. Credit Ind. Co.* v. *Wood*, 73 Fed. 81, 19 C. C. A. 264. The liberal rule of construction is always applied in favor of the insured in case of ambiguities, *Am. Credit Ind. Co.* v. *Athens W. Co.*, 92 Fed. 581, 34 C. C. A. 161 (Taft, J.); *People* v. *Mercantile Credit G. Co.*, 166 N. Y. 416, 60 N. E. 24 (what is an assignment or insolvency); *Goodman* v. *Mercantile Credit G. Co.*, 17 App. Div. 474, 45 N. Y. Supp. 508 (what is not a general assignment). But see *Mercantile Credit G. Co.* v. *Wood*, 68 Fed. 529, 15 C. C. A. 563. Loss held covered where sale was made within the period specified in the policy, but the loss accrued afterwards, *Sloman* v. *Mercantile Credit G. Co.*, 112 Mich. 258, 70 N. W. 886. Under another bond the opposite ruling was made, *Hogg* v. *Am. Credit Ind. Co.*, 172 Mass. 127, 51 N. E. 517. Death of a partner is not discontinuance of the business within the meaning of the bond, *Am. Credit Ind. Co.* v. *Cassard*, 83 Md. 272, 34 Atl. 703. Losses clearly excluded cannot be included by construction, *Talcott* v. *National Credit Ins. Co.*, 9 App. Div. 433, 41 N. Y. Supp. 281, aff'd 163 N. Y. 577, 57 N. E. 1125; *Brierre* v. *American Ind. Co.*, 67 Mo. App. 384. Meaning of the phrase "pro-rated," *Talcott* v. *National Credit Ins. Co.*, 28 App. Div. 75, aff'd 163 N. Y. 577.

[1] *People* v. *Mercantile Credit G. Co.*, 166 N. Y. 416, 60 N. E. 24 (assignment); *Strouse* v. *Am. Credit Ind. Co.*, 91 Md. 244, 46 Atl. 328 (the fact of insolvency of a debtor may be proved in other ways as well as in those set forth in the policy). "Failure" means what in policy, *Am. Credit Ind. Co.* v. *Carrollton, etc., Mfg. Co.*, 95 Fed. 111, 36 C. C. A. 671. Construction as to losses under renewal certificates, *American Credit Ind. Co.* v. *Champion, etc.*, 103 Fed. 609, 43 C. C. A. 340; *Lauer* v. *Gray*, 55 N. J. Eq. 544, 37 Atl. 53. And see *American Credit Ind. Co.* v. *Champion C. Paper Co.*, 103 Fed. 609.

[2] *Smith* v. *National Credit Ins. Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511. An action to recover back the premium is not an action on the policy and need not be brought within the one-year limit, *McCallum* v. *National Credit Ins. Co.*, 84 Minn. 134, 86 N. W. 892. Losses sustained after the insurer becomes insolvent cannot be recovered, *Gray* v. *Reynolds*, 55 N. J. Eq. 501, 37 Atl. 461. Proofs of loss, how to be made, *American Credit Ind. Co.* v. *Athens W. Mills*, 92 Fed. 581, 34 C. C. A. 161; *Jackel* v. *American Credit Ind. Co.*, 54 N. Y. Supp. 505, 34 App. Div. 565, aff'd 164 N. Y. 598; *Strouse* v. *Am. Credit Ind. Co.*, 91 Md. 244, 46 Atl. 328.

[3] *Commonwealth* v. *Mass. Ins. Co.*,

on the part of the insurer in suspending business and in becoming disabled from fulfilling its engagements, the insured has a valid claim against the insurer, measured by the present value of his policy at the time of the company's default.[1]

§ 475. **Employers' Liability Insurance.**—Proprietors of large establishments employing many agents and workers, as, for example, factories, mills, and department stores, also common carriers, contractors, and others are subjected to numerous claims growing out of personal injuries.

These claims naturally fall into two classes, those of the employees, based upon injuries sustained by themselves in connection with their work for the employer, and those of the customers and the outside public generally who have been injured by the careless or improper acts of the employer or his employees in connection with running the employer's elevators or machinery, or driving his delivery wagons or automobiles, or conducting other branches of his business. The amount of these claims against any one proprietor, sometimes very large, it is impossible to estimate in advance, but the aggregate recoveries against many proprietors may be brought within laws of average, and, therefore, such liabilities offer a fit subject for a scheme of insurance.[2]

Policies of this general character have become popular within the past few years, though in their purposes, terms, and scope they vary widely. For injuries to persons caused by the careless management of the employers' draught animals or vehicles a separate policy is often issued known as a "teams liability policy," and for injuries to any person or property, including also the machine itself, connected with running automobiles, "an automobile policy."[3]

The premium in what is known as "the general liability policy" is based upon the total compensation to employees, together with specific charges for floor area, street frontage, and elevators. In what is known as "the employers' liability policy," a policy of

119 Mass. 45; *Taylor* v. *North Star Mut. Ins. Co.*, 46 Minn. 198, 48 N. W. 772.

[1] *Carr* v. *Hamilton*, 129 U. S. 252; *Taylor* v. *North Star Mut. Ins. Co.*, 49 Minn. 198; *People* v. *Commercial Alliance L. Ins. Co.*, 154 N. Y. 95 (status is fixed as of date of commencement of action for dissolution); *People* v. *Empire Mut. Life Ins. Co.*, 92 N. Y. 105; *People* v. *Security Life Ins. & Ann. Co.*, 78 N. Y. 114; *Commonwealth* v. *American Life Ins. Co.*, 162 Pa. St. 586, 29 Atl. 660.

[2] See § 2, *supra*. Casualty companies may carry on business in other states than where organized, *People* v. *Van Cleave*, 187 Ill. 125, 58 N. E. 422; *People* v. *Fidelity & Cas. Co.*, 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; *Employers' Liability Assur. Corp.* v. *Merrill*, 155 Mass. 404, 29 N. E. 529.

[3] *Gould* v. *Brock* (Pa. St., 1908), 69 Atl. 1122.

somewhat more restricted scope, the premium is based upon the total compensation to employees.[1] In "the teams liability policy" the premium is usually based upon the total compensation to the drivers.[2] These and other modified forms of similar policies all constitute legitimate varieties of accident insurance.[3]

An approximate estimate of pay rolls is usually made in advance to roughly determine the premium, and the precise adjustment is postponed until the end of the term of insurance, inasmuch as meanwhile the schedule of employees and their wages is likely to show fluctuation.[4]

To aid the insurer in testing the accuracy of the final adjustment for premium, the policy provisions often secure to him the privilege of examining the books of the insured. This right the courts will enforce by ordering the production of the books unless the insured allow inspection at reasonable times.[5]

[1] *Swedish Am. Tel. Co.* v. *The Fidelity & Cas. Co.*, 208 Ill. 562, 70 N. E. 768.

[2] Sometimes upon the number of vehicles, *Gray* v. *Standard Life & Acc. Co.*, 170 Mass. 558.

[3] *Employers' Liability Assur. Corp.* v. *Merrill*, 155 Mass. 404, 29 N. E. 529. The policy may be limited to injuries to employees, *Travelers' Ins. Co.* v. *Henderson Cotton Mills* (Ky., 1905), 85 S. W. 1090; or to personal injuries caused by an elevator, or by steam boiler explosions.

[4] But by some policies the wages of both the injured person and the person injuring him must be included in the estimated wages named in its schedule attached to the policy, *East Carolina Ry. Co.* v. *Maryland Cas. Co.*, 145 N. C. 114, 58 S. E. 906.

[5] *Swedish Am. Tel. Co.* v. *Casualty Co.*, 208 Ill. 562, 70 N. E. 768; *Fidelity & Cas. Co.* v. *Seagrist Jr. Co.*, 79 App. Div. 614, 80 N. Y. Supp. 277. As in other forms of insurance the doctrine of waiver applies, *Andrus* v. *Maryland Cas. Co.*, 91 Minn. 358, 98 N. W. 200 (knowledge of forfeiture at inception of contract). In construing the meaning and scope of the policy the insured is favored in case of ambiguity. Thus, an injury received in an elevator was held covered though the elevator was not mentioned, as required by the policy, in the schedule, *Fuller Bros. T. & Lumber Co.* v. *Fidelity & Cas. Co.*, 94 Mo. App. 490, 68 S. W. 222. A kidney disease contracted by an employee in handling infected rags is an "injury accidentally suffered," *Columbia Paper Stock Co.* v. *Fidelity & Cas. Co.*, 104 Mo. App. 157. The term "accident" was broadly rather than narrowly construed in *Chi. Sugar Refining Co.* v. *Am. Steam Boiler Co.*, 48 Fed. 198, aff'd 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572. Under a clause insuring "all operations connected with the business of iron and steel works," an injury to an employee, caused by the fall of a girder which was being raised by an independent crew of workmen, was held to be within the policy, *Hoven* v. *Emp. Liab. Assur. Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. And see *Phillipsburg Horse Car Co.* v. *Fidelity & Cas. Co.*, 160 Pa. St. 350, 28 Atl. 823. Losses were insured resulting from injuries to employees while engaged in the ice business; *held*, that injuries sustained by an employee of the assured by the fall of an ice house, while in process of construction by the assured, though not in the season for cutting ice, were within the policy, *People's Ice Co.* v. *Emp. Liab., etc., Co.*, 161 Mass. 122, 36 N. E. 754. Where, however, the policy names a partnership for loss by injuries to its employees by the firm's negligence, it is not liable for the negligence of a member of the firm when not engaged in the partnership business, *Kelley* v. *London Guar. & Acc. Co.*, 97 Mo. App. 623, 71 S. W. 711. Exception of injuries to

Since, in general, the same doctrines of law apply as in other branches of insurance law, it is obvious that the insured must not deliberately enhance the risk during the term of the policy.

In a Missouri case the policy insured against common law or statutory liability to employees, and described the business of the insured as wholesale dry goods and general merchandise. After the issuance of the policy and without consent of the insurers, the insured employer introduced into his business machinery for polishing rusted cutlery, which was unusual in establishments of that character. In connection with its use one of the employees received injuries for which he recovered judgment against the employer, who in turn brought action on the policy to recoup from the insurers the amount of his loss. The court held that he could not recover on the policy.[1]

§ 476. The Employer, not the Injured Person, Is Insured.—The policy may name both employer and employees as beneficiaries.[2] In that event the injured employee in most jurisdictions may have a right of action against the insurer on the policy, if he has not already been indemnified for his loss.[3] And if, in such a case, the employer collects the insurance money on account of the injury, the fund will be impressed with a trust in favor of the employee, of which the employee cannot be deprived by agreement between the employer and the insurer.[4]

Usually, however, in procuring this class of insurance, and in paying the premium for it, the employer is looking out for his own protection solely, and is alone named in the policy as the insured. In that event there is no privity of contract between the injured person and the insurer; the employer alone is entitled to sue on the policy and no trust is impressed on the insurance moneys in favor of the injured person, since the latter is altogether a stranger to the contract.[5]

children under statutory age construed in *Goodwilli* v. *London Guar. & Acc. Co.*, 108 Wis. 207, 84 N. W. 164. An employer's liability policy provided for cancellation "upon notice;" *held*, no cancellation where the company threatened immediate cancellation unless a certain employee was discharged, *London Guar. & Acc. Co.* v. *Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. R. 185. As to cancellation of such a policy and suit for the premium earned, see *Macdonell* v. *Keeler Mfg. Co.*, 90 Minn. 321, 96 N. W. 785.

[1] *Wallmann* v. *Fidelity & Cas. Co.*, 87 Mo. App. 677. What is commonly understood by the term "general woodwork" may present a question for the jury, *Fidelity & Cas. Co.* v. *Phœnix Mfg. Co.*, 100 Fed. 604, 40 C. C. A. 614.

[2] Statutes expressly authorize this, N. Y. L. 1892, c. 690, § 55.

[3] *Embler* v. *Hartford Steam Boiler Ins. Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512.

[4] *Dearborn* v. *Refining Co.*, 7 Misc. 513, 28 N. Y. Supp. 493.

[5] *Hawkins* v. *McCalla*, 95 Ga. 192, 22 S. E. 141; *Frye* v. *Bath Gas &*

Accordingly the employer, when so insured, may, at any time, make settlement with his insurers and give them an effective discharge, without the consent of the injured claimant, and without notice to him, although the latter may have procured a final and unsatisfied judgment against the employer for negligence or breach of duty.[1] Nor can such a claimant, in his own right, whether a judgment creditor or otherwise, have recourse to an equitable action to enforce the policy.[2]

If he have an unsatisfied judgment against the insured, he may, of course, as such judgment creditor, pursue the appropriate statutory remedies, by attachment, garnishment, or otherwise, to reach the insurance fund as property belonging to his debtor.[3] But in any such proceeding he is likely to come into competition with the other creditors of the insured.

We have had occasion to observe that there is usually no privity of contract between the original insured and a company issuing a contract of reinsurance, and that, therefore, if the direct insurer is insolvent it may, after a loss, collect the reinsurance for its creditors generally, while the original insured, the owner of the insured property, is left without indemnity or largely so.[4] Likewise it is obvious, for the same reason, that an insolvent employer may, under certain forms of liability policies, collect for injuries to his employees or to outsiders, while the injured claimants themselves, whether judgment creditors or not, may receive no compensation for the losses which they have sustained. For this and other reasons the employers' liability policy is now generally confined to an indemnity, in whole or in part, against *paid* losses.

An interesting and perhaps novel litigation is reported in Illinois in which the employee succeeded in recovering damages in an action

Elec. Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. R. 500; *Bain* v. *Atkins*, 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. R. 411. "An injured employee has no rights against a liability company which has an indemnity contract or policy with his employer," *Kinnian* v. *Fidelity & Cas. Co.*, 107 Ill. App. 406; *Burke* v. *London Guarantee & Acc. Co.*, 47 Misc. (N. Y.) 171 (Gaynor, J., citing cases). The policy may, and usually does, expressly provide that the employer alone can bring action, *Beyer* v. *International Aluminum Co.*, 115 App. Div. (N. Y.) 853; *Munro* v. *Maryland Cas. Co.*, 48 Misc. (N. Y.) 183. But this does not prevent an assignee of a claim by assignment made after loss from bringing action, *Maryland Cas. Co.* v. *Omaha Electric L. & P. Co.*, 157 Fed. 514.

[1] *Bain* v. *Atkins*, 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. R. 411.

[2] *Cushman* v. *Carbondale Fuel Co.*, 122 Iowa, 656, 98 N. W. 509 (statutes allowing actions to be brought by the real party in interest will not aid such a claimant); *Beyer* v. *International Aluminum Co.*, 115 App. Div. 853.

[3] *Fritchie* v. *Miller's Pa. Extract Co.*, 197 Pa. St. 401, 47 Atl. 351.

[4] See § 319, *supra*.

of tort against the guarantee company for inducing the insured employer to discharge the injured employee because the latter would not release his claim. One Horn, foreman in the bicycle factory of Arnold, Schwinn & Co., of Chicago, lost two fingers in attempting to operate a milling machine. For this injury he recovered judgment for $3,500 against his employers. Thereafter Horn was discharged solely because the guarantee company threatened that otherwise it would cancel the policy for the unexpired term, which it had the right to do under a five-day cancellation clause. Horn's employment was terminable at the will of his employers. Prior to his recovery of judgment against them, Bloomingston, claim agent and attorney for the guarantee company, offered Horn $75.00 in settlement of his claim and said that if it were not accepted, he would see to it that Horn was not re-employed by Arnold, Schwinn & Co., and also that he did not get work anywhere else. Horn was awarded damages against the guarantee company by a jury in the sum of $800, and on appeal, the majority of the court affirmed the judgment, concluding that there was evidence of a willful and unjustifiable interference on the part of the defendant with the known rights of the plaintiff.[1]

§ 477. Period of Risk.—If the casualty causing the personal injury, liability for which is insured against, occurs during the term specified in the policy, it is covered by the policy though the liability of the insured may not be actually determined by judgment or otherwise until long after the term of insurance has expired.[2]

§ 478. Whether the Policy Is Indemnity Against Liability or Satisfied Liability.—In construing the meaning of the employers' liability policy the practical inquiry arises whether, to make out his cause of action against the insurer, it is enough for the employer to show that he is liable to pay an employee or outsider for a personal injury, or whether besides the liability he must show an actual payment or satisfaction of the liability. The answer to this inquiry turns upon the phraseology of the policy. It is a question of the character of the risk as defined by the particular contract.

If the insurer's promise is to pay "all losses with which the insured may be legally charged or for which he may become legally liable," it is obvious that as soon as the employer's liability to the

[1] *London Guar. & Acc. Co.* v. *Horn*, 206 Ill. 493, 69 N. E. 526 (citing many cases).

[2] *Southern Ry. News Co.* v. *Fidelity & Cas. Co.* (Ky., 1904), 83 S. W. 620.

third party is fixed, his right to sue in turn upon his policy is perfected. The question whether the employer has actually paid, or ever does pay, or is pecuniarily able to pay, the judgment procured against him or the liability without judgment is of no concern to the insurer and is not germane to the issues in the trial of the action on the policy.[1]

If, on the other hand, as is now customary, the insurer obligates himself to indemnify the insured within certain limits, "for loss actually sustained and paid by him," or, as in some policies, "for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue," it needs no argument to show that the insured cannot recover on his liability policy until he has proved a payment or satisfaction of the liability.[2]

Accordingly, under a policy of the last-mentioned class, the New Jersey court held that not the amount of the employee's judgment against the employer, but the amount actually paid by the employer thereon measured the liability of the insurer. Nevertheless, the court concluded that a transfer by the insolvent employer to a trustee in bankruptcy would take the place of actual payment to the employee, and the master in bankruptcy was allowed to recover on the policy. In view of the insolvency of the employer, however, the recovery was reduced in amount, and the judgment was held payable in part, to wit, in the ratio which the insolvent's assets, excluding the insurance claim, bore to all his debts, excluding the judgment.[3]

Consistently with a general doctrine of insurance law,[4] all these three kinds of obligations, evidenced by the three forms of policies

[1] *American Emp. L. Ins. Co.* v. *Fordgee*, 62 Ark. 562; *Frye* v. *Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444; *Stephens* v. *Penn. Cas. Co.*, 135 Mich. 189; *Anoka Lumber Co.* v. *Fidelity & Cas. Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; *Ross* v. *Am. Emp. Liability Ins. Co.*, 56 N. J. Eq. 41, 38 Atl. 22; *Fenton* v. *Casualty Co.*, 36 Ore. 283, 56 Pac. 1096, 48 L. R. A. 770; *Fritchie* v. *Miller's, etc., Co.*, 197 Pa. St. 401; *Pickett* v. *Casualty Co.*, 60 S. C. 477, 38 S. E. 160; *Hoven* v. *Assur. Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

[2] *Allen* v. *Ætna Life Ins. Co.*, 145 Fed. 881 (until judgment is paid, insurer cannot be garnisheed); *Cushman* v. *Carbondale, etc., Co.*, 122 Iowa, 656 (payment is a condition precedent); *Carter* v. *Ætna Life Ins. Co.* (Kan., 1907), 91 Pac. 178; *O'Connell* v. *R. R. Co.*, 187 Mass. 272, 72 N. E. 979; *Connolly* v. *Bolster*, 187 Mass. 266, 72 N. E. 981 (payment of the judgment is a condition precedent); *Frye* v. *Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. R. 500. The New York court says: "There was no loss or damage sustained by the defendant within the terms of this policy until the insured had been compelled to pay the claims of the owners of the vessels, the contract of insurance being simply for indemnity," *McWilliams* v. *Home Ins. Co.*, 40 App. Div. 400, 404.

[3] *Moses* v. *Travelers' Ins. Co.*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. R. 663.

[4] See § 24, *supra*.

above described in this section, may well be classified as contracts of indemnity. The first class is an indemnity against liability. The other two are an indemnity against satisfied liabilities; the one, regardless of judgments; the other, only if established by a judgment rendered after trial of the issue.

The usual rule of construction, however, is clear, that in case of ambiguous phraseology, employed by the insurer in its contract, the insured will be favored by the court.[1] Accordingly, if the language of the policy permits, the court will construe the instrument as an insurance against liability, and not against a satisfied or discharged liability only.

A New Hampshire case furnishes a good illustration, although the conclusions of the court have not met with general approval.[2] Here the employer's liability policy provided that the policy should be liable only for losses actually sustained and paid by the insured in satisfaction of judgments. By another clause of the policy, however, the court concluded that the insurer obligated itself to pay, or secure the discharge of the insured from, any claim in a suit by an employee against the employer where the insurer took control of the defense. The obligation "to defend" was thus construed as meaning "to successfully defend." The insurer had in fact taken control of a litigation for the defendant, the insured, and judgment had been obtained in that action by the plaintiff, the employee. This judgment the employer had not paid and could not pay because he had become insolvent. The court, nevertheless, taking advantage of provisions of the policy, which it considered inconsistent, decided that equity had jurisdiction to compel a satisfaction of the judgment by the insurer.[3]

A litigation instituted by an employer named Kennedy, against his insurer, illustrates a further point involved in this subject.

Kennedy's policy provided, "no action shall lie against the company . . . . unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment," etc. One of the employees in his steam laundry, Kathryn Carlin, received bodily injuries during the term of the policy and, based thereon, recovered judgment against Kennedy for nearly $8,000. In the following month payment of the

[1] *Fidelity & Cas. Co.* v. *Lone Oak Cotton, etc., Co.* (Tex. Civ. App.), 80 S. W. 541.

[2] *St. Louis, etc., Co.* v. *Maryland Cas. Co.*, 201 U. S. 173, 182; *Connolly* v. *Bolster*, 187 Mass. 266; *Munro* v. *Maryland Cas. Co.*, 48 Misc. 183, 96 N. Y. Supp. 705.

[3] *Sanders* v. *Frankfort Marine Acc. & Plate Glass Ins. Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. R. 688.

judgment was accepted by Kathryn in the form of a series of promissory notes made by Kennedy in her favor and payable at various times during the following four years. The judgment was thereupon satisfied. An action was brought by Kennedy on his policy for reimbursement and was tried prior to the actual payment of the notes. The court held that a payment of the judgment in good faith by means of promissory notes was a sufficient payment to satisfy the terms of the policy.[1]

§ 479. Immediate Notice of Injury with Full Particulars Required.—To aid the insurer in making prompt compromise of claims or suitable preparation for defense, the policy usually provides in substance that the insured must give to the insurer immediate or prompt notice with full information on the occurrence of any injury or accident. This provision when properly construed is reasonable,[2] and compliance with it is a condition precedent to a right of recovery on the policy.[3]

"Immediate notice," however, as already more than once observed, means notice given with such promptness as is reasonable under all the circumstances of the case.[4] The obligation to give immediate notice in this connection involves only the duty to exercise due diligence, and what is due diligence is often a question of fact for the jury to pass upon.[5] But where the court concludes that only one inference is deducible from the facts, it will decide the question as one of law.[6]

[1] *Kennedy* v. *Fidelity & Cas. Co.* (Minn., 1907), 110 N. W. 97 (some policies now require payment in cash).

[2] *Columbia Paper Stock Co.* v. *Fidelity & Cas. Co.*, 104 Mo. App. 571, 78 S. W. 320.

[3] *London Guarantee & Acc. Co.* v. *Livy* (Ind. App.), 66 N. E. 481.

[4] *Columbia Paper Stock Co.* v. *Fidelity & Cas. Co.*, 104 Mo. App. 157, 78 S. W. 320; *Employers' Liability Assur. Corp.* v. *Light, Heat & P. Co.*, 28 Ind. App. 437, 63 N. E. 54 (notice, among other things, was aimed at "immediate medical attendance"). Similarly, when the policy specified a limit of ten days, the court concluded that the time would not begin to run until the important facts and particulars had been ascertained, *Trippe* v. *Provident Fund Soc.*, 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. R. 529. Where the policy required immediate notice, "upon occurrence of an accident and upon notice of any claim," etc., it was held that notice need not be given until the claim for damages had been made, *Grand Rapids Elec. L. & P. Co.* v. *Fidelity & Cas. Co.*, 111 Mich. 148, 69 N. W. 249; *Anoka Lumber Co.* v. *Fidelity & Cas. Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

[5] *Ward* v. *Maryland Cas. Co.*, 71 N. H. 262, 51 Atl. 900, 93 Am. St. R. 514.

[6] *Travelers' Ins. Co.* v. *Myers*, 57 N. E. 458, 49 L. R. A. 760; *Rooney* v. *Maryland Cas. Co.*, 184 Mass. 26, 67 N. E. 882 (3 months, too late); *Nat. Cont. Co.* v. *Travelers' Ins. Co.*, 176 Mass. 121, 57 N. E. 350 (7 months, too late); *Smith, etc., Co.* v. *Travelers' Ins. Co.*, 171 Mass. 357, 50 N. E. 516 (notice after 26 days is not "immediate"); *Underwood Veneer Co.* v. *London Guaranty & Acc. Co.*, 100 Wis. 378, 75 N. W. 996 (9 months, too

To govern the rights of parties under this important provision, the New York Court of Appeals has laid down the following set of rules: Under a clause in an employers' liability insurance policy, providing that, "The assured, upon the occurrence of an accident and also upon receiving information of a claim on account of an accident, shall give immediate notice in writing of such accident or claim, with full particulars, to the company at its office in New York City, or to the agent, if any, who shall have countersigned this policy," the assured is not bound to give notice of an accident immediately after the occurrence thereof, but as soon as he has become apprised of the accident, provided, however, he exercises reasonable diligence to acquire information. It is his duty, therefore, to use reasonable care in the regulation of his business so that he may be apprised with reasonable celerity of any accident that may occur in its conduct. If, despite the exercise of reasonable care, the insured fails to acquire the information till after a lapse of time, but on its acquisition gives prompt notice to the insurance company, he complies with the obligation of the policy. Where, however, the assured employs many servants and the duty of acquiring information of accidents as they occur is necessarily committed to servants or agents, he is liable for their negligence or fault, in the discharge of this duty, to the same extent as he would be responsible for their negligence or misconduct on any other obligation to third persons, and the assured is not relieved from such responsibility by the promulgation of rules adapted to apprise him of accidents, whether the servants complied with the rules or not; but his liability for the negligence of his servants or agents in failing to apprise him of an accident must be confined to those agents whose duty it was, either by his express regulation, or by their supervision and control in the natural and proper conduct of business over the subordinate servants by whom the accident had been caused, to transmit such knowledge to their superiors or the assured, and the assured is not chargeable with the knowledge of the servant causing the accident or with the knowledge or information of a coservant of the same rank as the one causing the accident.[1]

late). A notice of accident after a year was held insufficient though meanwhile the insured did not know that injury had resulted. *Northwestern Tel. Exch. Co.* v. *Maryland Cas. Co.*, 86 Minn. 467, 90 N. W. 1110.

[1] *Woolverton* v. *Fidelity & Casualty Co.*, 190 N. Y. 41, 82 N. E. 745 (truck driver informed foreman of trucking company. Latter neglected to give prompt notice to superintendent. *Held*, that it was for the jury to determine whether in ordinary course it was the foreman's duty to report to superintendent. If so, notice to foreman was notice to the plaintiff) Com-

South Carolina furnishes an illustration. The Edgefield Manufacturing Company, proprietor of a mill, had obtained a policy to protect it against claims for accidents to its employees, the insurance being limited to $1,500 for the death or injury of any one person. An accident causing personal injuries to an employee occurred October 21st. At that time the plaintiff's officer, Price, in charge of the mill was sick with the smallpox. The rest of the office force were mostly ill with the same disease. Price died of the attack in February of the following year. The next month, Tompkins, the successor of Price, first learned of the casualty insurance. Thereupon he immediately gave to the insurance company a notice of the accident and of the pendency of the negligence suit, which had been instituted in consequence the preceding January. In that action the employee ultimately recovered judgment against the employer for $3,500. Thereafter this action was begun for $1,500. The court on appeal decided that the "jury could not reasonably reach any other conclusion than that the delay was excusable and the notice given and the summons sent with all promptness to be fairly expected and exacted." The judgment of the mill owner against the insurer was affirmed.[1]

In another case, an employer's liability policy was procured for the benefit of a copartnership by one of two partners, without the knowledge of the other. The latter, while ignorant of the existence of the insurance, knew about an accident which subsequently happened to one of the employees of the firm. The other partner, though cognizant of the policy, knew nothing of the accident. In consequence of this situation the notice of claim, stipulated to be immediate, was not given to the agent of the insurance company until eight months after the occurrence of the injury. The court held that the notice was too late, and that the neglect of one partner to inform the other of the insurance offered no adequate excuse for the delay.[2]

As to the character and extent of the information, which must be furnished to the insurer with the notice, the New Hampshire court holds that the particulars required are only such as are sufficient

pare *Mandell* v. *Fidelity & Cas. Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. R. 291 (employer not chargeable with servant's knowledge); *Saint* v. *Mfg. Co.*, 95 Ala. 362, 10 So. 539, 36 Am. St. R. 210; *Fidelity & Cas. Co.* v. *Bank*, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. R. 440 (bank not chargeable with cashier's knowledge); *McShane* v. *Howard Bank*, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552; *Pittsburg Ft. W. & C. Ry. Co.* v. *Shaeffer*, 59 Pa. 350.

[1] *Edgefield Mfg. Co.* v. *Maryland Cas. Co.* (S. C., 1907), 58 S. E. 969.

[2] *Deer Trail, etc., Mining Co.* v. *Maryland Cas. Co.*, 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275.

to enable the insurance company to judge of the probability of a claim, and that it has no right to expect the results of an exhaustive investigation such as might be called for to determine the facts upon a consideration of conflicting evidence.[1]

§ 480. The Employer Must not Settle Claims, Without Insurer's Consent.—If the employer purposes to enforce his liability policy, it is obvious that he must not, without his insurer's consent, settle or compromise claims made upon him by his employees or by the public, which fall within the reach of the insurance,[2] unless, indeed, he is coerced into taking such precautionary measures by the improper attitude of the insurer.[3]

§ 481. The Employer Must Show a Liability Insured Against.—To make out his case on the policy, the insured employer must not only show a liability, but a liability on account of an injury covered by the policy. Thus it was held that his action against his insurers must fail, because though he offered in evidence a judgment for damages obtained against him by an employee, yet it did not appear whether the judgment related to an injury sustained during the term of the policy or to another injury sustained after expiration of the policy.[4]

Where the policy provided that the amount of the employer's liability must first be "determined," before the insurer would be obligated to pay, the court held that such amount was not "determined" so long as an appeal from the judgment against the insured employer was pending in court.[5]

§ 482. The Insurer Conducts Compromise or Defense in Accident Suit.—Unless the insurance company repudiates liability under

[1] *Ward* v. *Maryland Cas. Co.*, 71 N. H. 262, 51 Atl. 900, 93 Am. St. R. 514; *Moran Bros.* v. *Pac. Coast Cas. Co.* (Wash., 1908), 94 Pac. 106. A 30 days' limitation for beginning action has been held void, *Travelers' Ins. Co.* v. *Henderson Cotton Mills* (Ky., 1905), 85 S. W. 1090, and will be considered waived by pending negotiations for settlement, *Lynchburg Cotton Mill Co.* v. *Travelers' Ins. Co.*, 149 Fed. 954.

[2] *Pickett* v. *Fidelity & Cas. Co.*, 60 S. C. 477, 38 S. E. 160.

[3] See § 484, *infra*.

[4] *Reigler* v. *Sherlock*, 66 Ark. 215, 49 S. W. 1080.

[5] *Fidelity & Cas. Co.* v. *Fordyce*, 64 Ark. 174, 41 S. W. 420. The insurance was against liability for personal injuries sustained by employees or by the public "caused by the assured or by the assured's workmen but not caused by a subcontractor or subcontractor's workmen." The court held that the burden was on the insured employer to prove that the injury was not caused by a subcontractor or a subcontractor's workmen, *Tolmie* v. *Fidelity & Cas. Co.*, 95 App. Div. 352, 88 N. Y. Supp. 717, aff'd as to extent of liability, 183 N. Y. 581.

the policy in respect to the claim, it properly should control the conduct of the defense in the action against the employer for negligence, or breach of statutory duty, inasmuch as the ultimate responsibility to the extent of the policy will rest upon the insurer.[1] Indeed, even though the policy be silent on the subject, the employer must, for his own proper protection, tender this privilege to his insurer, otherwise the insurer may repudiate the binding force of any judgment which is obtained by the injured person;[2] but usually the terms of the policy expressly obligate the insurer to defend against claims which are not repudiated, or else secure to it the option through its own counsel, and at its own expense to take charge of the litigations against the insured based upon them.[3]

While the policy usually reserves to the insurers the right to compromise such an action, they may not credit on the judgment therein the amount of a compromise of a claim not in suit made without consent of the insured.[4]

§ 483. Judgment in Accident Suit Conclusive.—The insurer, having received proper notice of the accident suit and opportunity to conduct the defense, is concluded by the judgment therein rendered, which naturally is offered in evidence in the suit on the policy, to establish the fact of the employer's liability to the injured person, and the amount of that liability.[5] But the estoppel of the judgment does not extend beyond the issues which were litigated in the prior action in which it was rendered.[6]

[1] *Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316, 16 S. Ct. 564, 40 L. Ed. 712. By taking charge of the defense of the accident suit, it has been held, that the insurer waives the policy exception to liability for injuries caused by failure of assured to observe statutes affecting the safety of persons, *Royle Min. Co.* v. *Fidelity & Cas. Co.* (Mo. App., 1907), 103 S. W. 1098. See *Chicago-Coulterville Coal Co.* v. *Fidelity & Cas. Co.*, 130 Fed. 957.

[2] *Glens Falls Portland Cement Co.* v. *Ins. Co.*, 162 N. Y. 399, 56 N. E. 897.

[3] *Anoka Lumber Co.* v. *Fidelity & Cas. Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

[4] *New Orleans & C. R. Co.* v. *Maryland Cas. Co.* (La.), 38 So. 89.

[5] *B. Roth Tool Co.* v. *New Amsterdam Cas. Co.*, 161 Fed. 709; *City of St. Joseph* v. *Ry. Co.*, 116 Mo. 636, 22 S. W. 794, 38 Am. St. R. 626. The United States Supreme Court says: "When a person is responsible over to another either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he had the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not," *Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316, 16 S. Ct. 564, 40 L. Ed. 712.

[6] *B. Roth Tool Co.* v. *New Amsterdam Cas. Co.*, 161 Fed. 709.

It has been held, however, that the insurer, by taking dominion over the conduct of the defense in the accident suit and depriving the employer of control, estops itself from denying liability on the alleged ground that the case is one to which the policy is not applicable.[1]

§ 484. Effect of Insurer's Breach of Agreement to Defend.—The insurer, erroneously contending that the particular accident or injury does not come within the reach of the policy, often declines to have anything to do with the defense in the accident suit. It then becomes of moment to determine the practical effect of a breach by the insurer of its agreement in this particular.

If the insurance company declines to take charge of the defense in the action against the insured, it has been held that a compromise made by the insured and the injured person, in good faith and with reasonable prudence, can properly be taken into consideration as evidence of the actual loss sustained.[2] It has also been held that where, after due notice of the pendency of an accident suit, the insurance company refused to defend, the judgment entered therein upon a *bona fide* compromise was conclusive evidence of the employer's liability and *prima facie* evidence of its amount.[3]

In a New York case the insurer was obligated to defend actions brought by employees against the insured and founded on personal injuries. The defense in such an action the insurer had actually conducted to the very eve of trial, but then it had withdrawn, leaving the employer no reasonable opportunity to make its own preparation for trial. The employee accordingly obtained judgment by default. In the subsequent action by the employer against the insurance company, the defendant was held estopped from denying the effect of the employee's judgment as conclusively establishing negligence and violation of the Factory Law on the part of the employer, defenses set up in the first action by the insurer's counsel himself.[4]

The St. Louis Dressed Beef and Provision Company had a teams liability policy, issued by the defendant, which therein agreed to defend any suit for damages brought against the assured, the latter not to make any settlement without the company's consent. One of

[1] *Employers' Liability Assur. Corp.* v. *Chicago, etc., Coal & C. Co.*, 141 Fed. 962, 73 C. C. A. 278.

[2] *Southern Ry. News Co.* v. *Fidelity & Cas. Co.* (Ky., 1904), 83 S. W. 620.

[3] *Kansas City M. & B. R. Co.* v. *News Co.*, 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. R. 545. And see *Conner* v. *Reeves*, 103 N. Y. 527, 9 N. E. 439.

[4] *Glens Falls, etc., Co.* v. *Travelers' Ins. Co.*, 162 N. Y. 399, 56 N. E. 897

the plaintiff's employees, Nellie Heideman, was seriously injured by the negligence of John Berry, a driver of one of plaintiff's wagons. She brought suit for $10,000 as her damages. The casualty company, though duly requested, refused to defend this suit, erroneously contending that Berry was not in the employ of the insured at the time. The insured, alarmed at the gravity and size of the claim made against it, effected a compromise with Nellie in good faith at $2,000, and paid her that amount, and thereafter brought suit on the policy. The court held that the insurer by its breach of contract to defend had released the assured from the stipulation regarding settlement without consent and had waived the condition that the insurer was liable only for a satisfied judgment rendered after a trial. The court further held that the liability of the assured to the employee and its amount might be litigated in the action on the policy.[1]

§ 485. Costs and Expenses of Accident Suit.—Where the policy contains no provision on the subject, the question arises whether it covers the costs and expenses which the employer has incurred in his defense in the action for negligence or breach of duty.

If the insurer is obligated to conduct the defense for the employer and has neglected to do so, the employer may recover on the policy the costs and expenses which he has been compelled to incur in addition to the judgment,[2] but limited in the aggregate by the amount specified in the policy,[3] unless the policy is so worded as to be susceptible of the construction that the limit of liability specified for damages is exclusive of the costs and expenses which may then be superadded.[4]

It is also held that the insurer cannot, in order to limit the recovery of the insured upon the policy, credit itself with the expenses which it has incurred in defending the negligence suit.[5]

In a New York case, the only question involved was one regarding expenses in the negligence suit, inasmuch as the employer had been successful in establishing his defense therein. On this state of facts the court decided that he could recover nothing on his liability

[1] *St. Louis Dressed Beef & P. Co.* v. *Maryland Cas. Co.*, 201 U. S. 173.

[2] *Southern Ry. News Co.* v. *Fidelity & Cas. Co.* (Ky., 1904), 83 S. W. 620; *Travelers' Ins. Co.* v. *Henderson Cotton Mills* (Ky.), 85 S. W. 1090; *New Orleans & C. R. Co.* v. *Maryland Cas. Co.* (La.), 38 So. 89. And see *Mandell* v. *Fidelity & Cas. Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. R. 291.

[3] *National, etc., Mills* v. *Frankfort, etc., Ins. Co.* (R. I., 1907), 66 Atl. 58 ($75 extra allowed for services of doctors rendered at request of insurer); *Munro* v. *Maryland Cas. Co.*, 48 Misc. 183, 96 N. Y. Supp. 705.

[4] *New Amsterdam Cas. Co.* v. *Cumberland T. & T. Co.*, 152 Fed. 961.

[5] *Cudahy Packing Co.* v. *New Amsterdam Cas. Co.*, 132 Fed. 623.

policy, although the judgment obtained, dismissing the complaint of the alleged employee, might enure to the benefit of the insurer. The judges stood four to three.[1]

Where the policy provides that the insurer shall pay the cost of defending in the accident suit brought against the employer, the word "cost" is not to be limited to statutory costs, but means "expense" and includes also the fees of its attorneys and of stenographers and the like.[2]

§ 486. **Carriers' Liability Policy.**—Railway companies and other common carriers are subjected to so many claims at the instance of their employees and of the traveling public, based upon negligence and breach of statutory duty, that some public carriers prefer to be their own insurers. Others are glad to take out liability insurance to protect themselves, at least in part. Of late years insurers have, for the most part, discontinued carrying this class of risks.

Although the law holds the common carrier to the exercise of a high degree of care, and although insurance may sometimes tend to diminish the exercise of such care on the part of the insured, nevertheless, the doctrine of public policy is not pressed so far as to make it unlawful for a common carrier to protect himself from the results of negligence and breach of duty by procuring policies of this character.[3]

In a Massachusetts case the policy insured against loss from liability to any person accidentally sustaining bodily injuries while traveling on the street railway of the insured under circumstances which would impose a common-law or statutory liability. Where the death of the insured passenger followed the occurrence of the accident so closely that no time was allowed for conscious suffering on his part in consequence of his injuries, it was held that the loss did not come within the terms of the policy.[4]

[1] *Cornell* v. *Travelers' Ins. Co.*, 175 N. Y. 239, 67 N. E. 578; but see *Chilson* v. *Downer*, 27 Vt. 536. And compare *Fernald* v. *Prov. Washington Ins. Co.*, 27 App. Div. 137, 50 N. Y. Supp. 838 (counsel fees not recoverable); *Egbert* v. *St. Paul F. & M. Ins. Co.*, 92 Fed. 517; *Munson* v. *Stand. M. Ins. Co.*, 156 Fed. 44; *Xenos* v. *Fox*, L. R. 3 C. P. 630, 4 C. P. 665.

[2] *Maryland Cas. Co.* v. *Omaha Electric Light & P. Co.*, 157 Fed. 514, 85 C. C. A. 106 (recovery for costs may exceed the limit of $5,000 named for damages).

[3] *Trenton Pass. R. Co.* v. *Guarantors', etc., Indem. Co.*, 60 N. J. L. 246, 37 Atl. 609, 44 L. R. A. 213; *American Casualty Co.'s Case*, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; *Boston, etc., R. R. Co.* v. *Mercantile Trust, etc., Co.*, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; *Kansas City, etc., Co.* v. *South. Ry. News Co.*, 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 38, 74 Am. St. R. 545. See also § 469, *supra*.

[4] *Worcester S. Street Ry. Co.* v. *Travelers' Ins. Co.* (Mass.), 62 N. E. 364.

APPENDIX

APPENDIX

CHAPTER I

An Exhibit or List of American Statutes Relating to the Insurance Contract and Revised to January 1st, 1909

1

Civil Codes

The following states have adopted civil codes which treat of the subject of insurance law with some detail.

California, Deering's Civ. Code, 1903.
Georgia, Code, 1895.
Montana, Rev. Civ. Code, 1907.
North Dakota, Rev. Codes, 1899.
South Dakota, Rev. Codes, 1903.

Subject of Insurance—Contingent or Unknown Event

The California Code provision is given:

"Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter."

California, Civ. Code, 1903, § 2531.
Montana, Rev. Civ. Code, 1907, § 5546.
North Dakota, Rev. Code, 1899, § 4442.
South Dakota, Civ. Code, 1903, § 1794.

3

What Policy Must Specify

In several states there are express requirements of what must be specified in a policy of insurance generally.

California, Civ. Code, 1903, § 2587.
Georgia Code, 1895, § 2022, provides that contracts are to be evidenced by the policy and that the liability of the company "shall be governed by the terms, stipulations and conditions appearing upon the face of the policy.
North Dakota, Civ. Code, 1899, § 4488.
South Dakota, Civ. Code, 1903, § 1837.
See as to statutes as to life policy Nos. 52–54, herein.

4

Corporate Seal Not Required on Policy

The following States have adopted laws providing that policies of insurance not executed over the corporate seal of the company are nevertheless binding.

The Pennsylvania statute is given as a specimen:

"Policies of insurance made or entered into by the company may be made either with or without the seal thereof, and they shall be subscribed by the president or such other officer as may be designated by the directors for that purpose, and attested by the secretary; and when so subscribed and attested, shall be obligatory on the company."

Arizona, Rev. Stat. 1901, § 786.
Colorado, Sess. Laws, 1907, ch. 193, § 31, p. 453.
Idaho, Civ. Code, 1901, § 2216.
Indiana, Burns's Ann. Stat. Rev. 1908, § 4652.
Iowa, Ann. Code, 1897, § 1712.
Kansas, Gen. Stat. 1905, § 3528.
Maine, Rev. Stat. 1903, ch. 49, § 15, p. 476.
Montana, Rev. Code, 1907, § 4051.
Nebraska, Comp. Stat. 1903, § 3876. See Laws, 1907, ch. 75, § 9, p. 282.
New Mexico, Comp. Laws, 1897, § 2106.
Ohio, Bates's Ann. Stat. 1906, § 3645.
Pennsylvania, Pepper & Lewis's Dig., vol. 1, col. 2364, § 41.
Wyoming, Rev. Stat. 1899, § 3166.

5

Annexation of Application to Policy

The following states have adopted laws requiring the annexation of applications to policies.

The Ohio statute is given as a specimen:

"Every company doing business in this State shall return with, and as part of any policy issued by it, to any person taking such policy, a full and complete copy of each application or other document held by it which is intended in any manner to affect the force or validity of such policy, and any company which neglects so to do shall, so long as it is in default for such copy, be estopped from denying the truth of any such application or other document; and in case such company neglect, for thirty days after demand made therefor, to furnish such copies, it shall be forever barred from setting up, as a defense to any suit on such policy, any incorrectness or want of truth of such application or other document."

California. See Deering's Civil Code, 1903, § 2605.
Georgia, Laws, 1906, No. 466, p. 107.
Illinois, Rev. Stat. 1908, p. 1248, § 208, n. (3).
Iowa, Ann. Code, 1897, §§ 1741, 1819, 1826. Supp. to Code, 1907, §§ 1741, 1819, 1826.
Maine, Laws, 1907, ch. 30, p. 28; ch. 187, p. 204.
Massachusetts, Acts & Res. 1907, ch. 576, § 73, p. 894.
Michigan, Pub. Acts, 1899, p. 127.
Mississippi, Code, 1906, § 2675.
Missouri, Rev. Stat. 1899, § 7929.
Ohio, Bates's Annot. Stat. 1906, § 3623.
Oklahoma, Rev. Stat. 1903, § 3200.
Texas, Supp. 1903 to Sayles's Civ. Stats., § 3096*ee*.
Wisconsin, Laws, 1905, ch. 51, p. 108.

6

Provisions of Application or By-Laws to Be Set Forth in Policy

The following states have adopted laws providing that conditions are not

valid or provisions of application or by-laws are not binding unless set forth in the policy.

The Pennsylvania statute is given as a specimen:

"All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this State, or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to, or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

Connecticut, Gen. Stat. 1902, § 3496.
Georgia, Code, 1895, § 2022.
Louisiana, Acts, 1906, Act No. 52, p. 86.
Massachusetts, Acts & Res. 1907, ch. 576, § 59, p. 882.
Minnesota, Rev. Laws, 1905, §§ 1616, 1693.
Mississippi, Code, 1906, § 2597.
New Jersey, Laws, 1907, p. 134.
New York, Ins. Law, 1892, ch. 690, § 58.
Pennsylvania, Pepper & Lewis's Dig., vol. 1, col. 2375, § 68.
Tennessee. See Shannon's Annot. Code, 1896, p. 776, § 3356.

7

Statements to Be Deemed Representations and Not Warranties

The New York statute is given as a specimen:

"All statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties."

Kentucky, Stats. 1909, § 4286.
Louisiana, Acts, 1906, Act No. 52, p. 86 (life).
Missouri, Rev. Stat. 1899, §§ 7973, 7974 (other than life).
New Hampshire, Pub. Stat. 1901, ch. 170, § 2, p. 570.
New York, Ins. Law, 1892, ch. 690, § 58, am'd L. 1906, ch. 326 (life).
Ohio, Laws, 1908, p. 171 (life).
Tennessee, Acts, 1907, p. 1530.

In New Hampshire it is provided that:

"A policy shall not be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made or unless the difference between the property as it was represented and the property as it really existed contributed to the loss."

New Hampshire, Pub. Stat. 1901, ch. 170, § 2, p. 570.

8

When Contract of Insurance Subject to Laws of State

The Alabama Code provides that:

"All contracts of insurance, the application for which is taken within the state,

shall be deemed to have been made within this state, and subject to the laws thereof."

Alabama, Civ. Code, 1907, § 4583.
Colorado, Sess. Laws, 1907, ch. 193, § 54, p. 469.
Minnesota. See Rev. Laws, 1905, § 1596.
Mississippi. See Code, 1906, § 2563.
North Carolina, Rev. of 1905, § 4806.
Tennessee, Acts, 1907, ch. 441, p. 1496.
Texas, Supp. 1903 to Sayles's Civ. Stats. § 3096*dd*.

9

Representations and Concealment

In some of the states express provisions are made as to the information of matters which are and are not necessary to be communicated or disclosed.

California, Civ. Code, 1903, §§ 2563 *et seq.*
Georgia. Code, 1895, §§ 2098, 2099, 2101 (fire risk). *Id.*, § 2138 (mutual insurance).
Montana. Rev. Code, 1907, §§ 5570 *et seq.*
North Dakota, Rev. Code, 1899, §§ 4466 *et seq.*
South Dakota, Civ. Code, 1903, §§ 1815 *et seq.*

10

Concealment—Rescission of Contract

The California Code provision is given:

"A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance."

California, Civ. Code, 1903, § 2562.
Georgia, Code, 1895, § 2099.
Montana, Rev. Code, 1907, § 5569.
North Dakota, Rev. Code, 1899, § 4465.
South Dakota, Civ. Code, 1903, § 1816.

11

Falsity of Representation—Rescission of Contract

The California Code provision is given:

"If a representation is false in a material point whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false."

California, Civ. Code, 1903, § 2580.
Georgia, Code, 1895, § 2101 (fire policy).
Montana, Rev. Code, 1907, § 5587.
North Dakota, Rev. Code, 1899, § 4483.
South Dakota. Civ. Code, 1903, § 1834.
See Colorado, Sess. Laws, 1907, p. 447, ch. 193, (1) as to false statements in application by solicitor, agent or examining physician being a misdemeanor, etc.

12

Falsity of Warranty—Fraudulent Omission—Rescission of Contract

The California Code provision is given:

"An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

California, Civ. Code, 1903, § 2569.
Montana, Rev. Code, 1907, § 5576.
North Dakota, Rev. Code, 1899, § 4472.
South Dakota, Civ. Code, 1903, § 1823.

13

Express Warranties Must Be Contained in Policy

The California Code provision is given:

"Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it."

California, Civ. Code, 1903, § 2605.
Montana, Rev. Code, 1907, § 5608.
North Dakota, Rev. Code, 1899, § 4505.
South Dakota, Civ. Code, 1903, § 1853.

14

Policy Avoided by Violation of Material Warranty or Other Provisions

The California Code provision is given:

"The violation of a material warranty, or other material provisions of a policy, on the part of either party, thereto, entitles the other to rescind."

California, Civ. Code, 1903, § 2610. Policy may, however, also provide for avoidance., *Id.* § 2611.
Montana, Rev. Code, 1907, § 5613.
North Dakota, Rev. Code, 1899, § 4510.
South Dakota, Civ. Code, 1903, § 1858.

15

Breach of Warranty Without Fraud—Effect of

The California Code provision is given:

"A breach of warranty, without fraud, merely exonerates the insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk."

California, Civ. Code, 1903, § 2612.
Montana, Rev. Code, 1907, § 5615.
North Dakota, Rev. Code, 1899, § 4512.
South Dakota, Civ. Code, 1903, § 1860.

16

Agreement Before Loss Not to Transfer—Effect of

The California Code provision is given:

"An agreement made before a loss, not to transfer the claim of a person insured against the insurer, after the loss has happened, is void."

California, Civ. Code, 1903, § 2599.
Montana, Rev. Code, 1907, § 5605.
North Dakota, Rev. Code, 1898, § 4500.
South Dakota, Civ. Code, 1903, § 1850.

17

Insured Not to Be Deprived, by Policy Provision, of Right of Trial by Jury

The statute of Arkansas provides:

"No policy of insurance shall contain any condition, provision or agreement which shall directly or indirectly deprive the insured or beneficiary of the right to trial by jury on any question of fact arising under such policy, and all such provisions, conditions or agreements shall be void.

"The provisions of this act shall apply to all forms of insurance."

Arkansas, Acts, 1903, p. 188, Act No. 111.

18

When Policy Void

The California Code provision is given:

"Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering is void."

California, Civ. Code, 1903, § 2558.
Montana, Rev. Civ. Code, 1907, § 5567.
North Dakota, Civ. Code, 1899, § 4463.
South Dakota, Civ. Code, 1903, § 1814.

19

Solicitor Is Agent of Insurer

The following states have adopted laws providing that the soliciting agent shall be deemed the agent of the insurer.

The Iowa statute is given as a specimen:

"Any person who shall hereafter solicit insurance or procure applications therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding."

Arizona, Rev. Stat. 1901, § 814.
Colorado, Sess. L. 1907, p. 446, ch. 193, § 9.
Connecticut, Gen. Stat. 1902, § 3575.
Delaware, Laws, 1907, ch. 108, p. 192.
Florida, Gen. Stat. 1906, §§ 2765, 2777.
Georgia, Code, 1895, § 2054.
Illinois, Rev. Stat. 1908, p. 1243, § 203.
Indiana, Burns's Annot. Stat., Rev. 1908, § 4714.
Iowa, Ann. Code, 1897, §§ 1749, 1750, 1815; Supp. to Code, 1907, §§ 1749, 1750, 1815.
Kentucky, Stat. 1909, § 4281.
Louisiana, Acts, 1906, Act No. 94, p. 156.
Maine, Rev. Stat. 1903, ch. 49, §§ 29, 93.
Massachusetts, Acts & Res. 1907, ch. 576, § 96, p. 910.
Michigan, Pub. Acts, 1907, p. 245.
Minnesota, Laws, 1907, ch. 41, § 1, p. 47. *Id.*, p. 639, ch. 446, last clause § 1642.
Mississippi, Code, 1906, § 2615.
Missouri, Rev. Stat. 1899, § 8000. See Laws, 1907, p. 317.
Montana, Rev. Code, 1907, § 5589.
Nebraska, Comp. Stat. 1903, § 1942.
New Hampshire, Laws, 1907, ch. 109, p. 109.
New Jersey, Laws, 1907, p. 138.

New Mexico. See Comp. Laws, 1897, § 2120.
New York, Ins. Law, 1892, ch. 690, § 59; Laws, 1905, ch. 568, am'd 1906, ch. 326.
North Carolina, Pub. Laws, 1907, p. 1361.
North Dakota, Laws, 1907, ch. 146, p. 238.
Ohio, Bates's Annot. Stat. 1906, § 3644, Laws, 1908, p. 175.
Oklahoma, Rev. Stat. 1903, § 3227.
Rhode Island, Gen. Laws, 1896, p. 574, § 10.
South Carolina, Civil Code, § 1810; vol. 1, Code of Laws, 1902, p. 692.
Tennessee, Acts, 1907, ch. 442, p. 1497; compare Shannon's Annot. Code, 1896, p. 772, § 3332, as to brokers.
Texas, Sayles's Civ. Stat. 1897, and Supp. 1903, art. 3093.
Vermont, Pub. Stat. 1906, § 4775.
Virginia, Code, 1904, § 1286*a* (5).
Washington, Ball's Ann. Codes & Stat., Supp. 1903, § 2841, p. 305.
West Virginia, Acts 1907, ch. 53, § 1, p. 238.
Wisconsin, Laws, 1905, ch. 353, p. 536; Sanborn & B.'s Annot. Stat. 1898, § 1977, p. 1489.

20

Payment of Premium—When Earned

The California Code provision is given:

"An insurer is entitled to payment of the premium as soon as the thing insured is exposed to the peril insured against."

California, Civ. Code, 1903, § 2616.
Montana, Rev. Code, 1907, § 5616.
North Dakota, Rev. Code, 1899, § 4513.
South Dakota, Civ. Code, 1903, § 1861.

21

Receipt of Premium Acknowledged in Policy—Effect of

The California Code provision is given:

"An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid."

California, Civ. Code, 1903, § 2598.
Montana, Rev. Code, 1907, § 5604.
North Dakota, Rev. Code, 1899, § 4499.
South Dakota, Civ. Code, 1903, § 1849.

22

Return of Premium in General—When and When Not Allowed—Return for Fraud, etc., of Insurer

In several states the statutes provide when the insured is and is not entitled to a return of premium, and also for a return thereof for fraud and misrepresentation of the insurer "or on account of facts of the existence of which the insured was ignorant without his fault; or when by default of the insured, other than actual fraud, the insurer never incurred any liability under the policy."

California, Civ. Code, 1903, §§ 2617–2619.
Montana, Rev. Code, 1907, §§ 5617–5619.

North Dakota, Rev. Code, 1899, §§ 4514–4518.

South Dakota, Civ. Code, 1903, §§ 1862, 1867.

23

Peril Specially Excepted—Excepted Loss

The California Code provision is given:

"Where a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."

California, Civ. Code, 1903, § 2628.
Montana, Rev. Code, 1907, § 5625.
North Dakota, Rev. Code, 1899, § 4523.
South Dakota, Civ. Code, 1903, § 1870.

24

Reinsurance—What Communications or Disclosures Required

The California Code provision is given:

"Where an insurer obtains reinsurance, he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk."

California, Civ. Code, 1903, § 2647.
Montana, Rev. Code, 1907, § 5635.
North Dakota, Rev. Code, 1899, § 4534.
South Dakota, Civ. Code, 1903, § 1880.

25

Reinsurance with Companies Not Authorized to Do Business in State Forbidden

The statute of Arkansas is given as a specimen:

"That no insurance company shall directly or indirectly contract for or effect reinsurance of any risk in the State of Arkansas with any company not authorized to do business therein."

Arkansas, Acts, 1901, p. 182, Act No. CXV.
Colorado, Sess. Laws, 1907, p. 471, ch. 193, § 58 (2) (fire or casualty companies).
Florida, Gen. Stat. 1906, § 2766 (fire).
Illinois, Hurd's Rev. Stat. 1908, p. 1219, ch. 73, § 80*a* (fire insurance).
Indiana, Burns's Annot. Stat. Rev. 1908, § 4702 (stock or mutual life), § 4753 (mutual life or accident).
Kentucky, Stat. 1909, § 4390 (life insurance).
Louisiana, Acts, Pamp. Laws, 1906, p. 25, § 20 (Acts, 1906, p. 188, Act No. 115, § 14, covers only life, accident, sick benefit, or physical disability insurance on the fraternal plan).
Michigan, Pub. Acts, 1899, p. 376.
Montana, Rev. Civ. Code, 1907, § 4037 (fire insurance).
New Hampshire, Pub. Stat. 1901, ch. 86, § 2, p. 567.
New Mexico, Laws, 1905, ch. 5, § 23, p. 21 (fire insurance).
North Carolina, Laws of 1901, ch. 100, § 2, p. 127.
Pennsylvania, Pepper & Lewis's Dig. Supp. 1901, col. 1102, § 8.
West Virginia, Code, 1906, § 1111.
Wisconsin, Laws, 1899, ch. 190, § 2. p. 287.

26

Effect of War

The following states have passed laws as to policy not being invalidated by war.

The Massachusetts statute is given as a specimen:

"No policy of insurance issued to a citizen of this Commonwealth by an authorized company organized under the laws of a foreign country shall be invalidated by the occurrence of hostilities between such foreign country and the United States."

Alabama, Civ. Code, 1907, § 4574.
Massachusetts, Acts & Res. 1907, ch. 576, § 89, p. 908.
Minnesota, Rev. Laws, 1905, § 1708.
Tennessee, Shannon's Annot. Code, 1896, p. 768, § 3307.
West Virginia, Acts, 1907, § 41, p. 307.

27

Limitation of Time for Suit

The following states have adopted laws forbidding certain limitations of time for bringing suit:

The Massachusetts statute is given as a specimen:

"No foreign or domestic insurance company or association transacting business in this commonwealth shall make, issue or deliver therein any policy or contract of insurance containing any condition, stipulation or agreement depriving the courts of this commonwealth of jurisdiction of actions against such companies or associations, or limiting the time for commencing actions against such companies or associations to a period of less than two years from the time when the cause of action accrues; and any such condition, stipulation or agreement shall be void."

Colorado, Sess. Laws, 1907, ch. 193, § 37, p. 456.
Connecticut, Gen. Stat. 1902, § 3605.
Illinois, Rev. Stat. 1908, p. 1250, § 208*v*, 1.
Indiana, Burns's Ann. Stat. 1908, § 4803.
Iowa, Ann. Code, 1897, §§ 1744, 1820; Supp. to Code, 1907, §§ 1744, 1820.
Maine, Rev. Stat. 1903, ch. 49, § 94, p. 490.
Massachusetts, Acts & Res. 1907, ch. 576, § 29, p. 857.
Michigan, Pub. Acts, 1907, p. 254.
Mississippi, Code, 1906, § 2575.
New Jersey, Laws, 1907, p. 136.
North Carolina, Rev. of 1905, § 4809.
Ohio, Laws, 1908, p. 174.
Tennessee, Acts, 1907, p. 1533.
Vermont, Pub. Stat. 1906, § 4823.
Virginia, Acts, 1906, ch. 112, § 39, p. 143.
West Virginia, Acts, 1907, ch 77, § 48, p. 309.

28

Suits, Where Instituted

The provision of the Idaho Code is given:

"Suits may be instituted and prosecuted against any fire, marine, inland, life or health insurance company in any county where loss occurs, or where the policyholder instituting such suit resides, and the process in any such suit may be

served upon any person in this state holding a power of attorney for such company."

Idaho, Civ. Code, 1901, § 2244.
Indian Territory. See Stats. 1899, § 3207.
Michigan, Pub. Acts, 1901, p. 79.
Nebraska, Laws, 1905, ch. 171, § 55, p. 655.
New Hampshire. See Pub. Stat. 1901, ch. 170, § 12, p. 571.
Ohio, Bates's Ann. Stat. 1906, § 3630*f*.
South Carolina, Acts, 1906, Act No. 70, p. 111.
Texas, Sayles's Civ. Stat. 1897, § 3070.
West Virginia, Code, 1906, § 3794.

29

Anti-compact Laws

The following states have adopted anti-compact laws.

The New Hampshire statute is given as a specimen:

"If a licensed foreign insurance company shall enter into a contract or combination with other insurance companies for the purpose of controlling the rates to be charged for insurance upon property within the state, or shall make application for the removal of any action brought against it in the courts of this state to the United States courts, the commissioner shall forthwith revoke its license and those of its agents; and no renewal of the licenses shall be granted until after the expiration of three years from the date of such revocation."

Arkansas, Acts, 1905, p. 1, as amended by Acts, 1907, p. 430.
Georgia, Code, 1895, § 2085.
Iowa, Annot. Code, 1897, § 1754, Supp. to Code, 1907, § 1754.
Michigan, Comp. Laws, 1897, § 5124.
New Hampshire, Pub. Stat. 1901, ch. 169, § 10.
Ohio, Bates's Annot. Stat. 1906, § 3659.
South Carolina, Civ. Code, § 1819; 1 Code of Laws, 1902, p. 695 (fire).
South Dakota, Laws, 1903, ch. 158, p. 183 (fire).
Tennessee, Acts, 1905, ch. 479, p. 1019 (fire).
Washington, Ballinger's Codes & Stats. p. 725, § 2841*b*.
See Louisiana, Act No. 110 of 1900, Pamph. L. 1906, pp. 37–39, prohibiting fire insurance companies, associations or partnerships, or their agents from entering into combinations to fix rates. A statutory prohibition of combination to control rates is constitutional, *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401.

Compare the following more general statutes against pools, trusts, or combinations to fix prices of articles or to restrain trade:

Alabama, Cr. Code, 1907, §§ 7579–7582.
California, Civ. Code, 1903, § 1673.
District of Columbia. See United States.
Illinois, Rev. Stat. 1908, ch. 38, §§ 269*a*–269*j*, pp. 765–768.
Iowa, Code, 1897, §§ 5060 *et seq.*
Kansas, Gen. Stat. 1905, ch. 67*a*.
Kentucky, Stat. 1909, Art. 35, p. 885.
Louisiana, Const. & Rev. Laws, 1904, p. 1806.
Maine, Rev. Stat. 1903, ch. 47, §§ 53–55, p. 443.
Minnesota, Rev. Laws, 1905, §§ 5168, 5169.

Mississippi, Code, 1906, ch. 145, p. 1348.
Missouri, Rev. Stat. 1899, ch. 143, p. 2082.
New Mexico, Comp. Laws, 1897, §§ 1292–1294.
Oklahoma, Rev. & Ann. Stat. 1903, ch. 83, p. 1501.
Texas, Sayles's Civ. Stat. 1897, title 108, p. 1878.
United States, Stat. at Large, vol. 26, ch. 647, p. 209.
Wisconsin, Stat. 1898, § 1791*j*, p. 1319.

Fire Insurance

30

Standard Policy

The following states have passed statutes for the adoption of a standard form of fire policy:

Connecticut, Comp. Ins. Laws, 1905, p. 18, §§ 3497, 3499; Gen. Stat. 1902, §§ 3497, 3499.
Iowa, Supp. to Code, 1907, §§ 1758*a*, 1758*b*.
Louisiana, Const. and Rev. Laws, 1904, p. 864; Pamph. of Ins. L., issued Dec. 31, 1906, p. 26, art. III, § 22, adopted only by reference to New York Standard.
Maine, Laws, 1905, ch. 158, p. 169.
Massachusetts, Acts, 1907, ch. 576, § 60, pp. 882–886.
Michigan, Pub. Acts, 1905, p. 423, Act No. 277.
Minnesota, Rev. Laws, 1905, § 1640.
New Hampshire, Laws, 1885, ch. 93.
New Jersey, Laws, 1902, p. 437, par. 77, ch. 134.
New York, Laws, 1886, ch. 488, am'd 1887, ch. 429, am'd 1901, ch. 513, am'd 1903, ch. 106.
North Carolina, Rev. 1905, §§ 4759, 4760.
North Dakota, Civ. Code, 1899, § 4608.
Oregon, Laws, 1907, ch. 137.
Rhode Island, Gen. Laws, 1896, pp. 579, 580, §§ 4, 5.
South Dakota, Laws, 1907, ch. 170, amending Laws, 1905, ch. 126, § 2, repealing Rev. Codes, 1903, p. 682, §§ 664, 665, 666.
West Virginia, Acts, 1907, ch. 77, § 68, p. 313, amending and re-enacting ch. 34, Code.
Wisconsin, Laws, 1907, ch. 525, pp. 506, 507, amending Laws, 1905, ch. 102, 168, amending §§ 1941–1964 of Sand. & Berr. Stat. 1898.

31

Requiring That Conditions Be Inserted in Fire Policies

In West Virginia it is provided that:

"In all policies of insurance issued against loss by fire, made by companies chartered by or doing business in this State, no condition shall be valid unless stated in the body of the policy or attached thereto."

West Virginia, Acts, 1907, ch. 77, § 69, p. 313.
See also Mississippi Code, 1906, § 2597.
North Carolina, Rev. of 1905, § 4758.

32

Discrimination in Fire Insurance Premiums

The statute in Minnesota is given as a specimen:

"No fire insurance company shall charge or receive, directly or indirectly, a higher or greater rate or premium for insurance against destruction or damage by fire of any property within this state than it charges for other risks within this state of the same kind or class, taking into consideration the local fire loss record, the nature of the risk, the exposures and hazards thereof, and the means of fire prevention applicable thereto."

Minnesota, Laws, 1905, ch. 331, § 1, p. 522.
Montana, Rev. Codes, 1907, § 4026.
South Carolina. See Laws, 1903, p. 475, § 9.

See Kentucky, Stat. 1909, § 4318, which provides for classification of property and the issuance of policies at different rates in assessment or co-operative fire companies.

33

Return of Unearned Premiums

The following states have adopted laws providing that fire insurance companies in case of total loss shall return the unearned premium where the loss is less than the amount of the policy.

The Idaho statute is given as a specimen:

"In the event of the total destruction of any insured property, on which the amount or agreed loss shall be less than the total amount insured thereon, the insuring company or companies shall return to the insured the unearned insurance premium for the excess of the insurance over the appraised or agreed loss, to be paid at the same time and in the same manner as the loss shall be paid."

Hawaii, Rev. Laws, 1905, § 2622.
Idaho, Civ. Code, 1901, § 2235.
Louisiana, Const. & Rev. Laws, 1904, p. 861, Pamph., Ins. Laws, 1906; pp. 23, 31, § 15.
Massachusetts, Acts & Res. 1907 ch. 576, § 57, p. 882.
Nevada, Comp. Laws, 1900, § 921.
North Carolina, Rev. of 1905, § 4756.
Oregon, Bellinger & Cotton's Ann. Code & Stats. 1902, § 3737.
Virginia, Acts, 1906, ch. 112, § 30, p. 140.

See Colorado, Sess. Laws, 1907, § 57, as to necessity of policy containing a provision for cancellation at request of assured and that the unearned premium "shall be returned" on surrender of the policy or last renewal, etc.

See also following statutes providing for return of unearned premium where there is overinsurance by several insurers:

California, Civ. Code, § 2620.
Montana, Rev. Code, 1907, § 5620.
North Dakota, Rev. Code, 1899, § 5967.
South Dakota, Civ. Code, 1903, § 1865.

34

Breach of Condition—Risk Not Increased

In some states it is provided that a breach of a condition shall not avoid unless loss occurs during or by reason of it or unless risk thereby be materially increased.

Maine, Rev. Stat. 1883, ch. 49, § 20.
Michigan, Comp. L. 1897, § 5180.
Missouri, 2 Rev. Stat. 1899, § 7974.
New Hampshire, Pub. Stat. 1901, ch. 170, § 4.
North Carolina, Acts, 1903, ch. 299, § 9.
Ohio, Rev. Stat., § 3643.
Oklahoma, 1 Rev. Stat. 1903, § 3202.
Vacancy of Premises.—The Kansas statute provides that: "Any condition or stipulation in an application policy or contract of fire insurance hereafter made, making the policy void in case the insured premises become vacant, shall not prevent recovery on such policy if it shall be shown by the plaintiff that the insured premises had ceased to be vacant and were occupied at the time of the loss." Kansas, Gen. Stat. 1905, § 3542.

In Michigan it is provided that: "If a building that is insured, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days, without the consent of the company indorsed on the policy, such vacancy shall not avoid said policy of insurance," Michigan, Comp. Laws, 1897, § 5181.

35

Alteration in Use or Condition—Increase of Risk—Rescission

The California Code is given as a specimen:

"An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance." But where such an alteration does not increase the risk it "does not affect" the contract.

California, Civ. Code, 1903, §§ 2753, 2754.
Georgia, Code, 1895, § 2100. See also *Id.*, §§ 2102–2105.
Montana, Rev. Civ. Code, 1907, §§ 5639, 5640.
North Dakota, Rev. Code, 1899, §§ 4604–4606.
Oklahoma, Rev. Stat. 1903, §§ 3201–3203.
South Dakota, Civ. Code, 1903, §§ 1950, 1953.

36

Increase of Risk—Acts of Insured Subsequent to Execution of Policy

The California Code provision is given:

"A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss.

California, Civ. Code, 1903, § 2755.
Montana, Rev. Civ. Code, 1907, § 5641.
North Dakota, Rev. Civ. Code, 1899, § 4606.
South Dakota, Civ. Code, 1903, § 1952.

37

Examination of Premises by Insurer—Error in Description

In Kansas the statute provides for an examination of the premises by the insurer and that the policy shall contain a full and complete description of the

property or premises insured, and that "no failure to properly and fully describe such property or premises, nor any erroneous description of such property or premises, shall be a defense in any action to collect for loss thereon or thereunder when such description shall be sufficient to enable a person of ordinary intelligence to find and fully identify the property or premises upon which said insurance was written or upon which premiums have been paid and this notwithstanding any provision in said insurance policy contained."

Kansas, Gen. Stat. 1905, § 3539.

38

Non-forfeiture—Insurance Other Than Life

The Iowa Code provides as follows:

"No policy or contract of insurance provided for in this chapter shall be forfeited or suspended for non-payment of any premium, assessment or installment provided for in the policy, or in any note or contract for the payment thereof, unless within thirty days prior to or on or after the maturity thereof the company shall serve notice in writing upon the insured that such premium, assessment or installment is due or to become due, stating the amount and the amount necessary to pay the customary short rates, up to the time fixed in the notice when the insurance will be suspended, forfeited or canceled, which shall not be less than thirty days after the service of such notice, which may be made in person, or by mailing in a registered letter addressed to the insured at his post-office as given in or upon the policy, and no suspension, forfeiture or cancellation shall take effect until the time thus fixed and except as herein provided, anything in the policy, application or a separate agreement to the contrary notwithstanding."

Iowa, Annot. Code, 1897, § 1727.

39

Cancellation of Policy

The following states have adopted laws providing that no company shall cancel a fire insurance policy without notice first given and unearned part of premium returned.

The Connecticut statute is given as a specimen:

"No insurance company or association shall cancel a policy issued against loss by fire on property in this State without giving the party insured at least five days' notice, in writing, of such intention and returning the ratable proportion of the premium for the unexpired term of the policy."

California. See Civ. Code, 1903, Appendix, p. 737, § 16, as to cancellation by county fire insurance companies.

Connecticut, Gen. Stat. 1902, § 3526.

Idaho. See Act March 10, 1903, § 15, as to cancellation by mutual co-operative fire insurance corporations.

Iowa, Ann. Code, 1897, § 1727; Supp. to Code, 1907, § 1727.

North Dakota. See Rev. Code 1899, § 4502.

South Dakota. See Civ. Code, 1903, § 677.

West Virginia, Acts, 1907, ch. 77, § 67, p. 312.

Wisconsin. See Sanborn & B. Annot. Stat. 1898, §§ 1941–52, p. 1440.

40

Privilege of Insured to Cancel Policy

The following states have adopted laws providing that the insured shall have the privilege of insisting on the cancellation of the policy at any time.

The New York statute is given as a specimen:

"Any corporation, person, company or association transacting the business of fire insurance in this State, shall cancel any policy of insurance upon the request of the insured or his legal representatives, and shall return to him or to such representative the amount of premium paid, less the customary short-rate premium for the expired time of the full term for which the policy has been issued or renewed, notwithstanding anything in the policy to the contrary. Where the laws of any State permit corporations organized under its laws to cancel policies of insurance upon different terms than herein set forth, corporations organized under the laws of this State may cancel policies upon risks in any such State upon the same terms as are provided for corporations organized under its laws."

California, Deering's Civil Code, 1903, §§ 2617 *et seq.* See Civ. Code, 1903, Appendix, p. 737, § 16, as to cancellation by members of county fire insurance companies.

Colorado, Sess. 1907, ch. 193, § 57, p. 470.

Idaho. See Act March 10, 1903, § 15, as to cancellation by member of mutual co-operative fire insurance corporation.

Iowa, Ann. Code, 1897, §§ 1728, 1745; Supp. to Code, 1907, §§ 1728, 1745.

Kentucky. See Stat. 1909, § 4324, providing for withdrawal, etc., of members of assessment or co-operative fire companies.

Nebraska, Comp. Stat. 1903, § 3905.

New York, Ins. Law, 1892, ch. 690, §§ 122, 123.

North Dakota, Rev. Codes, 1899, § 4501.

Ohio, Bates's Annot. Stat. 1906, §§ 3664 *et seq.*

Philippines and Puerto Rico. See Laws of (ed., 1899) Commercial Code, arts. 392, 426.

South Dakota, Rev. Codes, 1903, Civ. Code, § 676.

Wisconsin, Sanborn & B. Annot. Stat. 1898, §§ 1941–52, p. 1440, § 1946*d*, p. 1456.

41

Valued Policy

The following states have adopted valued policy laws.

The Wisconsin statute is given as a specimen:

"Whenever any policy of insurance shall be written to insure real property, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed."

Arkansas, Sandel's & Hill's Dig. of Stat. 1894, § 4140, am'd by Acts, 1899, p. 112, Act LXI.

Delaware, Laws (vol. 18), 1889, p. 961, ch. 695, §§ 1, 2, as am'd Laws (vol. 19), p. 889, ch. 696 (with proviso that company may nevertheless adjust loss by replacing property).

Florida, Gen. Stat. 1906, §§ 1528, 2776.
Georgia, Code, 1895, § 2110. See Laws, 1895, p. 51.
Iowa, Ann. Code, 1897, § 1742; Supp. to Code, 1907, § 1742.
Kansas, Gen. Stat. 1905, § 3538.
Kentucky, Stat. 1909, §§ 4307, 4308.
Louisiana, Const. & Rev. Laws, 1904, pp. 888, 889; Pamph. Laws, 1906, pp. 32, 39.
Minnesota, Rev. Laws, 1905, § 1642.
Mississippi. See Code, 1906, § 2592.
Missouri, Rev. Stat. 1899, § 7969.
Nebraska, Comp. Stat. 1903, § 3906.
New Hampshire, Pub. Stat. 1901, ch. 170, § 5, p. 571.
North Dakota, Laws, 1907, ch. 158, p. 253.
Ohio, Bates's Annot. Stat. 1906, § 3643.
Oklahoma, Rev. Stat. 1903, §§ 3199, 3204.
Oregon, Ballinger & Cotton's Ann. Codes & Stats. 1902, §§ 3720, 3721.
Pennsylvania, Pepper & Lewis's Dig., vol. 1, col. 2387, § 101 (boiler ins.).
South Carolina, Civ. Code, § 1816, vol. 1, Code of Laws, 1902, p. 695.
South Dakota, Civ. Code, 1903, § 1939 (marine); § 1953 (fire); § 1958 (life).
Tennessee, Shannon's Annot. Code, 1896, p. 775, § 3348.
Texas, Sayles's Rev. Civ. Stat. 1897; Supp. 1903, art. 3089.
Washington, Ballinger's Annot. Codes & Stat. 1897, and Supp. 1899–1903, § 2833.
West Virginia, Code, 1906, § 1108.
Wisconsin, Sanborn & B. Annot. Stat. 1898, § 1943, p. 1450.
See California, Civ. Code, 1903, § 2756, as to effect of valuation and of no valuation in policy.
Kentucky, Stat. 1909, § 4308, provides for liability for value of live stock as fixed in policies on life and accident risks thereon.

42

Assignment to Mortgagee—Effect of as to Mortgagor's Interest and Acts

The California Code provides:

"Where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee, but any act which, under the contract of insurance is to be performed by the mortgagor, may be performed by the mortgagee with the same effect as if it had been performed by the mortgagor."

California, Civ. Code, 1903, § 2541, as am'd by Acts, 1905, p. 616, ch. CCCCLVIII.
Montana, Rev. Civ. Code, 1907, § 5553.
North Dakota, Rev. Civ. Code, 1899, § 4448.
South Dakota, Civ. Code, 1903, § 1800.

43

Mortgagor and Mortgagee—Assignment—New Contract with Insurer

The California Code provides:

"If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and, at the time of his assent, imposes further obligations on the

assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights."

California, Civ. Code, 1903, § 2542.
Montana, Rev. Civ. Code, 1907, § 5554.
North Dakota, Rev. Civ. Code, 1899, § 4449.
South Dakota, Civ. Code, 1903, § 1801.

44

Notice and Proofs of Loss—Preliminary Proofs—Waivers in Defects in Notice, or of Delay, etc.

In several states the statutes expressly provide for notice of loss without unnecessary delay, as to the sufficiency of preliminary proofs; and as to waiver of defects in notice of loss or of delay, etc.

California, Civ. Code, 1903, §§ 2633–2636.
Georgia. See Code, 1895, § 2108.
Montana. See Rev. Civ. Code, 1907, §§ 5627–5630.
North Dakota, Rev. Civ. Code, 1899, §§ 4525–4530.
Pennsylvania, Pepper & Lewis's Dig., col. 2386, § 99.
South Dakota, Civ. Code, 1903, §§ 1872–1875.

45

Dispensing with Certificate—Proof of Loss

The California statute provides:

"If a policy requires by way of preliminary proof of loss the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified."

California, Civ. Code, 1903, § 2637.
Montana, Rev. Civ. Code, 1907, § 5631.
North Dakota, Rev. Civ. Code, 1899, § 4530.
South Dakota, Civ. Code, 1903, § 1876.

46

Notice and Proof of Loss—Magistrate's Certificate

The following states have adopted laws forbidding the insertion of conditions requiring notice of loss within less than five days and the presentation of certificates of nearest magistrate.

The Indiana statute is given as a specimen:

"No such insurance company shall insert any condition, in any policy hereafter issued, requiring the insured to give notice forthwith, or within the period of time less than five days, of the loss of the insured property; nor shall any condition be inserted in such policy, requiring the insured to procure the certificate of the nearest Justice of the Peace, Mayor, Judge, clergyman, or other official, or person, of such loss, or the amount of such loss; and any provision or condition contrary to the provisions of this section, or any condition in said policy, in-

serted to avoid the provisions of this section, shall be void, and no condition or agreement, not to sue for a period of less than three years, shall be valid."

Indiana, Burns's Annot. Stat. 1908, § 4803.

Maine. See Rev. Stat. 1903, ch. 49, § 95, as to notice of accident, injury or death.

Mortgagee, Conn. Gen. Stat. 1902, § 3512.

47

Appraisal—Disagreement as to Amount of Loss

The provision of the Rhode Island standard policy is given:

"In the event of disagreement as to the amount of loss, the same shall . . . be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and the umpire."

Rhode Island, Gen. Laws, 1896, ch. 183, § 5.

48

Appraisal Clause—Failure to Select Umpire

In New Jersey it is provided as follows:

"When any contract or policy of fire insurance covering property in this state contains any clause or provision for the ascertainment by appraisers of the amount of any loss or damage to the property described in such contract or policy, and the clause or provision of such ascertainment of loss by appraisers provides that the insured and the insurer shall each select an appraiser and the two appraisers so chosen shall select an umpire, and the loss to the property described in such contract or policy of fire insurance shall have occurred, and the insured and the insurer shall have each selected an appraiser, and the appraisers so selected shall have failed or neglected, for a space of ten days after they have both been chosen, to agree upon and select an umpire, it shall be lawful for either the insured or the insurer to apply to the inferior court of common pleas of the county in which said property is or was situated, on five days' notice, in writing, to the other party of his or its intention so to do, to appoint a competent and disinterested umpire; and said notice in writing, when served by the insured, may be served upon any local agent of the insurer; and the judge or judges of said inferior court of common pleas shall, on proof by affidavit of the failure or neglect of the said appraisers to agree upon and select an umpire within the time aforesaid, and of the service of notice aforesaid, forthwith appoint a competent and disinterested person to act as umpire in the ascertainment of the amount of said loss; and the acts of the umpire so appointed shall be binding upon the insured and the insurer to the same extent as if such umpire had been selected in the manner provided for in said contract of insurance."

New Jersey, Laws, 1902, ch. 134, § 79, p. 439.

49

Protection of Mortgagee

In some states the mortgagee is protected by lien on policy to mortgagor or by payment to in order of priority.

Maine, Rev. Stat. 1903, ch. 49, § 54, p. 482.

Massachusetts. See Acts & Res. 1907, ch. 576, § 58, p. 882, as to payment to mortgagees upon proof.

Minnesota. See Rev. Laws, 1905, § 1644, as to payment to mortgagees in order of priority.

Mississippi, Code, 1906, § 2595, as to payment to mortgagees in order of priority.

North Carolina, Rev. of 1905, § 4757, as to payment to mortgagees in order of priority.

See California Stats. and Amend. to Codes, 1905, pp. 616, 458, amending § 2541, Civ. Code, as to insurance of mortgaged property. Effect of acts performed by mortgagee for mortgagor.

(As to mortgagor.) See California Stats. & Amend. to Codes, 1905, p. 616, ch. CDLVIII, amending § 2541, Civ. Code.

(Same.) See Montana Civ. Code, 1895, § 3393.

50

Anti-Coinsurance Laws

In the following states an option in some form is given to the insured.

The New Jersey statute is given as a specimen:

"No fire insurance company doing business in this State may issue any policy or contract of insurance covering property in this State which shall contain any clause or provision requiring the insured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way providing that the insured shall be liable as coinsurer with the company issuing the policy for any part of the loss or damage which may be caused by fire or lightning to the property described in such policy, and any such clause or provision shall be null and void and of no effect, provided, that it may be optional with the insured to accept a policy or contract of insurance containing a coinsurance clause or provision when a reduction in the rate for insurance on the property described in such policy is the consideration named in such clause, and when so accepted the coinsurance clause or provision shall be binding on the insured."

New Jersey, Laws, 1902, ch. 134, § 78.

Indiana, Burns's Annot. Stat., Rev. 1908, §§ 4623, 4624.

Michigan, Laws, 1907, No. 307 (coinsurance clause may be used on written application of insured).

Minnesota, Laws, 1907, p. 639, ch. 446, amending Rev. Laws, 1905, § 1642 ("any policy where the entire risks covered by the same amounts to more than $20,000 may contain a co-insurance clause, if the insured requests the same in writing, of which fact such writing shall be the only evidence, and if in consideration thereof, a reduction in the rate of premium is made by the company").

Missouri, Laws, 1903, p. 209 (coinsurance clauses prohibited, but the prohibition does not apply to policies issued upon personal property in cities which now contain, or which may hereafter contain one hundred thousand inhabitants or more, when-

ever the insured sign an agreement endorsed across the face of said policy to be exempt from the prohibition).

Tennessee, Laws, 1903, ch. 539 (coinsurance clauses apply only to cities and towns having a population of more than fifteen thousand. Option to accept or reject coinsurance clause given to the insured).

Wisconsin, 1 Rev. Stat. 1898, § 1943*a* (no coinsurance clause or rider to be attached or made a part of any policy except at the option of the insured).

In the following states the prohibition or limitation as to coinsurance is inferential because coinsurance would be inconsistent with affirmative statutory provisions regarding payment of loss, or an exclusive form of contract prescribed.

The Georgia statute is given as a specimen:

"All insurance companies shall pay the full amount of loss sustained upon the property insured by them provided said amount of loss does not exceed the amount of insurance expressed in the policy; and all stipulations in such policies to the contrary shall be null and void."

Georgia, Civil Code, 1895, § 2110.

Iowa, Code, 1907, § 1758*a*.

Mississippi, Code, 1906, § 2592 (coinsurance clause not allowed in case of real property or buildings, household or kitchen furniture).

Oklahoma, Rev. Stat. 1903, § 3199 (all insurance, however, is limited to seventy-five per cent of value).

In the following states coinsurance clauses are not allowed in policies on buildings or immovables.

Arkansas, 1 Kirby Dig. of Laws, 1904, § 4375 (fire insurance policy in case of total loss to be a liquidated demand for the full amount stated in policy, but this shall not apply to personal property).

Florida, Rev. Stat. 1906, §§ 2775, 2776.

Louisiana, Acts, 1908, p. 282, Act No. 187, prohibits use of clause on immovables; does not apply to personal or movable property where such policies are stamped so as to show that they are subject to such clause.

New Hampshire, Pub. Stat. 1901, ch. 170, § 5 (when the loss is total the sum insured is taken to be the value: when there is a partial loss the insured is entitled to his actual damages, not exceeding the sum insured).

Ohio, Bates's Stat., 5th ed., § 3643.

Oregon, Rev. Stat. 1902, §§ 3720, 3721 (goes to valued policy).

South Dakota, Laws, 1905, ch. 126.

51

Exemption of Money from Fire Policy

In Utah it is provided that:

"Whenever the homestead improvements are insured in favor of the owner, and a loss occurs entitling such person to the insurance, the money thus derived shall be exempt to the same extent as the improvements would have been had not such loss occurred."

Utah, Comp. Laws, 1907, § 1159.

Washington. See Ballinger's Annot. Stats. 1897, § 5251.

LIFE INSURANCE

52

Standard Policy

In New York the statute provides for standard forms of life insurance policies on and after January 1, 1907.

New York, Laws, 1906, ch. 326, § 101, am'd ch. 714, Laws, 1907. In Minnesota the statute provides standard forms in which life insurance policies "may be issued and delivered" in that state. Laws, 1907, ch. 220; O'Brien & Farnham's Comp. of Ins. Laws, par. 82, p. 27. See also North Dakota, Act, March 19, 1907, providing standard forms in which policies of life insurance "may" be issued "and regulating the conditions and provisions to be contained in policies of life insurance companies that do not adopt such standard forms."

Ohio has prescribed standard life policy by Laws, 1908, pp. 139–175.

53

Policy to Contain the Entire Contract

The New York statute is given as a specimen:

"Every policy of insurance issued or delivered within the State on or after the first day of January, nineteen hundred and seven, by any life insurance corporation doing business within the State shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are endorsed upon or attached to the policy when issued."

Colorado, Sess. Laws, 1907, ch. 193, § 36, p. 455.
Delaware, Laws, 1907, ch. 106, p. 190.
Kentucky, Stat. 1909, § 4400.
Louisiana, Acts, 1906, Act No. 52, p. 86.
Michigan, Pub. Acts, 1907, p. 243.
Minnesota, Laws, 1907, ch. 44, p. 49.
Montana, Rev. Codes, 1907, § 5593.
New Hampshire, Laws, 1907, ch. 110, p. 109.
New York, Ins. Law, 1892, ch. 690, § 58, am'd 1906, ch. 326.
North Dakota, Laws, 1907, ch. 155, p. 246.
Tennessee, Acts, 1907, p. 1530.

54

What Life Policy Shall Contain

In several states statutes have been passed prescribing certain provisions which the life policy must contain and certain provisions which it must not contain.

Arizona, Civ. Code, par. 809, as am'd by Act March 21, 1907, Sess. L., 1907, p. 162.
California, Civ. Code, 1903, § 450.
Colorado, Sess. Laws, 1907, p. 455, §§ 36, 37, ch. 193.
Illinois, Rev. Stat. 1908, pp. 1248–1250, §§ 208*u*, 208*v*.
Indiana. See Burns's Annot. Stat., Rev. 1908, § 4725 (providing for certain conditions in cases of mutual life and accident policies); § 4752 (pro-

viding that mutual life and accident policies shall specify the payments to be made and that the corporation shall be liable therefor).

Massachusetts, Acts & Res. 1907, ch. 576, § 75, pp. 895 *et seq.*

Michigan, Pub. Acts, 1907, p. 252.

New Jersey, Laws, 1907, ch. 72, p. 133.

North Carolina. See Rev. of 1905, § 4773.

Ohio, Laws, 1908, pp. 171–174.

Tennessee, Acts, 1907, ch. 457, p. 1529. See ch. 441, p. 1496.

55

Insurance Without the Consent of the Insured Prohibited—Exceptions

The New York statute is given as a specimen:

"No policy of insurance shall be issued upon any property except upon the application and on the name of some person having an interest in the property. No policy or agreement for insurance shall be issued upon the life or health of another or against loss by disablement by accident except upon application of the person insured; but a wife may take a policy of insurance upon the life or health of her husband or against loss by his disablement by accident; an employer may take out a policy of accident insurance covering his employees collectively for the benefit of such as may be injured, and a person liable for the support of a child of the age of one year and upward may take a yearly renewable term policy of insurance thereon, the amount payable under which may be made to increase with advancing age and which shall not exceed the sums specified in the following table, the age wherein specified being the age at the time of death, and which after the age of thirteen, may become an ordinary life policy for an amount not exceeding the sum specified in the table: . . . In respect of insurance heretofore or hereafter, by any person not of the full age of twenty-one years but of the age of fifteen years or upwards, effected upon the life of such minor, for the benefit of such minor, or for the benefit of the father, mother, husband, wife, brother or sister of such minor, the assured shall not, by reason only of such minority, be deemed incompetent to contract for such insurance or for the surrender of such insurance, or to give a valid discharge for any benefit accruing, or for money payable under the contract."

New York, Ins. Law, 1892, ch. 690, § 55, as amended by Laws, 1902, ch. 437.

Georgia. See Code, 1895, § 2091 (requires insurance of another's interest to be done by his consent or a subsequent ratification; applies to fire insurance).

Indiana, Burns's Annot. Stat., Rev. 1908, § 4728 (fraud in procuring life policy without insured's knowledge or consent).

Massachusetts, Acts & Res. 1907, p. 894, § 73, provides that policies of life insurance issued without knowledge or consent of insured or in case of a minor, without the consent of the guardian, etc., certain statements are binding, unless, etc.

56

To Whom Policy May Issue

The Illinois statute is given as a specimen:

"No corporation doing business of life insurance under this act shall issue a

certificate or policy upon the life of any person more than sixty-five years of age, excepting in case of transfer of policyholders as provided herein, nor upon a life in which the beneficiary named has no insurable interest. Any assignment of the policy or certificate to a person having no insurable interest in the insured life shall render such a policy or certificate void."

Illinois, Rev. Stat. 1908, p. 1258, § 238.
Indiana, Burns's Annot. Stat. 1908, § 4746.
Iowa, Ann. Code, 1897, §§ 1789, 1824; Supp. to Code, 1907, §§ 1789, 1824.
Kentucky, Stat. 1909, § 4399.
Missouri. See Rev. Stat. 1899, § 7907.
Nebraska, Comp. Stat. 1903, §§ 3995, 4015, 4075, 4099.
Nevada, Comp. Laws, 1900, § 949.
North Dakota. See Laws, 1907, ch. 157, § 8, p. 250 (accident insurance).
Ohio, Bates's Annot. Stat. 1906, § 3630*g*.
South Dakota, Sess. Laws, 1905, p. 185. § 24.
Tennessee, Acts, 1897, p. 304.
West Virginia, Code, 1906, § 2586.
Georgia, Code, 1895, §§ 2115, 2116.

57

Policy Void When in Favor of Person Convicted of Felonious Homicide

The statute of the District of Columbia provides:

"And every policy of insurance procured, directly or indirectly, by the person so convicted" (of "the felonious homicide of another by way of murder or manslaughter") "for his own benefit or payable to him upon the life of the person so killed shall be void."

District of Columbia, Code of Law, as am'd to March, 1905, § 961.

58

Days of Grace

The New York statute is given as a specimen:

"A grace of thirty days from the day when it would otherwise be payable shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force."

New York, Ins. Law, 1892, ch. 690, § 101; am'd by Laws, 1906, ch. 326; Laws, 1907, ch. 714.
Illinois, Act, May 20, 1907, § 1 (2); Hurd's Rev. Stat. 1908, p. 1248.
Massachusetts, Acts & Res. 1907, ch. 576, § 75, subd. 1, p. 896.
Michigan, Pub. Acts, 1907, p. 252.
New Jersey, Laws, 1907, ch. 72, p. 133.
Ohio, Laws, 1908, p. 171.
Tennessee, Acts, 1907, ch. 457, p. 1529.

59

Discrimination in Rates—Contracts or Agreements for Rebates, etc.

The following states have adopted laws prohibiting discrimination in rates by life insurance companies.

The New York statute is given as a specimen:

"No life insurance corporation doing business in this State shall make or permit any discrimination between individuals of the same class or of equal expecta-

tion of life, in the amount or payment or return of premiums or rates charged for policies of insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the policy; nor shall any such company permit or agent thereof offer or make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company or any officer, agent, solicitor or representative thereof pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducement to any person to insure, or give, sell or purchase, or offer to give, sell or purchase as such inducement or in connection with such insurance, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accruing thereon, or any valuable consideration or inducement whatever not specified in the policy, nor shall any person knowingly receive as such inducement, any rebate or premium, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for services of any kind or any valuable consideration or inducement whatever, not specified in the policy. No person shall be excused from attending and testifying or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding. No premium upon any policy of life insurance issued on or after January first, nineteen hundred and seven, shall be charged for term insurance for one year, higher in amount than the premium for term insurance for one year at the same age under any other form of policy issued by such corporation."

Alabama. See Civ. Code, 1907, § 4579, as to rebates on premiums being prohibited.

Arkansas, Acts, 1907, p. 781.

Colorado, Sess. Laws, 1907, ch. 193, § 49, p. 461, see also *Id.*, p. 462, § 50.

Connecticut, Gen. Laws, Rev. 1902, § 3538, am'd by Pub. Acts, 1907, p. 741, ch. 193.

Delaware, Laws (vol. 19), 1893, ch. 273, p. 551, as amended by Laws (vol. 20) 1897, ch. 595, p. 713.

Idaho, Civ. Code, § 2238; Act March 7, 1905; Sess. Laws, 1905, p. 256.

Illinois, Rev. Stat. 1908, p. 1200, §§ 27–30.

Iowa, Ann. Code, 1897, § 1782; Supp. to Code, 1907, § 1782.

Kentucky, Stat. 1909, § 4379.

Louisiana, Acts, 1908, Act No. 210, p. 314.

Maine, Laws 1907, c. 121, p. 135.

Maryland, Code Pub. Gen. Laws, 1903, art. 23, § 151, p. 391.

Massachusetts, Acts & Res. 1907, ch. 576, § 69, p. 892.

Michigan, Pub. Acts, 1907, p. 243.

Minnesota, Rev. Laws, 1905, § 1689.

Mississippi, Code, 1906, § 2600.

Missouri, Laws, 1907, p. 316; Rev. Stat. 1899, § 7931.

Montana, Rev. Codes, 1907, § 4141.

New Hampshire, Laws, 1907, ch. 111, p. 110.

New Jersey, Laws, 1907, p. 153.

New York, Ins. Law, 1892, ch. 690, § 89, amended, Laws, 1906, ch. 326, Laws, 1907, ch. 729.

North Carolina, Rev. of 1905, § 4775.
North Dakota, Laws, 1907, ch. 148, p. 239.
Ohio, Bates's Annot. Stat. 1906, § 3631, amended, Laws, 1908, p. 183.
Oregon, Gen. Laws, 1907, p. 377.
Pennsylvania, Pepper & Lewis's Dig., vol. 3 (suppl.), cols. 349, 350, § 5.
Rhode Island, Gen. Laws, 1896, p. 579, § 1.
Tennessee, Acts, 1897, p. 304, § 8; Shannon's Annot. Code, 1896, p. 769, § 3312.
Vermont, Pub. Stat. 1906, § 4782.
Virginia, Acts, 1906, p. 141.
Washington, Laws, 1905, ch. 178, p. 373.
West Virginia, Acts, 1907, ch. 77, § 15, p. 298.
Wisconsin, Laws, 1907, p. 543.
Wyoming, Rev. Stat. 1899, § 3274.

60

Discriminations Against Colored Persons—Rates, Rebates, etc.

The following states have adopted laws prohibiting discrimination against colored persons, by life insurance companies.

The New York statute is given as a specimen:

"§ 1. No life insurance corporation doing business within this State shall make any distinction or discrimination between white persons and colored persons, wholly or partially of African descent, as to the premiums or rates charged for policies upon the lives of such persons, or in any other manner whatever; nor shall any such company demand or require a greater premium from such colored persons than is at that time required by such company from white persons of the same age, sex, general condition of health and prospect of longevity; nor shall any such corporation make or require any rebate, diminution or discount upon the amount to be paid on such policy in case of the death of such colored persons insured, nor insert in the policy any condition, nor make any stipulation whereby such person insured shall bind himself, or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon white persons in similar cases; and any such stipulation or condition so made or inserted shall be void.

Connecticut, Gen. Stat. 1902, §§ 3535–3537.
Massachusetts, Acts & Res. 1907, ch. 576, § 70, p. 892.
Michigan, Comp. Laws 1897, § 7220, p. 2272.
Minnesota, Rev. Laws, 1905, § 1689.
New Jersey, Laws, 1902, p. 441.
New York, Ins. Law, 1892, ch. 690, § 90.
Ohio, Bates's Annot. Stat. 1906, § 3631–1.
Tennessee, compare Acts 1905, ch. 480, § 16, p. 1028 (association of races).

61

No Forfeiture of Policy Without Notice

The following states have adopted non-forfeiture laws in life insurance.

The New York statute is given as a specimen:

"No life insurance corporation doing business in this state shall within one year after the default in payment of any premium, instalment or interest declare

forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of nonpayment when due of any premium, interest or instalment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or instalment, unless a written or printed notice stating the amount of such premium, interest, instalment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address in this state, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, instalment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, instalment, interest or portion thereof for which it is claimed that forfeiture ensued."

Arizona, Rev. Stat. 1901, § 809, as amended by Act March 21, 1907.

California, Deering's Civ. Code, 1903, § 450. *Id.*, Appendix, p. 729, § 11.

Colorado, Sess. Laws, 1907, ch. 193, § 43, p. 457.

Illinois, Rev. Stat. 1908, p. 1249, § 208*u*, (6).

Kansas. See Gen. Stat. 1905, § 3657.

Kentucky, Stat. 1909, § 4382.

Louisiana, Acts, 1906, Acts Nos. 68, 193, Pamph. Laws, 1906, pp. 86, 97.

Maine, Rev. Stat. 1903, p. 492, ch. 49, § 101.

Massachusetts, Acts & Res. 1907, ch. 576, § 80, p. 901.

Michigan, Pub. Acts, 1907, p. 253.

Missouri, Laws, 1903, p. 208.

Montana, Rev. Codes, 1907, § 4139.

Nevada, Comp. Laws, 1900, § 953.

New Jersey, Laws, 1907, p. 135.

New York, Ins. Law, 1982, ch. 690, § 92, as amended, Laws, 1906, ch. 326.

Tennessee, Acts, 1907, p. 1531.

62

Technical Forfeitures—Warranties Converted into Representations

The following states have adopted laws providing that misrepresentations and other breaches of policy shall not avoid unless in matters material to the risk.

The Alabama statute is given as a specimen:

"No written or oral misrepresentation, or warranty therein made, in the negotiation of a contract or policy of life insurance, or in the application therefor or proof of loss thereunder shall defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive or unless the matter misrepresented increase the risk of loss."

Alabama, Civ. Code, 1907, § 4572.
Arizona Act March 18, 1907; Sess. L., 1907, p. 59.
Georgia. See Code, 1895, §§ 2098, 2099.
Iowa, Ann. Code, 1897, § 1743; Supp. to Code, 1907, § 1743.
Kansas, Laws, 1907, ch.226, § 1, p. 359.
Kentucky, Stat. 1909, § 4286.
Maryland, Pub. Gen. Laws, 1903, art. 23, § 192, p. 417.
Massachusetts, Acts & Res. 1907, ch. 576, § 21, p. 854.
Michigan, Pub. Acts, 1907, p. 252.
Minnesota, Rev. Laws, 1905, § 1623.
Missouri, Rev. Stat. 1899, §§ 7890.
New Hampshire, Pub. Stat. 1901, ch. 170, § 2, p. 570.
North Carolina, Rev. of 1905, § 4808 (general).
North Dakota, Rev. Codes, 1899, § 4485.
Ohio, Bates's Ann. Stat. 1906, § 3625.
Pennsylvania, Pepper & Lewis's Dig., vol. 1, col. 2382, § 88.
Rhode Island, Laws, 1902, ch. 997, p. 75.
South Carolina. See Civil Code, §§ 1817, 1825 (vol. 1, Code of Laws, 1902, pp. 695, 697).
Tennessee, Shannon's Annot. Code, 1896, p. 768, § 3306.
Texas, Supp. 1903, to Sayles's Civ. Stat., art. 3096*aa* (general).
Virginia, Acts, 1906, ch. 112, § 28, p. 139.

63

Misstatements as to Age

The provision of the New York Statutory Life Policy is given as a specimen:

"If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age."

Colorado, Sess. Laws, 1907, ch. 193, § 36, p. 455.
Illinois, Rev. Stat. 1908, p. 1248, § 208, n.
Iowa, Annot. Code, 1897, § 1813, Supp. to Code, 1907, § 1813.
Maryland, Code Pub. Genl. Laws, 1903, p. 417, art. 23, § 193.
Massachusetts, Acts & Res. 1907, ch. 576, § 75, p. 896. See *Id.*, p. 894, § 73.
Michigan, Pub. Acts, 1907, p. 253.
Mississippi, Code, 1906, § 2676.
New Jersey, Laws, 1907, ch. 72, p. 134.
New York, Ins. Law, 1892, ch. 690, § 101, as amended by Laws, 1906, ch. 326; Laws, 1907, ch. 714.
Ohio, Laws, 1908, p. 171.
Pennsylvania, Pepper & Lewis's Dig., col. 2383, § 89.
South Dakota, Civ. Code, 1903, § 733.
Tennessee, Acts 1907, p. 1530.
See Louisiana, Act, 1906, No. 115, § 33, Pamph. Laws, 1906, p. 112, making certificates in life, accident, sick benefit, or physical disability insurance on the fraternal plan incontestable for errors or innocent statements as to age.

64

Waiver of Forfeiture for Misrepresentation, etc.—Notice to Agent, When Notice to Company

The Louisiana statute provides that life, health and accident insurance companies, which issue policies or contracts of insurance to the assured without a medical examination by a physician, shall waive their right to claim forfeiture for misrepresentation, etc., under certain conditions; also making notice to the agent notice to the company as to the health, habits or occupation of the assured.

Louisiana, Acts, 1908, p. 139, Act No. 97.

See Massachusetts, Acts & Res., 1907, p. 894, § 73, providing that certain policies issued without medical examination to be valid, unless, etc.

In Minnesota it is provided that:

"In any action upon a policy issued in this state without previous medical examination, or without the knowledge or consent of the insured, or, in case of a minor, without the consent of his parent, guardian, or other person having his legal custody, the statements made in the application as to the age, physical condition, and family history of the insured shall be valid and binding upon the company, unless wilfully false or intentionally misleading," Minnesota, Rev. Laws, 1905, § 1693.

65

Misrepresentation by Insurance Company

The New York statute is given as a specimen:

"No life insurance corporation doing business in this State and no officer, director or agent thereof shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or shall use any name or title to any policy or class of policies misrepresenting the true nature thereof. Nor shall any such corporation or agent thereof make any misrepresentation to any person insured in another company for the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. Any violation of this section shall constitute a misdemeanor and it shall be the duty of the superintendent of insurance to revoke the license of the corporation or agent so offending."

Colorado, Sess. Laws, 1907, ch. 193, § 48, p. 460. *Id.*, p. 446, § 9.

Delaware, Laws, 1907, ch. 105, p. 189.

Illinois, Rev. Stat. 1908, p. 1246, § 208, n.

Iowa, Supp. to Code, 1907, § 1820*b*.

Louisiana, Acts, 1906, p. 172, Act No. 107, Pamph. Laws, 1906, p. 96.

Massachusetts, Acts & Res. 1907, ch. 576, § 74, p. 895.

Michigan, Pub. Acts, 1907, p. 250.

Minnesota, Laws, 1907, ch. 43, p. 49.

Missouri, Laws, 1907, p. 317.

New Jersey, Laws, 1907, p. 138.

New York, Ins. Law, 1892, ch. 690. § 60, as amended by Laws, 1908, p. 1015, ch. 347.

North Dakota, Laws, 1907, ch. 147, p. 239.

Ohio, Laws, 1908, p. 175.

Tennessee, Acts, 1907, p. 1526.

West Virginia, Acts, 1907, ch. 77, § 34 p. 304.

Wisconsin, Laws, 1907, p. 509.

See Connecticut, Genl. Stat., Rev. 1902, § 3617, as to false statement of assets by insurance companies generally or their agents. *Id.*, § 3618, as amended by Pub. Acts, 1907, p. 742, ch. 193, § 3, providing that advertisements must conform to last verified statement. Louisiana, Pamph. Ins. Laws, 1906, p. 23, §§ 13, 14, read: "No insurance company, corporation, association, partnership, or society," etc., and applies to advertisements, etc., to funds or assets.

66

Effect of Change of Interest or Transfer—Exceptions

The California Code provides:

"Except[1] . . . in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent, until the interest in the thing and the interest in the insurance are vested in the same person."

California, Civ. Code, 1903, § 2553. See *Id.*, § 2593.
Montana, Rev. Civ. Code, 1907, § 5562.
North Dakota, Rev. Civ. Code, 1899, § 4457.
South Dakota, Civ. Code, 1903, § 1809.

67

Change of Beneficiary

The following states have adopted laws providing that a member of certain life insurance societies may make a change of beneficiary without consent of former beneficiary.

The New York statute is given as a specimen:

"Membership in any such corporation, association or society shall give to any member thereof the right, at any time, with the consent of such corporation, association or society, to make a change in his payee or payees or beneficiary or beneficiaries without requiring the consent of such payee or beneficiaries."

Illinois, Hurd's Rev. Stat. 1908, p. 1262.
Indiana, Burns's Annot. Stat., Rev. 1908, §§ 4703, 4760.
Iowa, Ann. Code, 1897, §§ 1789, 1834; Supp. to Code, 1907, § 1789.
Kansas, Gen. Stat. 1905, § 3649.
Kentucky, Stat. 1909, § 4392.
Maine. See Rev. Stat. 1903, c. 49, § 130, p. 500.
Montana, Rev. Code, 1907, § 4170.
Nebraska, Comp. Stats. 1903, § 4095.
New York, Ins. Law, 1892, ch. 690, § 211. See also *Id.*, § 238.
Oklahoma, Rev. Stat. 1903, § 3247.
Texas, Suppl. 1903, to Sayles's Civ. Code, p. 308 (accident insurance).
Virginia, Acts, 1906, p. 152.
Wisconsin, Laws, 1899, ch. 101, p. 138, repealing § 1955c, ch. 89, Stat. 1898.

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1 The exceptions specified here are: § 2554. A change after the occurrence of an injury which results in the loss; § 2555, "a change of interest in one or more of several distinct things, separately insured by one policy, does not avoid the insurance as to the others;" § 2556, "a change of interest, by will or succession, in the death of the insured;" § 2557, "a transfer of interest by one of several partners, joint owners, or owners in common who are jointly insured, to the others."

68

Notice of Transfer of Policy Upon Life or Health

The California Code provides:

"Notice to an insurer of a transfer or bequest thereof is not necessary to preserve the validity of a policy of insurance upon life or health, unless thereby expressly required."

California, Civ. Code, 1903, § 2765.
Montana, Rev. Civ. Code, 1907, § 5646.
North Dakota, Rev. Civ. Code, 1899, § 4613.
Oklahoma, Rev. Stat. 1903, § 3234.
South Dakota, Civ. Code, 1903, § 1957.

69

Suicide

Colorado has enacted:

"From and after the passage of this act the suicide of a policyholder, after the first policy year of any life insurance company doing business in this state, shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary and whether said policyholder was sane or insane."

Colorado, Sess. Laws, 1907, ch. 193, § 55, p. 469.
Missouri, Rev. Stat. 1899, § 7896.
Under the Georgia Code, 1895, § 2118, self-caused death releases insurer, including death by the hands of Justice.

70

Defense of Intoxication of Insured

The provision of the Iowa Code is given as a specimen:

"In any action pending in any court of the State on any policy or certificate of life insurance, wherein the defendant seeks to avoid liability upon the alleged ground of the intemperate habits or habitual intoxication of the insured, it shall be a sufficient defense for the plaintiff to show that such habits or habitual intoxication of the assured was generally known in the community or neighborhood where the agent of the defendant resided or did business, if thereafter the company continued to receive the premiums falling due thereon."

Iowa, Code, 1897, § 1811; Supp. to Code, 1907, § 1811.
South Dakota, Civ. Code, 1903, § 730.

71

Incontestable

The following states have adopted an incontestable clause in life risks.

The New Jersey law is given as a specimen:

"On and after the first day of January, nineteen hundred and eight, no policy of life insurance shall be issued by any domestic company or be issued or de-

livered within this State to any resident thereof by any foreign company, unless the same shall contain the following provisions: . . ."

A provision that the policy shall constitute the entire contract between the parties and that after a specified time, not later than two years from its date, shall be incontestable, except for non-payment of premiums and for violation of its express conditions, if any, relating to hazardous travel, residence or occupation, in which case the liability of the company may be limited to a definitely determinable reduced amount, which shall not be less than the full reserve for the policy and any dividend additions.

Alabama, Civ. Code, 1907, § 4573.
Colorado, Sess. Laws, 1907, p. 455, ch. 193, § 36 (2).
Illinois, Act May 20, 1907, § 1 (3); Hurd's Rev. Stat. 1908, p. 1248.
Kansas, Gen. Stat. 1905, § 3657.
Massachusetts, Acts & Res. 1907, ch. 576, § 75, p. 896.
Michigan, Pub. Acts, 1907, p. 252.
New Jersey, Gen. Laws, 1907, p. 133.
Ohio, Bates's Annot. Stat. 1906, § 3626; Laws, 1908, p. 171.
South Carolina, Civ. Code, § 1825; 1 Code of Laws, 1902, p. 697.
South Dakota, Civ. Code, 1903, § 732.
Tennessee, Acts, 1907, p. 1530.

72

Sum Fixed in Policy Measures Indemnity; Unless

The California Code provides:

"Unless the interest of a person insured is susceptible of exact pecuniary measurement, the measure of indemnity under a policy of insurance upon life or health is the sum fixed in the policy."

California, Civ. Code, 1903, § 2766.
Montana, Rev. Civ. Code, 1907, § 5647.
North Dakota, Rev. Civ. Code, 1899, § 4614.
Oklahoma, Rev. Stat. 1903, § 3235.
South Dakota, Civ. Code, 1903, § 1958.

73

Protection of Wife and Children

The following states have adopted laws protecting beneficiaries, if wife and children, against creditors and acts of the insured.

The New York statute is given as a specimen:

"A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except that where the premium actually paid annually out of her husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to be for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such

money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendant surviving. After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely.

"A policy of insurance on the life of any person for the benefit of a married woman, is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured."

Arkansas, Sandel's & Hill's Dig. of Stat. 1894, § 4944.
Connecticut, Gen. Stat. 1902, § 4548.
Delaware, Rev. Code, 1872, am'd 1874, p. 478, ch. 76, § 3.
District of Columbia, Code of Laws, as amended to March 3, 1905, §§ 1161–1163.
Hawaii, Rev. Laws, 1905, §§ 2268–2270.
Illinois, Rev. Stat. 1908, p. 1242, § 199.
Indian Territory, Ann. Stat. 1899, § 3023.
Iowa. See Ann. Code, 1897, § 1805; Supp. to Code, 1907, § 1805.
Kentucky, Stat. 1909, § 4377.
Maine, Rev. Stat. 1903, ch. 77, § 19, p. 667.
Maryland, Pub. Gen. Laws, 1903, art. 23, § 146, p. 389.
Massachusetts, Acts & Res. 1907, ch. 576, § 73, p. 894.
Michigan, Comp. Laws, 1897, § 7212, p. 2268.
Minnesota, Rev. Law, 1905, § 1692.
Missouri, Rev. Stat. 1899, §§ 7892–7895.
New Hampshire, Pub. Stat. 1901, ch. 1171, § 1, p. 573.
New Jersey, Laws, 1902, pp. 421, 422.
New York, Domestic Relations Law, 1896, ch. 272, § 22.
North Carolina, Rev. of 1905, §§ 4771, 4772.
Ohio, Bates's Annot. Stat. 1906, §§ 3628, 3629.
Oklahoma, Rev. Stat. 1903, § 3223.
Pennsylvania, Pepper & Lewis's Dig., vol. 1, col. 2383, § 91.
Rhode Island, Gen. Laws, 1896, p. 589, § 8.
South Carolina, Civ. Code, § 1824 (vol. 1, Code of Laws, 1902, p. 697).
South Dakota, Civ. Code, 1903, § 728.
Tennessee, Shannon's Annot. Code, 1896, p. 991, § 4030; p. 1051, §§ 4231, 4232.
Vermont, Pub. Stat. 1906, §§ 3047, 3051.
Washington, Ballinger's Annot. Codes & Stat. 1897; Supp. 1899–1903, §§ 4452, 5252.
West Virginia, Code, 1906, § 2954.
West Virginia, Code, 1899 (Warth), p. 669, ch. 66, § 5.
Wisconsin, Sanborn & B. Annot. Stat. 1898, § 2347, p. 1700.

74

Protection of All Beneficiaries

The following states have adopted laws securing to the beneficiaries in certain cases the proceeds of life insurance free from creditors, etc.

The New York statute is given as a specimen:

"The money or other benefit, charity, relief or aid paid or to be paid, provided or rendered by any such corporation, association or society shall not be liable to be seized, taken or appropriated by any legal or equitable process, to pay any debt or liability of a member or any debt or liability of the widow of a deceased member of such corporation designated as the beneficiary thereof, which was in-

curred before such money was paid to her or such benefit, charity, relief or aid was provided or rendered."

California, Deering's Civ. Code, 1903, Appendix, p. 728, § 8.
Colorado, Sess. Laws, 1907, ch. 193, p. 483.
Connecticut, Genl. Stat., Rev. 1902, § 3588.
District of Columbia, Code of Laws, as amended to March, 1905, §§ 759, 1162.
Idaho, Civ. Code, 1901, § 2255.
Illinois, Rev. Stat. 1908, pp. 1262, 1268, §§ 254, 266.
Indiana, Burns's Annot. Stat. 1908, § 4761.
Iowa. See Ann. Code, 1897, §§ 1805, 1828; Supp. to Code, 1907, § 1805.
Kansas, Gen. Stat. 1905, § 3587.
Kentucky, Stat. 1909, §§ 4378, 4393.
Maine, Rev. Stat. 1903, ch. 49, § 106, p. 493; ch. 49, § 130, p. 500.
Maryland, Code Pub. Genl. Laws, 1903, p. 389, art. 23, § 145. *Id.*, p. 427, art. 23, § 213.
Massachusetts, Acts & Res. 1907, ch. 576, § 73, p. 894.
Minnesota, Rev. Laws, 1905, § 1691.
Mississippi, Code, 1906, §§ 2140, 2141, 2602, 2603; Laws, 1908, ch. 175, p. 188.
Missouri, Rev. Stat. 1899, §§ 7908, 7927.
Montana, Rev. Codes, 1907, §§ 4092, 4171.
Nebraska, Comp. Stat. 1903, § 4018.
Nevada, Comp. Laws, 1900, § 950.
New Hampshire, Pub. Stat. 1901, p. 569; ch. 171, § 2, p. 573; ch. 86, § 10, p. 581.
New Jersey, Laws, 1902, p. 422.
New York, Ins. Law, 1892, ch. 690, § 212.
North Carolina, Rev. of 1905, § 4772.
Oklahoma, Rev. Stat. 1903, § 3248.
Pennsylvania, Pepper & Lewis's Dig., vol. 1, col. 2383, § 90.
Rhode Island. See Gen. Laws, 1896, p. 589, § 8.
South Carolina, Civ. Code, § 1837; 1 Code of Laws, 1902, p. 704.
South Dakota. See Civ. Code, 1903, § 728.
Tennessee, Acts, 1905, ch. 480, § 12, p. 1024.
Utah, Comp. Laws, 1907, § 3245, subd. 8.
Vermont, Pub. Stats. 1906, § 4783.
Virginia. See Acts, 1906, p. 139, exempting weekly or monthly payments of sick benefits.
Washington, Ballinger's Annot. Codes & Stat. 1897, and Supp. 1899–1903, § 5252; and Supp. 2841*d*, p. 301.
Wisconsin, Laws, 1899, ch. 270, § 14, p. 468.
Wyoming, Laws, 1901, p. 51, § 7.

75

Voting for Directors of Mutual Life Insurance Companies—Effect of Mailing of Ballot to Policyholder

In Wisconsin it is provided that:

"The mailing by the corporation of the said ballot, to any person under the provisions of this act, shall not be construed as an admission by the corporation of the validity of any policy, or of the fact that such person was a policyholder of said company; and no such mailing shall be competent evidence against the corporation in any action or proceeding, in which the question of the validity of any policy or of any claim under it is involved."

Wisconsin, Laws, 1907, p. 525.

Accident Insurance

76

Insurance Against Accident or Disease—What Policies Must State

The Connecticut statute provides:

"Any company chartered by and now doing business in this State, and empowered to make contracts contingent upon life, may issue policies or certificates insuring persons against loss of life or personal injury resulting from any cause and against loss of time resulting from disease, which policies or certificates shall state on their face the agreement with the persons receiving the same, and, when executed in accordance with the charter and by-laws of said company, shall be binding upon the company."

Connecticut, Genl. Stat., Rev. 1902, § 3541.

Montana, Rev. Civ. Code, 1907, § 4161, providing that the policy shall state the sum of money which it promises to pay upon the happening of each contingency insured against.

Texas, Suppl. 1903, to Sayles's Civ. Stat., p. 308.

Assessment accident associations required to print plainly and legibly in every policy or certificate issued, the minimum and maximum limit of the contingent mutual liability of the person to whom the policy is issued, etc., Colorado, Sess. Laws, 1907, p. 482, ch. 193 (4).

77

Prohibiting Limitation of Time for Service of Notice

The Wisconsin statute is given:

"It shall be unlawful for any accident or casualty insurance company, corporation or association licensed to transact business in the state of Wisconsin, its officers, employees or agents to limit by any means or in any manner the time for the service of any notice of injury that may be required of the person insured to a less period of time than twenty full calendar days."

Wisconsin, Laws, 1901, ch. 235, § 1; and deposit of notice in post office, postage prepaid, is sufficient, § 3.

Maine, Sess. Laws, 1907, ch. 170, p. 186.

78

What Notice of Injury Is Sufficient

The Wisconsin statute is given:

"The deposit in any post office by any injured person, his agent or attorney, of a registered, postage prepaid letter, containing the proper notice of injury at any time within twenty full calendar days after the injury received by the assured, properly addressed to the company, corporation or association issuing the accident or casualty policy or certificate, shall be a lawful and sufficient service of any notice of injury that may be required."

Maine, Laws, 1907, ch. 170, p. 186.

Wisconsin, Laws, 1901, ch. 235, § 3.

79

Assessment Accident Associations—Benefit Not Subject to Attachment

The Colorado statute is given:

"The money or other benefit, charity, relief or aid to be paid, or provided or rendered by any corporation authorized to do casualty insurance on the assessment plan, shall not be liable to attachment or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, nor by operation of law, to pay any debts or liability of a policy or certificate holder, or any beneficiary named therein."

Colorado, Sess. Laws, 1907, p. 483, ch. 193 (6).

80

Cancellation—Mutual Corporations—Accidents of Employees

The Illinois statute provides:

"When any policy for which a premium note shall have been given in part payment of the premium therefor, is cancelled by the company, the insured must upon demand from the company pay his proportion of all losses which have actually occurred up to the date when such policy was cancelled, upon the doing of which the company shall return such notes to the maker thereof."

Illinois, Hurd's Rev. Stat., 1908, p. 1289, ch. 73.

Marine Insurance.

81

Wagering Policies

The statute of the District of Columbia provides:

"No insurance shall be made by any person or persons, bodies politic or corporate, on any ship or ships, or on any goods, merchandise, or effects laden or to be laden on board of any ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer; and every such insurance shall be null and void to all intents and purposes."

District of Columbia, Code of Laws, as amended March, 1905, § 656.

82

Concealments and Representations—What Information Must Be Communicated—Marine Risk

Several states expressly provide by statute what information must be communicated or disclosures made in marine risks; what is material information; and what concealments and representations or misrepresentations do and do not vitiate the contract in marine risks.

California, Civ. Code, 1903, §§ 2669–2677.

Georgia, Code, 1895, § 2131.

North Dakota, Rev. Code, 1899, §§ 4545–4550.

South Dakota, Civ. Code, 1903, §§ 1891–1896.

83

Particular Average Loss—Effect of Agreement as to

The California Code provides:

"Where it has been agreed that an insurance upon a particular thing or class of things shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it become entirely worthless; but he is liable for his proportion of all general average loss assessed upon the thing insured."

California, Civ. Code, 1903, § 2711.
North Dakota, Rev. Civ. Code, 1899, § 4574.
South Dakota, Civ. Code, 1903, § 1920.

84

Insurance Confined in Terms to an Actual Total Loss—Effect of

The California Code provides:

"An insurance confined in terms to an actual total loss does not cover a constructive total loss, but covers any loss which necessarily results in depriving the insured of the possession, at the port of destination, of the entire thing insured."

California, Civ. Code, 1903, § 2712.
North Dakota, Rev. Civ. Code, 1899, § 4575.
South Dakota, Civ. Code, 1903, § 1921.

85

Notice of Abandonment—Requisites of

The California Code provides:

"A notice of abandonment must be explicit, and must specify the particular cause of the abandonment, but need state only enough to show that there is probable cause therefor, and need not be accompanied with proof of interest or of loss."

California, Civ. Code, 1903, § 2722.
North Dakota, Rev. Civ. Code, 1899, § 4582.
South Dakota, Civ. Code, 1903, § 1928.

86

Effect of Abandonment

The California Code provides:

"An abandonment is equivalent to a transfer, by the insured, of his interest, to the insurer, with all the chances of recovery and indemnity."

California, Civ. Code, 1903, § 2724.
North Dakota, Rev. Civ. Code, 1899, § 4584.
South Dakota, Civ. Code, 1903, § 1930.

87

Acceptance of Abandonment

The statutes of several states expressly provide as to the acceptance of an abandonment with relation to the rights of assured and its effect as being conclusive and irrevocable; its effect upon freightage; and also the effect of a refusal to accept, or of an omission to abandon.

California. Civ. Code, 1903, §§ 2727–2732.
North Dakota, Rev. Civ. Code, 1899, §§ 4587–4591.
South Dakota, Civ. Code, 1903, §§1934–1937.

88

Valuation in Policy of Marine Insurance—When Conclusive—Fraudulent Valuation—Rescission

The California Code provides:

"A valuation in a policy of marine insurance is conclusive between the parties thereto in the adjustment of either a partial or total loss, if the insured has some interest at risk, and there is no fraud on his part; except that when a thing has been hypothecated by bottomry or respondentia, before its insurance, and without the knowledge of the person actually procuring the insurance, he may show the real value. But a valuation fraudulent in fact entitles the insurer to rescind the contract."

California, Civ. Code, 1903, § 2736.
North Dakota, Rev. Civ. Code, 1899, § 4593.
South Dakota, Civ. Code, 1903, § 1939.

89

Profits Valued—Effect

The California Code provides:

"When profits are valued and insured by a contract of marine insurance, a loss of them is conclusively presumed from a loss of the property out of which they were expected to arise, and the valuation fixes their amount."

California, Civ. Code, 1903, § 2740. See also *Id.*, § 2738.
North Dakota, Rev. Civ. Code, 1899, § 4597.
South Dakota, Civ. Code, 1903, § 1943.

CHAPTER II

Forms

1

Simple Form of Application for Fire Policy. See § 75

The Home Insurance Co., New York. Insurance is wanted by.....to the amount of $.....rate.....term.....from....., 190.. to....., 190.. On .....
.....
Location .....

2

Binding Slip Used in New York City. See § 75

Name.....
Location.....
on.....
Amount $.....Rate.....Time.....Months.

Each of the undersigned companies, for itself only, insures the property above described for the amount set opposite its name until the issue of its Standard Policy on the same in place hereof, or until twelve o'clock noon of the next business day after the risk is declined, by notice to the assured or broker placing the risk. But in no event shall this insurance be in force over fifteen days from the date of commencement of liability hereunder.

Binder Signed	Company	Amount	Date of Commencement of Liability	Signature

(The use of the foregoing form of binder is compulsory among the members of the New York Fire Exchange, to wit, the stock companies and certain insurance agencies. The late judge William Rumsey, who prepared it, advised that it was not inconsistent with the cancellation clause of the standard fire policy, but the point has not been adjudicated. The New York Fire Exchange governs the action both of stock companies and of brokers within specified territory. Some such

institution is almost a necessity to compel uniformity and system in rates and forms of clauses and in other particulars relating to the conduct of insurance. The Exchange prohibits rebates and encourages improvements by the insured which shall diminish the risk of fire loss and lower the rates of premium. For a shorter form of binder once in general use and sometimes still used elsewhere than in New York City, see 28 App. Div. 163, 51 N. Y. Supp. 79.)

3

Standard Form of Fire Insurance Policy for New York State. See § 227

THE.....Insurance Company, in consideration of the stipulations herein named and of.....dollars premium, does insure.....for the term of .....from the.....day of....., 190.., at noon, to the.....day of....., 190.., at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding.....dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:—

(Description of property insured, and special clauses, see next forms.)

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowl-

edge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations,

in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to

examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss; stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured; and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies, or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agree-

ment indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

IN WITNESS WHEREOF, this company has executed and attested these presents, but this policy shall not be valid unless countersigned by the duly authorized agent of the company at....., this.....day of....., 19...

The legislatures of the following states have adopted the New York standard fire policy, Connecticut, Louisiana, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, and West Virginia, and it is in fact generally used in all the other states except Massachusetts, Maine, Michigan, Minnesota, Iowa, New Hampshire, South Dakota and Wisconsin, which have statutory forms of fire policies of their own. No attempt has been made here to follow precisely the styles of type designated in the statutes or the statutory numbering of the lines. Notice that a policy is issued subject to the New York guaranty, and special reserve fund provisions must be printed upon such policy, say as follows: "Provisions required by law to be stated in this policy. This policy is in a stock corporation, and is issued under and in pursuance of sections 130, 131, 132 of the Insurance Law of the State of New York." In addition to the form prescribed by statute the insurance departments generally have allowed companies to express upon the face of a standard policy appropriate words to indicate limited liability, thus a foreign company, which abroad is allowed to transact the business both of life and of fire insurance, is allowed to state to which class of assets alone the insured under its fire policies have a right to look. On the back of almost all policies, among other things, are endorsed the words, "It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once." Where at the time of loss the subsisting policies are nonconcurrent, the adjustment under the *pro rata* or contribution clause often becomes very complicated. See §§ 317, 318.

4

Printed Rider Called "The Forms" (Including Description of the Property and Special Clauses), Prepared by the Broker to Be Attached to the Policies on Stock of a Department Store. See § 75

$.....On merchandise and articles on sale of every description, including materials, samples and supplies, manufactured, unmanufactured and in process of manufacture, their own or held by them in trust or on consignment or commission, or sold but not delivered or removed, including the property of others held on storage, or for repairs, or for which the insured may be liable, also for labor and materials put on same, contained in the brick, stone and iron buildings and additions situate.....

It is understood and agreed that this insurance shall cover the assured, as now or hereafter constituted.

It is understood and agreed that this insurance is for the benefit of Brown & Co., as now or may be hereafter constituted.

Privileged to work overtime and to keep for use not exceeding two (2) quarts of benzine, in patent safety cans.

Privileged to do such work and to use such materials as are usual in the business of department store.

Privileged to use steam for heat and power and gas for light and heat, and for existing communications.

Other insurance permitted.

Sole Occupancy Warranty.—"Warranted by the assured that the building herein described is occupied exclusively by one tenant."

Watchman and Clock.—"Warranted by the assured to maintain Night, Sunday and Holiday Watchman, with approved stations and approved watch clock, and making such reports to the New York Fire Insurance Exchange as may be required."

Special Building Signal.—"Warranted by the assured to maintain a Special Building Signal approved by the New York Board of Fire Underwriters for the transmission of alarms to Fire Department Headquarters."

Automatic Fire Alarm Clause.—The entire building containing the property hereby insured, having been equipped with the Automatic Fire Alarm Signal Telegraph, in accordance with the Rules and Regulations of the New York Board of Fire Underwriters, and a certificate to that effect issued by authority of said Board, this policy is issued at a reduced rate of premium, and in consideration of such reduced rate, it is hereby made a condition of this policy that the assured shall use due diligence that such equipment shall continue to be maintained during the full term of this insurance.

Automatic Sprinkler Clause.—It is hereby made a condition of this policy that the insured shall use due diligence to maintain in full working order during the term of this insurance the automatic sprinkler equipment now in use, and that no change shall be made in such system without the approval of the New York Fire Insurance Exchange or the New York Board of Fire Underwriters, and that if such sprinkler equipment is not automatically connected with a central fire alarm station in a manner approved by said Exchange or Board the insured shall maintain a watchman, with an approved watch clock, during the hours when the premises are not regularly in operation and when closed or whenever such automatic fire alarm signal station is temporarily disconnected.

(The 100% average clause in form No. 25 as given below is here inserted.)

Mechanics' Privilege.—Permission for mechanics to be employed for ordinary alterations and repairs in the within described premises, but this shall not be held to include the constructing or reconstructing of the building or buildings, or additions or the enlargement of the premises.

New York Standard Clause Forbidding the Use of Electricity.—This entire policy shall be void if electricity is used for light, heat or power in the above described premises unless written permission is given by this company hereon.

"*Privileged to Use Electricity* in the above mentioned premises for light, and/or heat, and/or power, it being hereby made a condition of this policy that where the equipment is owned or controlled in whole or in part by the assured a Certificate shall be obtained from the New York Board of Fire Underwriters, and that no alterations shall be made in that portion of the equipment owned or controlled by the assured after Certificate is issued without notice thereof being given to the said Board."

Lightning Clause.—This policy shall cover any direct loss or damage caused

by Lightning (meaning thereby the commonly accepted use of the term Lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. *Provided*, however, if there shall be any other insurance on said property, this Company shall be liable only *pro rata* with such other insurance for any direct loss by Lightning, whether such other insurance be against direct loss by Lightning or not.

Attached to and forming part of Policy No.....Insurance Company.
Send Policy to
Benedict & Benedict.
Liberty and Nassau Sts.
New York. (Signed).....

Please Sign This Form, and Make no Alterations

5

A Combined Form for Dwelling-House and Furniture Prepared by the Broker.
See § 75

$.....On the.....Dwelling, Additions and extensions, Decorations, Frescoes, Plate and other Glass, Heating and Electric Apparatus, Wiring and Moulding covering the same, Gas and Electric Fixtures, Elevators, Plumbing, Steam, Gas and Water Pipes, Awnings, Stoops, Sidewalks, Fences and Yard Fixtures, and all permanent fixtures contained in or attached to said dwelling and additions situate.....
Loss, if any, payable to.....Mortgagee, subject to clause hereto attached.....

$.....On Household Furniture and Utensils, useful and ornamental, Beds, Bedding, Carpets, Rugs, Linen, Wearing Apparel, Plate, Plated Ware, Chandeliers, Gas Fixtures, Printed Books and Music, Pictures, Paintings, Engravings and their Frames (at not exceeding cost), Bronzes, Statuary and other Works of Art, objects of Virtu, Curiosities, Curios, Antiques, Pianofortes, Musical Instruments, Scientific Instruments, Billiard Tables, Bicycles, Guns, Fishing Rods, and other Sporting Implements, Trunks, Tools, Sewing Machines, Curtains, Mirrors, Clocks, Watches, Diamonds, and all other Jewelry, Crockery, Glass and China Ware, Stoves, Fuel and Family Stores and all other household furniture the property of the assured, or any member of the family or servants or guests, all contained in the above-described dwelling, additions and extensions.

The item of this policy covering on household furniture does not cover on property insured under policies covering on building.

It is understood that the existence of a mortgage on the above-described buildings shall not invalidate this insurance.

It is understood that the insurance shall not be invalidated should the buildings stand on leased ground or be vacant or unoccupied. Other insurance permitted.

Privileged to make additions, alterations and repairs, and this policy to cover thereon and therein; to use Steam Furnaces or Grates for heating, to use Gas, Kerosene Oil or Electricity for lighting, and to use Kerosene Oil or Gas Stoves; also to use small quantity of Benzine or Naphtha for cleaning purposes.

(Lightning Clause as in last preceding form.)

Attached to and forming part of Policy No..... Insurance Company.

Send Policy to
Benedict & Benedict,
Liberty and Nassau Sts.
New York.

(Signed).....

Please Sign This Form, and Make no Alterations

(The purport of some of the provisions in the last two forms shows that they are included by the broker, because they are required by the insurer or because they secure a lower rate of premium.)

6

Dwelling Warranties

Dwelling Warranty.—Warranted by the assured that the within-described building is occupied exclusively for dwelling purposes by not more than two families;

or

Flat House Warranty.—Warranted by the assured that the within-described building is occupied exclusively for dwelling purposes. (The New York Fire Exchange requires one or the other to indicate whether private residence or apartment house. The latter calls for the higher rate. See 103 App. Div. 12.)

7

A Form of Warehouse Clause. See § 236

Linen and jute form—add 20 cents to base rate of warehouse.

On Manufactures of Linen, of Linen and Jute, of Jute, of Cotton, of Cotton and Linen, and of Cotton and Jute, the property of the assured or held by said assured in trust or on commission, or sold but not delivered while contained in....

This policy does not cover, attach or apply to any merchandise above enumerated the value of which exceeds $2.00 per square yard; nor does this policy cover Awnings, Banners, Braids, Burlaps coated or backed for wall decorations, Carpets, Comforters, Cord, Cordage, Cotton batting, Curtains, Flags, Fringes, Gimps, Labels, Gunny bags, Laces, Mattings, Nettings, Quilts, Rove bagging made of jute, Rugs, Tassels, Tents, Twine, Velours, Window shades, Yarns, or Articles of Wearing apparel.

This policy shall not attach, apply to or cover any merchandise insured more specifically or more generally than this policy covers.

Other insurance permitted without notice until required.

Attached to and forming part of Policy No..... Insurance Company.

(The use of this and similar warehouse forms differing as to property and rate of premium is required by the New York Fire Exchange.)

8

A Form of Average Clause. See § 242

It is understood and agreed, that the amount insured by this policy shall attach in each of the above-named premises in that proportion of the amount hereby insured that the value of property covered by this policy, contained in each of said places, shall bear to the value of such property contained in all of above-named premises.

(The New York standard fire policy and others expressly allow the attachment to the policy of special clauses, see 181 N. Y. 472.)

AUTHORIZED STANDARD FIRE POLICY RIDERS. FILED UNDER N. Y. INS. L. § 121 AS AMENDED BY L. 1901, C. 513

9

Clause Forbidding the Use of Electricity

NEW YORK STANDARD.

This entire policy shall be void if electricity is used for light, heat, or power in the above described premises, unless written permission is given by this Company hereon.

10

Application and Survey Clause. See § 282

NEW YORK STANDARD.

This policy is based upon an application and survey of the property on file which is hereby referred to as forming part of this policy.

Date of Application,.....

Where Filed,.....

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

11

Coinsurance Clause. See § 242

NEW YORK STANDARD.

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than the actual cash value thereof, this Company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash value of such property.

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

12

Coinsurance Clause (for Application to Specific Items of Policy)

NEW YORK STANDARD.

If at the time of fire the whole amount of insurance on the property covered by the.....item.....of this policy on.....shall be less than the

actual cash value thereof, this Company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured under said item.....shall bear to the actual cash value of property covered by such item.....

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

13

Coinsurance Clause for Floating Policy

NEW YORK STANDARD.

It is hereby declared and agreed that in case the property aforesaid in all the buildings, places, or limits included in this insurance, shall at the breaking out of any fire or fires, be collectively of greater value than the sum insured, then this Company shall pay and make good such a portion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid, at the time when such fire or fires shall first happen.

But it is at the same time declared and agreed, that if any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, shall at the time of any fire be insured in this or any other office, this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specific insurance or insurances, and shall not be liable for any loss, unless the amount of such loss shall exceed the amount of such specific insurance or insurances, which said excess only is declared to be under the protection of this policy and subject to average, as aforesaid.

It being the true intent and meaning of this agreement that this Company shall not be liable for any loss, unless the amount of such loss shall exceed the amount of the specific insurance or insurances, and then only for such excess, which said excess shall be the subject to average, as above.

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

14

Percentage Coinsurance Clause

NEW YORK STANDARD.

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than.....per cent. of the actual cash value thereof, this Company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said.....per cent. of the actual cash value of such property.

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

15

Percentage Coinsurance Clause (for Application to Specific Items of Policy)

NEW YORK STANDARD.

If at the time of fire the whole amount of insurance on the property covered

by the.....item.....of this policy on.....shall be less than..... per cent. of the actual cash value thereof, this Company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured under said item.....shall bear to the said.....per cent. of the actual cash value of the property covered by such item.....

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

16

Percentage Coinsurance and Limitation Clause

NEW YORK STANDARD.

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than.....per cent. of the actual cash value thereof, this Company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the said .....per cent. of the actual cash value of such property; *provided*, that in case the whole insurance shall exceed .....per cent. of the actual cash value of the property covered by this policy, this Company shall not be liable to pay more than its *pro rata* share of said.....per cent. of the actual cash value of such property; and should the whole insurance at the time of fire exceed the said per cent. a *pro rata* return of premium on such excess of insurance from the time of the fire to the expiration of this policy shall be made on surrender of the policy.

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

17

Percentage Coinsurance and Limitation Clause (for Application to Specific Items of Policy)

NEW YORK STANDARD.

If at the time of fire the whole amount of insurance on the property covered by the.....item.....of this policy on.....shall be less than..... per cent. of the actual cash value thereof, this Company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured under said item.....shall bear to the said.....per cent. of the actual cash value of property covered by such item.....; *provided*, that in case the whole insurance on the property covered by said item.....shall exceed.....per cent. of the actual cash value of the same, this company shall not on said item.....be liable to pay more than its *pro rata* share of said .....per cent. of the actual cash value of such property; and should the whole insurance on said item.....at the time of fire exceed the said..... per cent. a *pro rata* return of premium on such excess of insurance from the time of the fire to the expiration of this policy shall be made on surrender of the policy.

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

18

Assessment, Installment or Credit Clause. See §§ 228, 332

NEW YORK STANDARD.

If any assessment or installment, or any part of the premium for which credit is given be not paid when due the whole premium shall be considered earned and be immediately payable, and this policy shall be void so long as any part of such premium remains unpaid.

Dated,.....

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

19

Condition as to Incumbrances

NEW YORK STANDARD.

If the property, real or personal, covered by this policy be or become incumbered by a mortgage, trust deed, judgment or otherwise, this entire policy shall be void, unless otherwise provided by agreement indorsed hereon or added hereto.

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

20

Lightning Clause

NEW YORK STANDARD.

This policy shall cover any direct loss or damage caused by Lightning (meaning thereby the commonly accepted use of the term Lightning, and in no case to include loss or damage by cyclone, tornado or wind-storm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; *provided*, however, if there shall be any other insurance on said property this Company shall be liable only *pro rata* with such other insurance for any direct loss by Lightning, whether such other insurance be against direct loss by Lightning or not.

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

21

Mortgagee Clause. See § 291

NEW YORK STANDARD.

Loss or damage, if any, under this policy, shall be payable to.....as .....mortgagee [or trustee], as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *provided*, that in case the mortgagor or owner shall neg-

lect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

Provided, also, that the mortgagee [or trustee] shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee [or trustee], and, unless permitted by this policy, it shall be noted thereon and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee [or trustee] any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of.....claim.

Dated,.....

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

22

Mortgagee Clause (When Owner Has no Interest in the Insurance)

NEW YORK STANDARD.

It is hereby specially understood and agreed that this policy is for the benefit of the mortgagee [or trustee] only, the owner having no interest whatever therein.

And it is further agreed that whenever this Company shall pay the mortgagee any sum for loss under this policy this Company shall at once be legally subrogated to all the rights of the mortgagee [or trustee] under all the securities held as collateral to the mortgage debt to the extent of such payment, but such subrogation shall not impair the right of the mortgagee [or trustee] to recover the full amount of his claim.

Attached to and forming part of Policy No.....

.....[*Signature of Insured.*]

.....[*Signature of Company.*]

23

Mortgagee Clause with Full Contribution

NEW YORK STANDARD.

Loss or damage, if any, under this policy, shall be payable to.....as .....mortgagee [or trustee], as interest may appear, and this insurance, as

to the interest of the mortgagee [or trustee] only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; *provided*, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

Provided, also, that the mortgagee [or trustee] shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee [or trustee], and, unless permitted by this policy, it shall be noted thereon and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

In case of any other insurance upon the within described property this Company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Whenever this Company shall pay the mortgagee [or trustee] any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of.....claim.

Dated,.....

Attached to and forming part of Policy No.....

.....[*Signature for Company.*]

24

Average Clause. See § 242

New York Standard.

This Company shall not be liable for a greater proportion of any loss or damage to the property described herein than the sum hereby insured bears to .....per centum (.....%) of the actual cash value of said property at the time such loss shall happen.

If the insurance under this policy be divided into two or more items this Average Clause shall apply to each item separately.

25

Average Clause with Exemption of Special Inventory or Appraisement in Certain Cases

NEW YORK STANDARD.

This Company shall not be liable for a greater proportion of any loss or damage to the property described herein than the sum hereby insured bears to .....per centum (.....%) of the actual cash value of said property at the time such loss shall happen.

In case of claim for loss on the property described herein not exceeding five per cent. (5%) of the maximum amount named in the policies written thereon and in force at the time such loss shall happen, no special inventory or appraisement of the undamaged property shall be required.

If the insurance under this policy be divided into two or more items these clauses shall apply to each item separately.

26

A Three-Fourths Value Clause. See § 242

It is understood and agreed to be a condition of this insurance that in the event of loss or damage by fire to the property insured under this policy, this Company shall not be liable for an amount greater than three-fourths of the actual cash value of each item of property insured by this policy (not exceeding the amount insured on each such item) at the time immediately preceding such loss or damage, and in the event of additional insurance—if any is permitted thereon—then this Company shall be liable for its proportion only of three-fourths such cash value of each item insured at the time of the fire, not exceeding the amount insured on each such item.

(The above clause is used sometimes in the South, not in New York.)

27

An Iron Safe Clause. See § 333

The following covenant and warranty is hereby made a part of this policy:

1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within 30 days thereof, or this policy shall then be null and void and upon demand of the assured the unearned premium from that date shall be returned.

2d. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause, and during the continuance of this policy.

3d. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.

(The above clause is used sometimes in the South, not in New York.)

28

An Earthquake Clause. See §§ 280, 333

This Company shall not be liable for loss or damage occasioned by or through any volcano, earthquake, hurricane or other eruption, convulsion or disturbance of nature.

(See 164 Fed. 404; 159 Fed. 991; 157 Fed. 280; *ibid* 285.)

29

A Description for an Open Policy. See § 20

On goods, wares, merchandise, produce, or other property, his own, or held by him in trust, or on commission, or sold, but not delivered, as shall be specified and indorsed hereon by this Company and for such amounts, in such storehouses and places, and at such rates of premium as shall be approved and so indorsed hereon, or in a book attached hereto, by one of the officers of this Company, or by the duly authorized agent at. . . . . .

30

A Description for a Floater. See § 20

On merchandise consisting principally of. . . . . .excluding cotton and other vegetable fibre and petroleum and its liquid products, the property of the assured, or held by the assured in trust or on commission, or on joint account with others or sold but not delivered, while contained in any or all the bonded warehouses, general order stores, or brick and stone storage stores, and while in transitu in or on any of the streets, yards, wharves, piers and bulkheads, in the cities of New York, Brooklyn, Jersey City and Hoboken, and while afloat in transitu in the ports of said cities; subject to the following conditions of coinsurance and exceptions named below:

(Here is inserted coinsurance clause, form No. 13, *supra*.)

This policy does not cover in whole or in part, any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, which shall at the time of any fire be insured in this or any other office. This policy does not cover in whole or in part, goods on which at the time of any fire there may be any marine, inland or transportation insurance.

(As to when specific insurance is to be deemed exhausted so that an excess floater will attach, see 85 N. E. (Mass.) 174.)

31

A Form of Clause for Insurance of Use and Occupancy. See § 20

On the use and occupancy of his mill buildings, situate at. . . . . .

It is a condition of this contract of insurance that, if the said buildings or

machinery therein, or either of them, or any part thereof, shall be destroyed, or so damaged by fire occurring during the continuance of this policy that the mill is entirely prevented from producing goods, this Company shall be liable at the rate of.....dollars per day for each working day of such prevention, and in case the buildings, or machinery, or any part thereof, are so damaged as to prevent the making of a full daily average production of goods, this Company is to be liable per day for that proportion of.....dollars which the product so prevented from being made bears to the average daily yield previous to the fire, which, for the purpose of this insurance is agreed to be the average daily production of goods based upon the time said mill was running for one year previous to the fire, not exceeding in either case the amount insured. Loss to be computed from the day of the occurrence of any fire to the time when the mill could with ordinary diligence and dispatch be repaired or rebuilt, and machinery be replaced therein, and not to be limited by the day of expiration named in the policy.

The National Board of Fire Underwriters Have Recommended Certain Forms of Clauses Among Which Are the Following

32

Rent Clause. See § 20

National Board Standard.

$.....On the rents of the.....story.....building, situated and known as No.....

The intention of this insurance is to make good the loss of rents, caused by fire or lightning, actually sustained by the assured on occupied or rented portions of the premises which have become untenantable, for and during such time as may be necessary to restore the premises to the same tenantable condition as before the fire; said time, in case of disagreement, to be determined by appraisement in the manner provided in the conditions of this policy; but this Company shall not be liable for a greater proportion of any loss than the sum hereby insured bears to the actual annual rental of such occupied or rented portions of the premises.

Attached to and made a part of Policy No.....of.....Insurance Company.

33

Lumber Clear-Space Clause

National Board Standard.

It is a condition of this contract that a continuous clear space of.....feet shall be maintained between the property hereby insured and any wood-working establishment or dry kiln, otherwise this policy shall be void; this does not prohibit the transportation of lumber or timber products across such clear space.

Attached to and made a part of Policy No.....of.....Insurance Company.

34

Reinsurance Clause. See § 320

NATIONAL BOARD STANDARD.

"This policy is issued as reinsurance to apply to Policy No.....of the .....Insurance Company, and is subject to the same risks, privileges, conditions and endorsements (except changes of location), assignments, changes of interest or of rate, valuations and modes of settlement, as are or may be assumed or adopted by the said company.

"The amount payable under this policy shall bear the same ratio to the amount payable by the reinsured company under any and all policies upon the property specified and contained within the limits described herein, that the amount of this reinsurance in force at the time of loss shall bear to the total amount insured by the reinsured company upon such property in force at the time of such loss, and shall be paid at the same time and in the same manner as payment shall be made by said reinsured company.

"Other reinsurance is permitted without notice until required.

"Attached to and forming part of Policy No..... ..of the .....Insurance Company."

Where a Retainer Clause is desired to be attached to the foregoing Reinsurance Clause, the following is approved by the National Board of Fire Underwriters:

Retainer Clause

"The reinsured company shall retain at its own risk, on the identical property covered at the time of any loss, by this policy, over and above all its reinsurance thereon, an amount equal to the amount of this policy upon such property, and, failing so to do, the amount which would otherwise be payable under this policy by reason of said loss shall be proportionately reduced.

"Attached to and forming part of Policy No.....of the .....Insurance Company."

35

Permit for Buildings and Contents Where Automobiles Using Gasolene Are Kept or Stored

NATIONAL BOARD STANDARD.

In consideration of $.....additional premium, and the compliance by the assured with the hereinafter named warranties, permission is hereby given when not in violation of any law, statute or municipal restriction to keep not more than..... (state number here) automobiles using gasolene..... (insert "fuel" or "explosion engine power"), in the building described in this policy.

The warranties of this permit are as follows:—

First.—That no claim shall be made for loss or damage to an automobile, any of its parts or contents thereof, unless such automobile is specifically mentioned as insured under this policy.

Second.—That the filling, emptying or opening of any gasolene reservoir of an automobile while the same is contained in the within-described building, shall be done by daylight or incandescent electric light only, and that there

shall be no other artificial light, no fire or blaze in the room where and when such reservoir is open.

Third.—That there shall be no gasolene kept inside of such building, its additions or connections, except that contained in said automobiles, and not exceeding one gallon in the chamber of a measuring pump.

Fourth.—The supply tank shall be at least ten feet from such building, its additions or connections, unless it is buried at least two feet below the level of the basement floor. All pipes for filling or ventilating the supply tank to be outside the building, and piping to pump to be so laid as to drain toward the tank.

Fifth.—That when acetylene gas is used for automobile lamps, it shall be contained in an air-tight metal tank or generator, and not over twenty-five (25) pounds of calcium carbide shall be kept in the within-described building, its additions or connections, the same to be contained in water-tight metal receptacles.

Sixth.—The term "Gasolene" shall be held to include naphtha, benzine, or any of the light products of petroleum, by whatever name known, and the term "Automobile" shall be held to include motor cycles or any other self-propelled vehicle using gasolene.

(See 193 N. Y. 142, 85 N. E. 1006.)

36

A Form of Proof of Loss. See § 300

STATE OF....., }
COUNTY OF..... } ss.

BE IT KNOWN, That on this.....day of....., 189.., before me,....., a Notary Public duly commissioned and sworn, and residing in the County and State aforesaid, personally appeared....., who, being duly sworn, says that the following statement and the papers therein referred to and signed with his own hand contain a particular, just and true account of his loss in the words and figures following, to wit:

I. That on the.....day of....., 189.., the.....Insurance Company by their *Policy of Insurance*, numbered....., did insure the party herein and therein named against loss or damage by fire to the amount of..... dollars on (description of property insured from the policy) for the term of .....from the.....day of....., 189.., to the.....day of....., 189.., at noon.

II. That in addition to the amount covered by said policy of said company, there was other insurance made thereon to the amount of.....dollars, as specified in the following schedule, besides which there was no other insurance thereon. (List of policies covering any of the property, showing as to each policy its date, term, and amount, the name of the company, and a copy of the description and schedule of property insured contained in such policy.)

III. That the property insured belonged to.....(statement of interest of insured and of all others in the property and of all incumbrances thereon and changes of title, etc., since the issuing of the policy).

IV. That the building insured or containing the property destroyed or damaged, was occupied at the time of fire in its several parts by the parties hereinafter named, and for the following purposes, to wit: (List of tenants.)

V. That the actual cash value of the property so insured amounted to the sum of.....dollars at the time immediately preceding the fire, as set forth in the following schedule:

That on the.....day of....., 189.., a fire occurred by which the property insured was injured or destroyed to the amount of.....dollars, as set forth in the following schedule which the deponent declares to be a just, true and faithful account of his loss as far as he has been able to ascertain the same:

(Schedule of property damaged or destroyed, showing the cash value of each item thereof and the amount of loss thereon.) And the insured claims of the .....Insurance Company the sum of.....dollars.

(If there are subdivisions in policy, also a statement of the amount claimed under each subdivision.)

VI. That the fire originated (statement of knowledge and belief of the insured as to the time and origin of the fire), and the said deponent further declares that the said fire did not originate by any act, design or procurement on his part, or in consequence of any fraud or evil practice done or suffered by him, and that nothing has been done by or with his privity or consent to violate the conditions of insurance or render void the policy aforesaid.

.....
(insured.)

Sworn to before me this..... }
day of....., 189.. }
.....,
Notary Public.

37

The Michigan Standard Fire Policy. See § 227

This follows the New York policy, except as follows: After the list of conditions for breach of which the entire policy shall be void, unless otherwise provided by agreement, etc., the Michigan policy adds, "Provided, a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss."

In the clause, "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company," the Michigan policy after the words "relating to" adds the words "the procuring of."

In the appraisal clause in place of the words, "And the award in writing of any two shall determine the amount of such loss," the Michigan policy reads, "And the award in writing of any two shall be *prima facie* evidence of the amount of such loss."

38

The Missouri Fire Policy. See § 227

The Missouri legislature has not adopted a prescribed form of fire insurance policy, but the New York form is used with the addition of the following clause required by Missouri law: "It is hereby agreed on the part of the company issuing the policy that any provisions of said policy in conflict with the statutes of the

State of Missouri are distinctly held and acknowledged to be inoperative and of no avail."

39

The Massachusetts Standard Fire Policy. See § 227

(Corporate name of the company or association; its principal place or places of business.)

This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens.

In consideration of.....dollars to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, do insure.....and .....legal representatives against loss or damage by fire, to the amount of .....dollars.....

.....

Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specially mentioned.

Said property is insured for the term of.....beginning on the..... day of.....in the year nineteen hundred and....., at noon, and continuing until the.....day of....., in the year nineteen hundred and ....., at noon, against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only.

This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured,—or if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company,—or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter,—or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks, or if, without such assent the said property shall be sold, or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent, or if it be a manufacturing establishment, running, in whole or in part, extra time, except that such establishment may run, in whole or in part, extra hours not later than nine o'clock P. M., or if such establishment shall cease operation for more than thirty days without permission in writing indorsed hereon, or if the insured shall make any attempt to defraud the company either before or after the loss,—or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law,—or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal oil,

may be used for lighting, and in dwelling houses kerosene oil stoves may be used for domestic purposes,—to be filled when cold, by daylight, and with oil of lawful fire test only.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured. The company may also examine the books of accounts and vouchers of the insured, and make extracts from the same.

In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, *which amount if not agreed upon shall be ascertained by award of referees as hereinafter provided*, or replace the property with other of the same kind and goodness,—or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided.

If there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefore at the charge and for the account of the company.

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate: *provided*, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

This policy may be cancelled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured and to any mortgagee to whom this policy

is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.

In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties *shall be a condition precedent to any right of action in law or equity to recover for such loss;* but no person shall be chosen or act as a referee, against the objection of either party, who has acted in a like capacity within four months.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this commonwealth unless commenced within two years from the time the loss occurred.

In Witness Whereof, etc.

40

The Maine Standard Fire Policy. See § 227

This follows the Massachusetts policy except as follows: Instead of the words "In consideration of.....Dollars to them paid," the Maine policy substitutes the words "In consideration of.....Dollars to it paid," etc.

In the paragraph beginning "In case of any loss or damage under this policy, a statement.....shall be forthwith rendered to the company," the Maine policy substitutes for the word "forthwith" the words "within a reasonable time."

41

The Minnesota Standard Fire Policy. See § 227

This follows the Massachusetts policy except as follows: Instead of the words "In consideration of.....Dollars to them paid," the Minnesota policy substitutes the words "In consideration of.....Dollars to be paid," etc.

It omits the clause "This company shall not be liable beyond the actual value of the insured property at the time any loss or damage occurs."

To the words "the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens," it adds "except in case of total loss on buildings."

In the clause providing "if the insured.....make any other insurance on the said property without the assent in writing or in print of the company," etc., it omits the words "in writing or in print."

After the word "insured" in the clause providing that "In case of any loss or damage under this policy, a statement.....setting forth the value of the property insured," etc., it adds the words "except in case of total loss on buildings the value of said buildings need not be stated."

After the word "loss" in the clause providing that "If there shall be any other insurance.....the insured shall recover on this policy no greater

proportion of loss," etc., it adds the words "except in case of total loss on buildings."

At the end of the clause providing for an assignment of the mortgage to the company in the event of payment of loss under a mortgagee policy, it substitutes for the word "debt" the words "debts."

At the beginning of the appraisal clause, after the words "In case of loss," it adds "except in case of total loss on buildings."

In the clause providing for a two-year limitation of time in which to bring an action on the policy it substitutes for the word "commonwealth" the word "state."

42

The Iowa Standard Fire Policy. See § 227

Insert in this space the name and location of the company and whether it be a stock or mutual company.....

In consideration of the stipulations herein named and of.....Dollars does insure.....for the term of.....from the.....day of....., 19.., at noon (Standard time), to the.....day of....., 19.., at noon (Standard time), against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding.....dollars, to the following described property, while located and contained herein, and not elsewhere, to wit:

.....

It is hereby agreed that the insured may obtain $.....additional insurance in companies authorized to do business in the State of Iowa.

II. This company shall not be liable beyond the actual cash value of the property covered by this policy at the time any loss or damage occurs, and said liability shall in no event exceed what it would cost the insured to repair or replace the property lost or damaged with material of like kind and quality. The sum for which this company is liable pursuant to this policy, shall be payable forty days after due notice and proofs of loss have been received by this company in accordance with law.

III. This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof.

IV. Unless otherwise provided by agreement of this company this policy shall be void:

(a) If the insured now has or shall hereafter procure any other contract of insurance valid or invalid on the property covered in whole or in part by this policy; or

(b) If the subject of insurance be a manufacturing establishment, and it cease to be operated for more than ten consecutive days; or

(c) If the building herein described, whether intended for occupancy by the owner or tenant be or become vacant or unoccupied and so remain for ten consecutive days; or

(d) If the interest of the insured be other than unconditional and sole ownership; or

(e) If the subject of insurance be a building on ground not owned by the insured; or

(f) If any change other than by death of the insured, whether by legal pro-

ceedings, judgment, voluntary act of the insured or otherwise, take place in the interest, title, possession or use of the subject of insurance, if such change in the possession or use makes the risk more hazardous; or

(g) If the subject of insurance or a part thereof (as to the part so encumbered) be or become encumbered by lien, mortgage or otherwise created by voluntary act of the insured or within his control; or

(h) If the property insured or any part thereof (as to the part so removed) be removed to any other building or location than that specified in the policy; or

(i) If this policy be assigned before loss.

V. Unless otherwise provided by agreement of this company, this policy shall be void:

(a) If the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than 10 o'clock; or

(b) If the hazard be increased by any means within the knowledge of the insured; or

(c) If mechanics be employed in building, altering or repairing the within-described premises for more than fifteen days at any one time; or

(d) If illuminating gas or vapor be generated in any building covered hereby, or on any premises adjacent thereto for use upon the insured premises; or

(e) If there be kept, used, or allowed on the within-described premises benzine, benzole, dynamite, ether, fireworks, gasolene, Greek fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, calcium carbide, petroleum or any of its products of greater inflammability than kerosene of lawful standard, which last-named article may be used for lights and kept for sale according to law, in quantities not exceeding five barrels; or

(f) If the insured permits the property which is the subject of insurance, or any part thereof, to be used for any unlawful purpose.

Provided that nothing contained in paragraph five herein shall operate to avoid this policy in any case, if the insured shall establish that the failure to observe and comply with such provisions and conditions did not contribute to the loss.

VI. This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or military or usurped power, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property during and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for damage by fire only) by explosion of any kind or by lightning; but liability for direct damage by lightning may be assumed by specific agreement.

VII. This company shall not be liable for loss or damage to any property covered by this policy if the insured shall fail to pay any written obligation given to the company for the premium or any assessment or installment of premium when due; provided the company shall have given the insured notice as required by law. Upon payment and acceptance by the company of the delinquent premium, assessment or installment of premium before loss occurs, or after loss, if the company shall have had notice thereof and accepts such payment, this policy shall be revived and in full force according to its terms.

VIII. If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building, or its contents, shall immediately cease.

IX. This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed thereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, plate glass, frescoes or decorations; or property held in storage or for repairs; nor, beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repairs of buildings, or by interruption of business, manufacturing processes or otherwise.

X. Any application, survey, plan, or description of property signed by the insured and referred to in this policy shall, when a copy is attached hereto, be a part of this contract, and shall be held to be a representation and not a warranty.

XI. This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation either by registered letter directed to the insured at his last known address, or by personal written notice. If this policy shall be cancelled as hereinbefore provided, or becomes void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rates; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rata premium.

XII. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the provisions and conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be agreed upon by the company.

XIII. If property covered by this insurance is so endangered by fire as to require removal to a place of safety and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one new location bears to the value in all such new locations; but this company shall not in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total valid and collectible insurance on the whole property at the time of fire, whether the same cover in new location or not.

XIV. If loss occur the insured shall as soon as practicable after he ascertains the fact of such loss, give notice in writing thereof to the company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, and put it in the best possible order, and shall, within sixty days from date of loss, furnish this company with notice thereof in writing accompanied by affidavit stating the facts as to how the loss occurred and the extent thereof, so far as such facts are within his knowledge.

XV. The insured, as often as reasonably required, shall exhibit to any person designated by this company, all that remains of any property herein described as to which a claim for loss or damage is made, and submit to examination under oath by any person named by this company, and subscribe the same, and, as often as reasonably required, shall produce for examination all books of ac-

count, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made; provided, however, that this company shall not be held to have waived any of the provisions or conditions of this policy or any forfeiture thereof by any examination or investigation herein provided for.

XVI. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount thereby insured shall bear to the whole amount of valid and collectible insurance covering such property.

XVII. No suit or action on this policy, for the recovery of any claim thereon, shall be sustainable in any court of law or equity, unless commenced within twelve months next after the right of action for the loss accrues.

XVIII. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

XIX. This policy is issued and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions now or hereafter specifically authorized by law as may be endorsed hereon or added hereto.

In Witness Whereof, etc.

Endorsed on the back of the policy is a short rate table to govern in case of cancellations, prepared by the state auditor pursuant to the Code, § 1729.

43

The New Hampshire Standard Fire Policy. See § 227

The.....of.....in consideration of.....dollars, to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, do insure.....against loss or damage by fire, to the amount of..... dollars.....

This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens, except on buildings totally destroyed, in which case the full amount of the limitation shall be paid.

Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture, and curiosities are not included in said insured property, unless specially mentioned.

Said property is insured for the term of.....beginning on the..... day of....., in the year nineteen hundred and....., at noon, and continuing until the.....day of....., in the year nineteen hundred and ....., at noon, against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, except on buildings, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only.

This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured; or if the insured, at the time

of any loss, has any other insurance on the said property, without the assent in writing or in print of the company; or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter; or if the insured shall make any attempt to defraud the company, either before or after the loss; and this policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: if, without such assent, the situation or circumstances affecting the risk, shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; or if, without such assent, the said property shall be sold, or this policy assigned; or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent; or if it be a manufacturing establishment in which the works or machinery are operated more than the customary or legal working hours, or all night, without the written or printed assent of this company thereto; except that permission is hereby given to operate machinery extra hours, not later than 10 o'clock P. M., for the purpose of equalizing work, a competent man, other than the regular watchman, being kept in charge of those rooms in which shafting and belts are running, but where the machinery is not at work; or if such establishment shall cease operation for more than thirty days without permission in writing endorsed hereon; or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law; or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal-oil may be used for lighting.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured in detail, the interest of the insured therein, all other insurance thereon, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which, and the manner in which, the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same, and shall have access to the premises and property damaged. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable as hereafter provided.

In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness; or it may, within ten days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition.

In case difference of opinion shall arise as to the amount of any loss under this policy other than on buildings totally destroyed, unless the company and the insured shall, within fifteen days after notice of the loss, mutually agree upon referees to adjust the same, either party may, upon giving written notice to the other, apply to a justice of the supreme court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered, and their award in writing, after proper notice and hearing, shall be final and binding on the parties.

The referees' fees shall be equally divided between the company and the insured.

If there shall be any other insurance on the property insured, valid or invalid, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company.

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; *provided*, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

This policy may be cancelled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice; and no mortgagee shall then have the right to recover as to such risks. Mutual companies may vary this clause to suit their methods of business.

In case any special provisions or stipulations not enumerated or inserted above require mention in effecting insurance, such provisions or stipulations shall be legibly written or printed, and prominently and securely attached to this policy, and signed separately by the company or agent.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this State, unless commenced within one year from the time the loss occurred.

Chapter 170 of the Public Statutes is printed on the back of this policy contract, and hereby made a part thereof.

In witness whereof, etc.

Endorsed on the back is Chapter 170 of the Public Statutes of New Hampshire.

SECTION 1. The form of policy and insurance contract now in force in the state is continued until the insurance commissioner shall change it. He is authorized to change the form of such contracts from time to time as he may think the public good requires. Any company using any other form of policy than the one prescribed shall forfeit its license.

SECT. 2. Descriptions of property and statements concerning its value and the title of the insured thereto in an application of insurance or in an insurance policy shall not be treated as warranties. A policy shall not be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made, or unless the difference between the property as it was represented and the property as it really existed contributed to the loss; but the sum insured by the policy shall be taken to be such fractional part of the sum mentioned therein as the premium paid by the insured is of the premium which he ought to have paid, not exceeding in any event the value of the insured's interest in the property.

SECT. 3. If a company shall issue a policy upon an application prepared by a third person assuming to act as its agent or otherwise, it shall be charged with his knowledge of facts relating to the property insured as if they were stated in the application.

SECT. 4. A change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, shall not affect the policy except while the change or breach continues.

SECT. 5. If insured buildings are totally destroyed, the sum insured shall be taken to be the value of the insured's interest therein, as such interest is described in the policy, unless over-insurance thereon was fraudulently obtained; if they are only partially destroyed, the insured shall be entitled to his actual damages, not exceeding the sum insured.

SECT. 6. In case of loss or damage of property insured, the party insured shall give notice thereof, in writing, to the secretary, a director, or an agent of the company, within thirty days.

SECT. 7. The company shall adjust the loss within fifteen days after the receipt of such notice.

SECT. 8. If the company decides to rebuild or repair the property destroyed or injured, it shall begin to do so within twenty days after adjusting the loss, and shall prosecute the work with reasonable diligence until it is completed.

SECT. 9. If the company neglects to adjust the loss within fifteen days after receiving notice of it, or to begin to rebuild or repair the property destroyed or damaged within twenty days after the adjustment of the loss, the insured may proceed to rebuild or repair at the expense of the company, who shall be liable for the reasonable expenses incurred in so doing and for the loss sustained by its neglect, not exceeding the amount insured; or the insured may commence an action upon the policy.

SECT. 10. If dissatisfied with such adjustment, the party insured may bring his action, by causing his writ to be served on the proper officer or agent of such company, within six months after the reception of such notice in writing, and not afterward.

SECT. 11. Unless the company, in their notice of the amount of loss or damage determined by it shall notify the insured that his action will be forever barred by law if his writ is not served on the company within six months next after the service of such notice upon him, he may bring his action at any time.

SECT. 12. The insured may bring his action in the county of his residence, notwithstanding anything to the contrary contained in the policy.

SECT. 13. If upon trial the insured recovers more than the amount determined by the insurers, he shall have judgment and execution immediately therefor, with interest and costs. If he recovers no more than such amount, the court may allow interest thereon, and such costs to either party as may be just; but execution shall not issue against the company within three months, unless by special order of court.

SECT. 14. A person having a claim against an insurance company not organized under the laws of the state, arising from a transaction with an agent of the company in the state, may sue therefor in the courts of the state. Service of any process pertaining to such action upon the insurance commissioner shall have the same effect as if the company were a domestic corporation and the service were lawfully made within the state upon its officers.

SECT. 15. If in such action the plaintiff shall recover a judgment, and the company does not pay it within thirty days after notice of it is given to the insurance commissioner, the commissioner may suspend the authority of the company to do business in the state. If the company or any of its agents shall issue a policy during such suspension, the company and agents shall each forfeit two hundred dollars for each policy so issued, but the policies shall be valid and binding, nevertheless.

SECT. 16. If a policy has been transferred or assigned by the assured to a person to hold absolutely or as collateral security, with the assent of the insurer, the assignee may bring an action thereon in his own name or in that of the assignor, and may recover the full amount due upon the policy for the benefit of whom it may concern.

SECT. 17. Copies of charters, by-laws, certificates, appointments, and other papers required by law to be filed in the office of the insurance commissioner, and certified by him, shall be competent evidence in the courts of this state.

SECT. 18. This chapter shall be a part of every contract of insurance to which it is applicable and shall be plainly printed in every such contract. No waiver of any part of it shall be set up by the insurer, and every stipulation in the contract in conflict with it shall be void.

44

The South Dakota Standard Fire Policy. See § 227

In consideration of.....dollars to it paid by insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure.....and..... legal representatives and assigns against loss or damage by fire, to the amount of.....dollars to the following described property:.....
.....

Bills of exchange, notes, accounts, evidence and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specifically mentioned.

Said property is insured for the term.....beginning the.....day of ....., in the year 19.., at noon, and continuing until the.....day of ....., in the year 19.., at noon, against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots or any

military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, except that the amount of insurance written herein upon any real property, including structures on land owned by another than the insured, shall be taken conclusively to be the true value of such property and the amount of loss sustained by, and the measure of damages of, the insured, in case the same is wholly destroyed without criminal fault on the part of the insured or his assigns.

This policy shall be void if any material fact or circumstance concerning the risk has been, or the amount of loss shall be, fraudulently concealed or misrepresented by the insured, or if the insured now has or shall hereafter obtain any other insurance on said property without the assent of the company, or if without such assent the property shall be removed, except that if such removal shall be necessary for the preservation of the property from fire or water, this policy shall be valid without such assent for five days thereafter, or if without such assent the situation or conditions affecting the insured property shall be altered so as to materially increase the hazard, if such increase in hazard be occasioned by the act or agency of the insured, or if without such assent the insured shall sell and dispose of all insurable interests in the insured property, or if the premises hereby insured shall remain vacant and unoccupied for more than thirty days without the assent of the company, or if the subject of the insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than twenty consecutive days without permission in writing endorsed hereon, or if this policy be assigned before a loss without the assent of the insurer, or without such assent illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein, or if without the assent of the insurer there be kept on the above-described premises dynamite, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, or petroleum or any of its products of greater inflammability than gasoline or kerosene oil of lawful fire test (which gasoline and kerosene may be kept and used for lights and usual domestic purposes) and kerosene may be kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lights filled by daylight or at a distance not less than ten feet from artificial light.

If the insured property shall be exposed to loss or damage by fire the insured shall make all reasonable exertions to save and protect the same.

In case of any loss or damage under this policy the insured shall promptly give notice of such loss, and within sixty days from the time of the occurrence of the fire he shall make a statement in writing, sign and swear to the same, and render it to the company, setting forth substantially the property destroyed or damaged and a statement or estimate of the amount of his loss (except in case of total loss on buildings where the fire occurs without criminal fault on the part of the insured, or his assigns, in which case the value on the buildings need not be stated), the interest of the insured therein, all other insurance thereon, the purpose for which the building insured or containing the property insured was used, and by whom occupied, and the time and manner in which the fire originated as far as known to the insured. The company may also examine the vouchers, books and accounts of the insured and make extracts from the same. Should proof of loss not be furnished within six months from the date

of loss this policy shall be void, unless such proof of loss shall have been waived.

In case of any loss or damage the company, within sixty days after the insured shall have submitted the statement as hereinbefore provided, shall either pay the amount for which it shall be liable, which amount, if not agreed upon or determined by the provisions of the policy, shall be ascertained by award of appraisers as hereafter provided, or shall replace the property with other of the same kind and quality (except in case of total loss of buildings as aforesaid where the amount of loss is fixed), or it may within fifteen days after such statement is submitted notify the insured of its intention to repair the premises or any portion thereof separately insured by this policy and shall thereupon enter upon said premises and proceed to repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable as above provided. It shall be optional, however, with the company to take all or any part of the articles of personal property injured or damaged at the actual or appraised sound value thereof without deduction for damage. If there be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of loss sustained (except in case of total loss on buildings) than the sum hereby insured bears to the whole amount of insurance thereon.

Except in cases of loss where the amount thereof is fixed, as hereinbefore provided, in the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two chosen shall select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

If this company shall claim that the fire was caused by the act or neglect of any third person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

Whenever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy shall be made payable to a mortgagee or trustee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's or trustee's rights to recover in case of loss on such real estate. Provided, that such mortgagee or trustee shall, on demand, pay according to the customary scale of rates for any increase of risk not paid for by the insured. And in case this policy shall have been issued to the owner of the insured property with the loss payable to a mortgagee, and the owner shall have done any act voiding the policy as herein provided, or the policy shall have been cancelled so that the company is not liable to him in any event, then the mortgagee, upon payment to

him of the full amount secured by such mortgage, shall assign to the company or companies making such payment the mortgage, together with the note or debt secured thereby.

This policy may be cancelled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining after deducting the customary short rates for the time this policy shall have been in force.

The company also reserves the right to cancel this policy as to all risks subsequent to the expiration of five days after the giving of such notice in writing to the insured and to any mortgagee or trustee to whom this policy is made payable, and tendering to the insured the ratable proportion of the premium.

Any person who solicits insurance or issues policies of insurance, or procures applications therefor, shall be held to be, and considered, the general agent of the insurer issuing the policy or making a renewal thereof, except as to proof of loss and adjustment thereof, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract of insurance.

It shall be the duty of the insurer, in order to avail himself of any provision in this policy rendering it void, to promptly cancel the policy as provided herein upon having or obtaining notice or knowledge of the existence of any facts or circumstances which would, according to the terms of the policy, render it void; otherwise it will be deemed to have waived such provision or provisions voiding the policy. Provided, that if the grounds for cancellation under the last clause shall be distinctly specified in the written notice, such cancellation may be effected upon twenty-four hours' notice to the insured; and actual notice to, or the knowledge of, any agent of the company as above mentioned shall be deemed notice to, and knowledge of, the company.

In witness whereof, etc.

45

The Wisconsin Standard Fire Policy. See § 227

In consideration of the stipulations herein named and of.....dollars premium does insure.....for the term of.....from the.....day of ....., 19.., at noon, to the.....day of....., 19.., at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding.....dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

.....

This policy is made and accepted subject to the following stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached. Up to the time of the delivery of the policy to as-

sured, in all transactions relating to this policy or to the property herein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company.

In witness whereof, etc.

Except when otherwise provided by statute, this company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice and proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured, or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary

notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the Wisconsin standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days and continuing until the time of the fire.

This company shall not be liable for loss caused, directly or indirectly, by invasion, commotion, riot, insurrection, civil war, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensue, and, in that event, for the damage by fire only) by explosion of any kind. This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado, or windstorm), not exceeding the sum insured, nor the interest of the insured in the property and subject in all other respects to the terms and conditions of this policy. If there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not.

If a building or any part thereof fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. Unless during a time in which the hazard shall be increased solely by the act of God, and in such case and during such time of such increase of hazard the company shall not cancel this policy except upon sixty days' notice of such cancellation without the consent of the assured. If this policy shall be cancelled as hereinbefore

provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended by agreement with the company through the local agent, or any other authorized agent or any adjuster acting for such company concerning such loss, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of a magistrate or notary public residing in the county where the insured property is located (not interested in the claim as a creditor or otherwise nor related to the insured) stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations, all under oath, by any person named by this company, and subscribe the same; and as often as required, shall produce for examination all

books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement in the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, who shall be residents of this state unless otherwise agreed by the parties thereto; the insured and this company each selecting one, within thirty-five days after the mailing of proof of loss to said company, as herein stated, and in case either party fails to select an appraiser within such time the other appraiser and the umpire selected, as herein provided, may act as a board of appraisers, and whatever award they shall find shall be as binding as though the two appraisers had been chosen; and the two so chosen shall first select a competent and disinterested umpire, provided that if after five days the two appraisers cannot agree on such an umpire, the presiding judge of the circuit court of the county wherein the loss occurs may appoint such an umpire, upon application of either party in writing by giving five days' notice thereof in writing to the other party. Unless within thirty days after proof of the loss has been mailed to the company, either party, the assured or the company, shall have notified the other in writing that such party demands an appraisal, such right of an appraisal shall be waived; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived, except as above expressly provided for, any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall become payable sixty days after the notice and proof of the loss herein required have been received by this company.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts

of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

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A Form of Application for Life Insurance. See § 77

I hereby apply for an assurance of $.....on the.....plan, premiums payable.....with the.....Life Insurance Company, on the life of ....., born at....., on....., 18.., at present and for..... years resident of..... I hereby warrant that he is not intemperate in the use of stimulants or narcotics. I agree that the answers given herewith to the questions of the Agent and Examiner, which I declare and warrant to be true, shall be the basis of my contract with the company, and that such contract shall at all times and places be held and construed to have been made in the City of..... I also agree that if within two years from this date, the Insured shall, without the written consent of the company, reside or travel elsewhere than in or to the United States, Canada, or Europe; or shall within such period and without such consent, be personally engaged in blasting, mining, submarine operations, or in the making of explosives, or in service on any railway train, or on a steam or sailing vessel, or in naval or army service in times of war; the policy hereby applied for shall thereupon cease and determine.

Dated at.....this.....day of....., 18...

WITNESS..... SIGNATURE.....

Questions to be asked by the Agent, and answered by the person to be insured:

1. A What is your full name? B Are you married?
2. What is your occupation? (Give kind of business and position held.)
3. Are you in good health?
4. A For whose benefit is the proposed insurance? B How related to you?
5. What is the total insurance now on your life?
6. In what companies and for what amounts?
7. Have you any application for insurance now pending? In what companies?
8. A Have you ever applied to any agent or sought insurance in any company which either postponed or refused to issue a Policy? B State companies and cause.
9. Are you engaged in or connected with the manufacture or sale of Malt or Spirituous Liquors?

The answers to the following questions must be written by one of the Company's Examiners:

10. Have you now any disease or disorder? If so, what?
11. A For what have you sought medical advice during the past seven years? B Dates? C Duration? D Physicians consulted?
12. A Have you had any personal injury or accident? B What? C When? D Result?
13. A Have you had Rheumatism? B Number of attacks? C Dates? D Duration? E Severity?
14. A Are you or have you been subject to Dyspepsia? B Dates? C Duration? D Severity?
15. Have you ever had any of the following?

Calculus or gravel, ...	Dizziness or short breath, . . .
Difficulty in urinating, ...	Pneumonia, ...
Swelling of feet or face, . . .	Diabetes, ...
Dropsy, ...	Delirium Tremens, ...
Palpitation, ...	Vertigo, ...
Disease of heart or brain, . . .	Insanity, ...
Loss of consciousness, ...	Liver complaint, ...
Habitual or chronic cough, . .	Jaundice, ...
Consumption, ...	Colic, ...
Bronchitis, ...	Dysentery, ...
Asthma, ...	Diarrhœa (chronic), ...
Spitting of blood, ...	Disease of spine, ...
Bleeding piles, ...	Gout, ...
Pleurisy, ...	Tumors of any kind, ...
Varicose veins, ...	Swelling of glands, ...
Paralysis or palsy, ...	Ulcers or open sores, ...
Apoplexy, ...	Fistula, ...
Nervous exhaustion, ...	Discharge from the ear, . . .
Fits, ...	Rupture, ...
Sunstroke, ...	Difficulty in swallowing, . . .

16. Family record.

	Age	Condition of Health
Is your father living?.	. . . . .	. . . . .
Is your mother living?.	. . . . .	. . . . .
How many brothers living?. . . . . (If none, so state.)	. . . . .	. . . . .
	. . . . .	. . . . .
How many sisters living?. . . . . (If none, so state.)	. . . . .	. . . . .
	. . . . .	. . . . .
Father's father living?.	. . . . .	. . . . .
Father's mother living?.	. . . . .	. . . . .
Mother's father living?.	. . . . .	. . . . .
Mother's mother living?.	. . . . .	. . . . .

	Age	Disease which Caused Death	Duration	Previous Health
Is your father dead?.	. . . . .	. . . . .		. . . . .
Is your mother dead?.	. . . . .	. . . . .	. . . . .	. . . . .
How many brothers dead? (If none, so state.)	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .
How many sisters dead?. . (If none, so state.)	. . . . .	. . . . .	. . . . .	. . . . .
	. . . . .	. . . . .	. . . . .	. . . . .
Father's father dead?.	. . . . .	. . . . .	. . . . .	. . . . .
Father's mother dead?.	. . . . .	. . . . .	. . . . .	. . . . .
Mother's father dead?	. . . . .	. . . . .	. . . . .	. . . . .
Mother's mother dead?	. . . . .	. . . . .	. . . . .	. . . . .

17. Have any two members of the family, grandparents included, had consumption, cancer, paralysis or apoplexy, disease of heart, disease of kidneys?

Signed this.....*day of*....., 19..

(*Party to be insured sign here*).....

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A Form of Policy of Life Insurance. See § 335

This policy witnesseth that the.....Life Insurance Company, in consideration of the statements and agreements in the application for this Policy which are hereby made a part of this contract and of the sum of.....dollars to it in hand paid by.....and of the annual premium of.....dollars to be paid at or before twelve o'clock, M., on the.....day of.....in every year during the continuance of this policy, *does insure* the life of..... in the amount of.....dollars, for the term of life, *payable* to....., his executors, administrators or assigns, at its office in the City of....., upon due and satisfactory proof of interest and of the death of the said insured, deducting therefrom all indebtedness of the party to the company, together with the balance, if any, of the then current year's premium.

Provided, that in case the said premiums shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the company in the City of....., or to agents when they produce receipts signed by the President or Treasurer, then, and in every such case, this policy shall cease and determine, subject to the provisions of the company's NON-FORFEITURE SYSTEM *as indorsed hereon, with accompanying table.*

This policy does not take effect until the first premium shall have been actually paid; nor are agents authorized to make, alter or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture hereof, or to grant permits, or to receive for the cash due for premiums anything but cash. Any error made in understating the age of the insured will be adjusted by paying such amount as the premiums paid would purchase at the table rate.

No assignment of this policy shall take effect until written notice thereof shall be given to the company.

This policy, after two years, will be INCONTESTABLE, *except for fraud or non-payment of premium.*

IN WITNESS WHEREOF, the said.....*Life Insurance Company* has, by its President and Secretary, signed and delivered this contract, at the City of ....., this.....day of....., one thousand nine hundred and .....

....., *Secretary.* ....., *President.*

NON-FORFEITURE PROVISIONS

WHEN AFTER TWO FULL ANNUAL PREMIUMS shall have been paid on this policy it shall cease or become void solely by the non-payment of any premium when due, its entire net reserve by the American Experience Mortality and interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either, *first*, to the purchase of non-participating

term insurance for the full amount insured by this policy, or, *second*, upon the written application by the owner of this policy and the surrender thereof to the company at.....within three months from such non-payment of premium, to the purchase of a non-participating paid-up policy payable at the time this policy would be payable if continued in force. Both kinds of insurance aforesaid will be subject to the same conditions, except as to payment of premiums, as those of this policy. No part, however, of such term insurance shall be due or payable unless satisfactory proofs of death be furnished to the company within one year after death; and if death shall occur within three years after such non-payment of premium, and during such term of insurance, there shall be deducted from the amount payable the sum of all the premiums that would have become due on this policy if it had continued in force.

The following table shows the amount that the company agrees to loan (being one-half of the reserve) upon a satisfactory assignment of the policy as collateral security; also the additional time for which the insurance will be continued in full force after lapse by non-payment of premium; or the value of the policy in paid-up insurance upon surrender within three months from date of lapse.

The figures given are based upon the assumption that the premiums (less current dividends) have been fully paid in cash. If there be any indebtedness upon the policy, the values as stated in the table would have to be reduced proportionally upon the principles stated in the policy. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply:

Number of Years' Premiums Paid	Company will Loan	In Case of Lapse of Policy		
		Extended Insurance		Paid-up Policy
		Years	Days	
.....	$.....	.....	.....	$.....
.....	.....	.....	.....	.....

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New York Standard Life Insurance Policy

ORDINARY LIFE

Amount $..... Age..... ..... Premiums $.....

In consideration of the.....annual premium of.....dollars, and of the payment of a like amount upon each.....day of.....hereafter until the death of the Insured,

Promises to pay at the Home Office of the Company in.....upon receipt at said Home Office of due proof of the death of.....of....., County of....., State of.....herein called the insured,.....dollars, less any indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy year upon surrender of this Policy, properly receipted, to.....beneficiary.....with.....right of revocation.

Change of Beneficiary.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable

designation, the Insured, if there be no existing assignment of the Policy made as herein provided, may, while the Policy is in force, designate a new beneficiary with or without reserving right of revocation by filing written notice thereof at the Home Office of the Company, accompanied by the Policy for suitable endorsement thereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company. If any beneficiary shall die before the Insured the interest of such beneficiary shall vest in the Insured.

Payment of Premiums.—The Company will accept payment of premiums at other times than as stated above, as follows:.....

Except as herein provided the payment of a premium or instalment thereof, shall not maintain the Policy in force beyond the date when the next premium or instalment thereof is payable.

All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by an Executive Officer (the Company must here recite the titles of the several Executive Officers) of the Company and countersigned by said agent.

A grace of thirty days subject to an interest charge at the rate of.....per centum per annum shall be granted for the payment of every premium after the first year during which time the insurance shall continue in force. If death occur within the days of grace the unpaid portion of the premium for the then current Policy year shall be deducted from the amount payable hereunder.

Conditions.—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions must be applicable only to cases where the act of the Insured provided against occurs within one year after the issuance of the Policy.).....

Incontestability.—(The Policy shall here provide that it shall be incontestable, except for non-payment of premiums, either from its date or after one or two years in the following form):

This Policy shall be incontestable, except for non-payment of premiums,..... from its date.

If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Participation.—The proportion of the surplus accruing upon this Policy shall be ascertained and distributed annually and not otherwise.

Dividends.—Dividends at the option of the owner of this Policy shall on the.....day of.....of each year be either—

1. Paid in cash; or,
2. Applied toward the payment of any premium or premiums; or,
3. Applied to the purchase of paid-up additions to the Policy; or,

[AMOUNT OF INSURANCE PAYABLE AT DEATH..... PREMIUMS PAYABLE DURING LIFE..... ANNUAL DIVIDEND PERIOD.]

4. Left to accumulate to the credit of the Policy with interest at.....per centum per annum and payable at the maturity of the Policy, but withdrawable on any anniversary of the Policy.

Unless the owner of this Policy shall elect otherwise within three months after the mailing by the Company of a written notice requiring such election, the dividends shall be applied to purchase paid-up additions to the Policy.

Loans.—The Company at any time will advance upon the sole security of this Policy, at a rate of interest not greater than.....per centum per annum, a sum not exceeding the amount specified in the table of loan values herein set

forth, deducting therefrom all other indebtedness hereon to the Company. Failure to repay any such advance or interest shall not avoid this Policy unless the total indebtedness hereon to the Company shall equal or exceed the aggregate of all unpaid dividends and accumulations and of.....per centum (not less than eighty per centum) of the net value of the Policy and all additions thereto, and thirty days' notice shall have been given by the Company.

Assignment.—No assignment of this Policy shall be binding upon the Company unless it be filed with the Company at its said Home Office. The Company assumes no responsibility as to the validity of any assignment.

Options on Surrender or Lapse.—After this Policy shall have been in force three full years it may be surrendered by the owner at any time prior to any default or within three months after any default. Thereupon,

1. If there be no indebtedness hereon to the Company, the owner may elect either (a) to continue the insurance in force for its face amount and any outstanding dividend additions, but without future participation, and without the right to loans; or, (b) to purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this Policy. The periods for which the insurance will be continued and the amounts of paid-up life insurance which will be allowed, exclusive of the application of dividend additions, are shown in the table of surrender values herein set forth.

TABLE OF LOAN AND SURRENDER VALUES

(At the option of the Company the following clause may be inserted):

The loan and paid-up insurance values stated in the following table apply to a Policy for $1,000. As this contract is for $....., the loan or paid-up insurance available in any year will be....., the amount stated in the table for that year.

The period of paid-up continued insurance remains the same for a Policy of any amount.

After Policy Has Been in Force	Loan Value	Paid-up Life Insurance	Paid-up Continued Insurance		
			Years	Months	Days
3	$.....	$.....	.....	.....	.....

Values for later years will be computed on the same basis and be furnished upon request.

2. If there be an indebtedness hereon to the Company, it shall be deducted from the amount which otherwise would be applicable as a surrender value to the purchase of temporary insurance for the period aforesaid, and the owner may elect either to have the remainder applied (a) to continue the insurance in force without participation and without the right to loans for the face amount of this Policy and dividend additions, less the indebtedness, or (b) to purchase a proportionate amount of non-participating paid-up life insurance.

If in the event of any default in the payment of premium or otherwise, after the Policy shall have been in force three full years, the owner shall not exercise

either of said options within three months after such default, the insurance shall be continued as provided by option (a) in either paragraph (1) or (2).

In any case of continued temporary insurance under any of the above provisions this Policy upon evidence satisfactory to the Company of insurability may be reinstated within the first three years of the term for which the insurance is continued by payment of arrears of premiums and of whatever indebtedness hereon to the Company existed at the date of surrender or default, with interest at a rate not exceeding.....per centum per annum.

Modes of Settlement.—The Insured or the owner, or the beneficiary after the Insured's death, in case the Insured shall have no made election, may by written notice to the Company at its Home Office, elect to have the net sum payable under this Policy upon the death of the Insured paid either in cash or as follows:

1. By the payment of an annuity equal to.....per centum of such net sum payable at the end of each year during the lifetime of the beneficiary, and by the payment upon the death of the beneficiary of the said net sum, together with any accrued portion of the annuity for the year then current, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

2. By the payment of equal annual instalments for a specified number of years, the first instalment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum.

3. By the payment of equal annual instalments payable at the beginning of each year for a fixed period of twenty years and for so many years longer as the beneficiary shall survive, in accordance with the following table for each one thousand dollars of said net sum.

Any instalments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

When any option calling for annual payments is elected, this Policy shall be surrendered upon its maturity and a supplementary non-participating contract shall be issued for the option elected.

Unless otherwise specified by the owner or by the beneficiary in making such election, the beneficiary may at any time surrender the contract guaranteeing the payment of instalments, for the commuted value of the payments yet to be made, computed upon the same basis as option (2) in the following table; provided that no such surrender and commutation will be made under option (3) except after the death of the beneficiary occurring within the aforesaid twenty years:

TABLE OF INSTALMENTS FOR EACH $1,000

Option (2)				Option (3)			
Number of Annual Instalments	Amount of Each Instalment	Number of Annual Instalments	Amount of Each Instalment	Age of Beneficiary at Death of Insured	Amount of Each Instalment	Age of Beneficiary at Death of Insured	Amount of Each Instalment

No person except an Executive Officer of the Company as aforesaid has power to modify or in event of lapse to reinstate this Policy or to extend the time for paying a premium.

In Witness Whereof, the Company has caused this Policy to be executed this..... day of.....

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A Form of Policy of Accident Insurance. See § 384

The.....Insurance Company, in consideration of the warranties in the application for this policy and of.....dollars, does hereby insure..... under classification.....(being a.....by occupation) for the term of .....months from noon of....., 189.., in the sum of.....dollars per week against loss of time not exceeding.....consecutive weeks, resulting from bodily injuries effected during the term of this insurance, through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated. Or if loss by severance of one entire hand or foot results from such injuries alone within ninety days, will pay insured one-third the principal sum herein named, in lieu of said weekly indemnity, and on such payment this policy shall cease and be surrendered to said company, or in event of loss by severance of two entire hands or feet, or one entire hand and one entire foot, or loss of entire sight of both eyes, solely through injuries aforesaid within ninety days, will pay insured the full principal sum aforesaid, provided he survives said ninety days. Or if death results from such injuries alone within ninety days, will pay.....dollars to.....if surviving; in event of his prior death, to the legal representatives or assigns of insured, provided—

1. If insured is injured in any occupation or exposure classed by this company as more hazardous than that here given, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard.

2. This policy shall not take effect unless the premium is paid previous to any accident under which claim is made; and the company may cancel it at any time by refunding said premium, less a pro rata share for the time it has been in force.

3. The company's total liability hereon in any policy year shall not exceed the principal sum hereby insured; therefore, in case of claim for full principal sum, any sums paid as indemnity within such policy year shall be deducted therefrom.

4. Immediate written notice, with full particulars and full name and address of insured, is to be given said company at.....of any accident and injury for which claim is made. Unless affirmative proof of death, loss of limb or sight, or duration of disability, and of their being the proximate result of external, violent and accidental means, is so furnished within seven months from time of such accident, all claims based thereon shall be forfeited to the company. No legal proceedings for recovery hereunder shall be brought within three months after receipt of proof at this office, nor at all, unless begun within one year from date of alleged accident.

5. This insurance does not cover disappearances; nor suicide, sane or insane;

nor injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability, resulting wholly or partly, directly or indirectly from any of the following causes, or while so engaged or affected: Disease or bodily infirmity, hernia, fits, vertigo, sleep-walking; medical or surgical treatment, except amputations necessitated solely by injuries and made within ninety days after accident; intoxication or narcotics; voluntary or involuntary taking of poison or contact with poisonous substances or inhaling of any gas or vapor; sunstroke or freezing; dueling or fighting, war or riot; intentional injuries (inflicted by the insured or any other person); voluntary over-exertion; violating law; violating rules of a corporation; voluntary exposure to unnecessary danger; expeditions into wild or uncivilized countries; entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable cars), riding in or on any such conveyance not provided for transportation of passengers, walking or being on a railway bridge or roadbed (railway employees excepted).

6. No claim shall be valid in excess of $10,000 with $50 weekly indemnity under accident policies, nor for indemnity in excess of money value of insured's time. All premiums paid for such excess shall be returned, on demand, to insured or his legal representative.

7. Any medical adviser of the company shall be allowed, as often as he requires, to examine the person or body of insured in respect to alleged injury or cause of death.

8. Any claim hereunder shall be subject to proof of interest. A copy of any assignment shall be given within thirty days to the company, which shall not be responsible for its validity. The company may cancel this policy at any time by refunding the unearned premium thereon. No agent has power to waive any condition of this policy.

In witness whereof, etc.

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A Health Clause in an Accident Policy

For the period during which the Insured shall independently of all other causes be necessarily confined to the house and wholly disabled, and prevented by bodily disease not hereinafter excepted, from performing any and every duty pertaining to his occupation, the Company will pay a weekly indemnity of $....., and if following such a period of total disability and confinement in the house, he shall be wholly disabled and prevented from performing any and every kind of duty pertaining to his occupation, but shall not be necessarily confined to the house, one-half of said amount per week will be paid to the Insured; but no payment shall be made for disability of less than seven consecutive days' or in excess of twenty-six consecutive weeks' duration.

Upon satisfactory proof to the Company that he has, as the result of disease, contracted during the term of this Policy, and not hereinafter excepted, entirely and irrecoverably lost the sight of both eyes, or permanently and entirely lost the use of both hands or both feet, or of one hand and one foot, and also that he has been for one year, and will thereafter, and during his life, by reason thereof be permanently disabled from engaging in any work or occupation for wages or profit, the Company will pay to him $.....

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Marine Policy Established by Statute of Florence, January 28, 1528

Be it known and made manifest to all persons, that.....of..... makes assurance on....., merchandise belonging to him or his friends, or to whomsoever the same may belong, laden or to be laden for [such or such a part or roadstead in such a place] by the hands of....., or his agent, or although others have laden it in the name of the aforesaid....., or in some other name designated or not designated on board the ship named....., or howsoever named, commanded by..... We begin the said insurance from the time when the said goods shall be, or shall have been, laden on board the said ship in [such a place], to continue until the said merchandise shall be discharged on land or in safety at [such a place], with liberty for the ship to touch at any other place, and to navigate forwards or backwards, to the right hand or the left, at the pleasure of the captain, and as he may require: The said assurers taking upon themselves in respect of the said goods the risk of all perils of the seas, fire, jettison, reprisals, robbery by friend or foe, and every other chance, peril, misfortune, disaster, hindrance, misadventure, though such as could not be imagined or supposed to have occurred, or be likely to occur, to the said goods, and barratry by the master, except as to stowage or customhouse. All the said risks the said insurers are to run and take on themselves until the said goods shall be safely discharged on shore at [such a place]; and if they are not laden, the insurers are entitled to retain one and a half per cent.

And if the said goods shall sustain, or have sustained, any disaster (which God forbid), the insurers shall pay to the said.....the sum insured, within two months from the news reaching the city.

And if within six months there shall have been no true news, the insurers shall pay to the said.....the sum insured; and in case of subsequent arrival and safe discharge at the said place, the aforesaid shall pay back to each the sum he has received. In the event of shipwreck, it is allowed to make recovery without authority from the insurers, it being stipulated that the said insurers are not responsible for theft by the captain of the said ship.

And the insurers are bound first to pay to the aforesaid the sums insured, and to litigate afterwards. And these are to bind themselves by sufficient sureties (one or more as directed by the fire official deputies on insurance) to pay back to each insurer the sums they have received, with damages of twenty per cent. The time allowed to the insurers for proving is eighteen months.

To the observance of this the insurers bind themselves to the said....., themselves, their heirs, and goods present and future, submitting themselves to the office aforesaid, and to every other judgment and court, whither the said .....shall please to summon them.

52

A Form of Marine Binding Slip. See § 76

Insurance is wanted by.....for account of.....loss, if any, payable in funds current in the United States, or in the City of New York, to.....

Amount of Invoice or Bill, $
per cent. advance.....
———— } On.....
Sum Insured.....$

on board the....., ...Master, and to be insured at and from.....

Bill of Lading dated } Premium, per cent..... $.....
..... }

Time of Sailing: }
..... } Binding. { .....President.
New York, ..., 190.. { .....Applicant.

53

A Form of Policy of Marine Insurance: Cargo. See § 410

By the.....Insurance Company.....on account of..... In case of loss, to be paid in funds current in the United States, or in the City of New York, to....., do make insurance, and cause.....to be insured, lost or not lost, at and from.....upon.....laden or to be laden on board the good....., whereof.....is master for this present voyage ....., or whoever else shall go for master in said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board of the said vessel, at..... as aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at.....as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises, hereby insured, are valued (premium included) at.....dollars.

Touching the adventures and perils which the said.....Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the *seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners*, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof the said Insurance Company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured, or his assigns, at and after the rate of.....per cent.

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said.....(the amount of the note given for the pre-

mium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to *five per cent.* *Provided always,* and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said. . . . . .Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said. . . . . .Insurance Company shall return premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. And in case of any assurance upon the said premises, subsequent in day of date to this policy, the said. . . . . .Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other assurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said. . . . . .Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous assurance. It is also agreed, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

In Witness Whereof, the President or Vice-President of the said. . . . . .Insurance Company hath hereunto subscribed his name, and the sum insured, and caused the same to be attested by their Secretary, in. . . . . ., the. . . . . .day of. . . . . ., 19. . .

Memorandum. It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under *twenty per cent.* unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under *seven per cent.* unless general; and coffee, in bags or bulk, pepper in bags or bulk, and rice, free from average under *ten per cent.* unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the

contents of the packages so damaged and not otherwise, and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, *one-half per cent.* upon the sum insured is to be retained by the assurers.

$....., dollars.

....., *Secretary* ....., *President.*

54

A Form of Collision Clause. See § 428

And it is further agreed, that if the vessel hereby insured shall come in collision with another vessel, and the assured become liable to pay, and shall pay, any sum or sums for damages resulting therefrom to said other vessel, her freight or her cargo, in such case this company will contribute towards the payment of three-fourths part of the total amount of said damages, in the proportion that the sum insured under this policy bears to the total valuation of the vessel as stated herein, provided, that this company shall not in any event be held liable under this agreement for a greater sum than three-fourths part of the amount insured under this policy.

And it is also agreed that this insurance company will bear a like proportionate share of any costs and expenses that may be incurred in contesting the liability resulting from said collision, provided, the written consent of the company to such contest be first obtained.

But under no circumstances shall this company be held liable for any contribution in respect of any sum that the insured may be held liable to pay by reason of loss of life or personal injury to individuals from any cause whatsoever, nor for any claim for demurrage or loss of the use of any vessel, nor for wages or provisions or expenses of master, officers or crews.

It is further agreed to, that in no event shall this insurance company be liable under this policy for more than the sum insured in any case, either for claims for loss and damage and or charges to hull of the vessel hereby insured and or for claims of any and all kinds arising under this collision clause, or the policy to which it is attached, and all payments made under this policy shall reduce this policy by the amounts so paid, unless restored by a new premium.

55

Inchmaree Clause. See § 446

This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them or by the manager.

56

A Negligence Clause. See § 464

Including negligence and errors of navigation; including all risk of negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew.

57

A Deviation Clause. See § 421

It is hereby agreed to hold the assured covered should the vessel deviate from the terms and conditions of this policy, at a premium to be arranged as soon as the deviation is known.

58

A Craft Clause. See §§ 419, 422

Including all risk of craft, boats, lighters, to or from the vessel upon whatever terms as to liability or otherwise the lighterman may be employed: such craft, boat or lighter being deemed a separate insurance, and loss in boat, craft, or lighter is to be settled under this policy without reference to the liability or non-liability of the lighterman under special agreement between assured and lighterman or otherwise, the assured transferring all rights against the lighterman to the underwriters.

59

A Clause as to Loading. See § 455

Warranted by the assured not to be loaded in tons of 2,240 lbs. more than the registered capacity under tonnage deck, with lead, marble, stone, coal, sand or iron; also warranted not to be loaded with lime under deck. Also if loaded with grain, warranted to be loaded under the inspection of the Surveyor of the Board of Underwriters, and his certificate as to the proper loading and sea-worthiness obtained.

60

A Form of Fidelity Bond. See § 468

This bond, made this.....day of....., 190.., witnesseth: Whereas, ...(hereinafter called the Employer) has appointed.....(hereinafter called the Employee) to the position of..... in the service of the Employer, now, therefore, in consideration of the premium paid or to be paid and the statements made by the Employer, which are warranted to be true, The Empire State Surety Company, a corporation organized under the laws of the State of New York (hereinafter called the Surety), hereby agrees that it will, at the expiration of three months after receipt of proof of loss satisfactory to the Surety, reimburse the Employer for pecuniary loss not exceeding.....Dollars, sustained by the Employer by reason of dishonesty of the Employee, constituting larceny or embezzlement, in connection with the said position, during the term beginning on the.....day of....., 190.., and ending on the.....

day of....., 190.., at noon, and which loss shall be discovered during said term, or the sooner termination hereof, or within six months thereafter.

This Bond is executed and accepted upon the conditions printed below.

In witness whereof, etc.

CONDITIONS ON WHICH WITHIN BOND IS EXECUTED AND ACCEPTED

1. The Surety shall not be liable for any sum which the Employee may, at the commencement of the term hereof, owe the Employer.

2. The Surety shall not be liable to the Employer under any previous Bond executed in behalf of the Employee, and upon the execution by the Surety of any new Bond to the Employer on behalf of the Employee, this Bond and all liability thereunder shall cease, it being the intention that only the last Bond shall be in force; provided, That the Employer shall have the right, within six months after the termination of any Bond, to make claim for any loss occurring thereunder. The liability of the Surety, however, shall not be cumulative.

3. If at any time during the term of this Bond the Employer learn or be informed that the Employee is unreliable, dishonest, intemperate, gambling or indulging in other vices, the Employer shall immediately notify the Surety.

4. Upon the discovery by the Employer that loss has been sustained, or of facts indicating that a loss has probably been sustained, the Employer shall immediately notify the Surety, and shall within thirty days after such discovery furnish to the Surety in writing, proof of loss sustained in detail under oath.

5. The business of the Employer shall continue to be conducted, and the duties of the Employee shall remain, in accordance with the written statements made by the Employer to the Surety relative thereto and the Surety may at any time either before or after loss inspect the Employer's books, papers and accounts.

6. The Employer will in every way aid in the apprehension and prosecution of the Employee for any criminal offense committed by the Employee involving liability to the Surety.

7. The term "Employer," as used in this Bond, shall include any officer, or other representative of the Employer, whose duty it may be to supervise the work, or to examine the books or audit the accounts of others in the Employer's service, or to count or examine the cash or securities for which such others are responsible.

8. If the Employer hold any other security in behalf of the Employee, and the amount of loss be less than the aggregate amount of all such securities, the Surety shall be liable for only such proportion of the loss as the amount for which the Surety shall have become surety hereunder, bears to the total security held by the Employer, whether such other security be available or not.

9. The Surety may at any time terminate this Bond by mailing to the Employer written notice of its election so to do at the last address given it and the Surety shall not be liable for any act of the Employee thereafter committed. If the Company subsequently pay any loss hereunder the whole premium paid shall be held to have been fully earned, otherwise, the Surety shall, upon demand and the execution and delivery by the Employer of a full release from this bond, refund the premium paid, less a pro rata part thereof for the time this obligation shall have been in force.

10. No action, suit or proceeding at law or in equity shall be had or main-

tained upon this Bond unless commenced within one year from the time of the first discovery of any loss hereunder.

11. None of the conditions or provisions contained in this Bond shall be deemed to have been waived by or on behalf of the Surety, unless the waiver be clearly expressed in writing over the signature of its President, or any of its Vice-Presidents.

12. All notices and proofs of loss to the Surety shall be given in writing to its executive office, 34 Pine Street, New York City, New York.

61

A Form of General Liability Policy. See § 475

In consideration of the premium as determined in clause *G* of this Policy and of the statements herein made, the London Guarantee and Accident Company, Limited, hereinafter called the Company, subject to the terms of this policy as herein set forth, agrees to indemnify.....of.....State of ....., hereinafter called the Assured, against loss from the liability imposed by law upon the Assured for damages on account of bodily injuries, including death resulting at any time therefrom, accidentally suffered by any person or persons while within the premises of the Assured as described in the Schedule herein, or on the premises or ways adjacent thereto, when such injuries or death are suffered as the result of accidents occurring within the period beginning the.....day of....., 190.., and ending on the.....day of ....., 190.., at 12 o'oclock noon.

LIMITS OF LIABILITY

A. The Company's liability on account of an accident resulting in bodily injuries or death to one person is limited to.....Dollars ($.....), and, subject to the same limit for each person, the Company's total liability on account of any one accident resulting in bodily injuries or death to more than one person is limited to.....Dollars ($.....).

EXTRA BENEFITS AND SURGICAL AID

B. In addition to these limits the Company will pay for the providing at the time of accident of such immediate surgical aid as is imperative, and also will pay all cost and expense attendant upon its investigation, adjustment and settlement of claims.

NOTICE OF ACCIDENT AND CLAIM

C. Upon the occurrence of an accident the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company's Head Office, or to the agent who has countersigned this Policy. If a claim is made on account of such accident, the Assured shall give like notice thereof, with full particulars. The Assured shall render to the Company all co-operation and assistance in his power in the protection of his interests.

WHEN ASSURED IS SUED

D. If thereafter any suit, even if groundless, is brought against the Assured to recover damages on account of such injuries or deaths as are covered by this Policy, the Assured shall immediately forward to the Company every summons

or other process served upon him, whereupon the Company will, at its own expense, defend against such suit in the name and on behalf of the Assured, unless the Company shall elect to settle the same or pay to the Assured the indemnity as provided for in Clause *A* of this Policy.

EXCEPTIONS

E. This Policy does not cover loss from liability for injuries or death caused to or by

1. Any person engaged in the making of additions or alterations of a structural character, unless a written permit therefor is granted by the Company specifically describing the work and an additional premium paid.

2. Any person employed by the Assured contrary to law, or any person employed under fourteen years of age where no statute restricts the age of employment.

3. Any person in or about any elevator while in charge of any person under the age fixed by law for elevator attendants, or under the age of sixteen years where no such age is fixed by law.

4. Any person before the premises have been fully completed, ready for occupancy, unless a written permit is granted by the Company permitting same.

SETTLEMENTS

F. The Assured may settle any case at the Assured's own expense, giving immediate notice thereof in writing to the Company, and the Assured may settle any case at the Company's expense, if the Company shall have previously given its consent in writing.

PREMIUM

G. The premium of this Policy, calculated at the rate or rates specified herein in the Schedule, is based on the information contained therein, and if at the end of the Policy period the entire compensation earned by all employees is greater or less than the sum set forth in the Schedule, or the data otherwise given is erroneous, the premium charge shall be subject to adjustment on the basis of the rates set forth in said Schedule; but the Company shall retain not less than . . . . . Dollars ($. . . . . .) it being agreed that this sum shall be the minimum earned premium. The adjustment shall be made as soon as the correct premium has been ascertained.

CANCELLATION

H. This Policy may be cancelled by the Company at any time by giving five days' written notice to the Assured, stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured, the Company shall be entitled to the earned premium calculated at the customary short rates. In either case the earned premium shall be computed on the basis of the frontage, area, number of elevators and the actual compensation earned by the employees of the Assured during the time the Policy shall have been in force, but shall not be less than the aforesaid minimum premium. The Company's check mailed to the address of the Assured as given herein shall be a sufficient tender of any unearned premium.

AUDIT

I. The Company shall by its authorized representatives have the right and opportunity to examine the books and records of the Assured as respects compensation earned by the employees of the Assured, and the Assured shall render reasonable assistance; but the Company waives no right by failing to make such examination. The rendering of any estimate or statement, or the making of any previous settlement, shall not bar the examination herein provided for nor the Company's right to additional premiums. Such examination, however, shall be made within one year of the expiration of the Policy.

WHEN COMPANY MAY BE SUED

J. No action shall lie against the Company to recover for any loss or expense under this Policy unless it shall be brought by the Assured for loss or expense actually sustained and paid in money by the Assured, nor unless such action be brought within ninety days after the payment of such loss or expense.

SUBROGATION

K. In case of payment of loss or expense under this Policy the Company shall be subrogated to the amount of such payment to all rights of the Assured against any person, firm or corporation as respects such loss or expense, and the Assured shall do everything which may be necessary to secure to the Company such rights.

CO-INSURANCE

L. If the Assured carry a Policy of another insurer against a loss covered by this Policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid insurance applicable thereto.

INSPECTION

M. Any of the Company's authorized inspectors shall have the right and opportunity whenever the Company so desires to inspect at any reasonable time the plants, works, machinery and appliances of the Assured.

ALTERATIONS IN POLICY

N. No change, waiver or extension of any of the terms or conditions of this Policy shall be valid, unless endorsed hereon and signed by the General Manager of the Company for the United States; nor shall notice to any agent, nor shall knowledge possessed by any agent or any other person, be held to effect a waiver or change in any part of the Policy.

SCHEDULE

O. The hereinafter Schedule of statements and warranties is made by the Assured, and by acceptance of this Policy the Assured warrants the same to be true, except such as are matters of estimate only.

Item 1. The name of Assured. . . . . .
Item 2. The address of the Assured is. . . . . .
(State street, town and state where office is located.)

Item 3. The Assured is. . . . . .
(State whether individual, copartnership, corporation, estate or trustee.)

Item 4. The location of the building or buildings, the number and kind of elevators, the wages paid employees, the floor areas and frontages are as follows:

LOCATION		ELEVATORS			ESTIMATED WAGES	GROUND FLOOR AREA	NO. OF STORIES	STREET FRONTAGE
STREET	NO.	NO.	DESCRIPTION	POWER				
If there is more than one building, give location of each.			State whether Passenger or Freight, Sidewalk, One Story, Private House, Hand Hoist, Moving Platform or Escalator.	State whether Hydraulic, Electric, Steam or Plunger.	State separately estimated wages of office men and those of all other employés engaged on the premises.	State area of ground floor, including all parts enclosed.	If basement is used as salesroom, include it in number.	If there is frontage on more than one street, state each separately, naming streets.

Item 5. ANALYSIS OF PREMIUM

Number Kind

Elevators . . . . . at $. . . . . for each,. . . . . $. . . . . .
Elevators . . . . . at $. . . . . for each,. . . . . $. . . . . .
Estimated wages of office men,
$. . . . . at . . cents per $100. . . . . $. . . . . .
Estimated wages of all other
employees engaged on premises, $. . . . . at . . cents per $100. . . . . $. . . . . .
Total floor area, all floors included,. . . . . .square feet
at. . . . . .cents per 100 square feet $. . . . . .
Street frontage, all frontages included,. . . . . .running
feet at. . . . . .cents per running foot $. . . . . .
Total Premium $. . . . . .

Item 6. The kind of business done on the premises is as follows:. . . . . .

Item 7. The Assured manages the premises, except as follows:. . . . . .

Item 8. The Assured occupies the premises, except as follows:. . . . . .

Item 9. There is no elevator, escalator or moving platform on the premises, except as follows:. . . . . .

Item 10. All elevators, escalators and moving platforms have been accepted from the builders as satisfactory, except as follows:. . . . . .

Item 11. No Company has cancelled liability insurance on this risk during the past three years, except as follows:. . . . . .

Item 12. No Company has insured this risk during the past two years, except as follows:. . . . . .

Item 13. There is no other elevator or general liability insurance carried by the Assured on the premises, except as follows:. . . . . .

Item 14. Inspection reports and other notices and correspondence are to be mailed to the Assured at the address given above, or to. . . . . at. . . . . .

If to the latter, it is by request of the Assured, who acknowledges such person as the proper agent for this purpose.

Item 15. The minimum premium for this Policy is $. . . . . .

In witness whereof, etc.

CHAPTER III

Relating to Adjustment

1

Examples of the Operation of Coinsurance Clauses Prepared for This Book by Willis O. Robb, Esq., Secretary of the Loss Committee of the New York Board of Fire Underwriters. See § 242

			Companies Pay	
			Under 80% Clause	*Under 100% Clause*
1.	Value	$10,000	$ 4,500	$ 3,600
	Ins.	6,000		
	Loss	6,000		
2.	Value	10,000	6,000	4,800
	Ins.	6,000		
	Loss	8,000		
3.	Value	$10,000	6,000	6,000
	Ins.	6,000		
	Loss	10,000		
4.	Value	10,000	6,000	4,800
	Ins.	8,000		
	Loss	6,000		
5.	Value	10,000	8,000	6,400
	Ins.	8,000		
	Loss	8,000		
6.	Value	10,000	8,000	8,000
	Ins.	8,000		
	Loss	10,000		
7.	Value	10,000	6,000	6,000
	Ins.	10,000		
	Loss	6,000		
8.	Value	10,000	8,000	8,000
	Ins.	10,000		
	Loss	8,000		
9.	Value	10,000	10,000	10,000
	Ins.	10,000		
	Loss	10,000		

10.	Value	10,000	6,000	6,000
	Ins.	12,000		
	Loss	6,000		
11.	Value	10,000	8,000	8,000
	Ins.	12,000		
	Loss	8,000		
12.	Value	10,000	10,000	10,000
	Ins.	12,000		
	Loss	10,000		

Thus in the first example, under the 80% clause $\frac{6000=(\text{the insurance})}{8000=(80\% \text{ of value})}=\frac{6}{8}$, or 4500, of the loss falls on the insurers, and $\frac{2000=(\text{the deficit})}{8000=(80\% \text{ of value})}=\frac{2}{8}$, or 1500, falls on the insured. Under the 100% clause $\frac{6}{10}$, or 3600, falls on the insurers, and $\frac{4}{10}$, or 2400, on the insured.

2

York Antwerp Rules, Adopted by the Association for the Reform and Codification of the Law of Nations, at Antwerp, in 1877, *and Amended at Their Liverpool Conference in* 1890. *See § 225*

Rule I. Jettison of Deck Cargo.—No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Rule II. Damage by Jettison and Sacrifice for the Common Safety.—Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened, or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III. Extinguishing Fire on Shipboard.—Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV. Cutting away Wreck.—Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea peril, shall not be made good as general average.

Rule V. Voluntary Stranding.—When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI. Carrying Press of Sail; Damage to or Loss of Sails.—Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the

ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Rule VII. Damage to Engines in Refloating a Ship.—Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavoring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule VIII. Expenses Lightening a Ship when Ashore, and Consequent Damage.—When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Rule IX. Cargo, Ship's Materials, and Stores Burnt for Fuel.—Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

Rule X. Expenses at Port of Refuge, etc.—(*a*) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(*b*) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(*c*) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(*d*) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transshipment, and forwarding, or any of them (up to the amount of the extra expense saved), shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI. Wages and Maintenance of Crew in Port of Refuge, etc.—When a ship shall have entered or been detained in any port or place under the

circumstances, or for the purposes of the repairs, mentioned in Rule VII, the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XII. DAMAGE TO CARGO IN DISCHARGING, ETC.—Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII. DEDUCTIONS FROM COST OF REPAIRS.—In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.:

In the case of *iron or steel ships*, from date of original register to the date of accident,—

Up to 1 year old (A).	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 and 8 years (B).	One-third to be deducted off repairs to and renewals of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connections; other repairs in full.
Between 3 and 6 years (C.)	Deductions as above under Clause B, except that one-sixth be deducted off iron-work of masts and spars, and machinery (inclusive of boilers and their mountings).
Between 6 and 10 years (D).	Deductions as above under Clause C, except that one-third be deducted off iron-work of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging.
Between 10 & 15 years (E).	One-third to be deducted off all repairs and renewals, except iron-work of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.
Over 15 years (F).	One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.
Generally (G).	The deductions (except as to provisions and stores, machinery, and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of *wooden or composite ships:*

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions:

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labor metaling are subject to a deduction of one-third.

In the case of *ships generally:*

In the case of all ships, the expense of straightening bent iron-work, including labor of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages, and graving dock materials, shall be allowed in full.

Rule XIV. Temporary Repairs.—No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

Rule XV. Loss of Freight.—Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Rule XVI. Amount to Be Made Good for Cargo Lost or Damaged by Sacrifice.—The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII. Contributory Values.—The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

Rule XVIII. Adjustment.—Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

3

Customary Deductions: England. *See § 209*

In the adjustment of claims for particular average in a policy on ship, in the absence of any special provisions in the policy, the following items for repairing

damage or making good losses are recoverable from the insurer without deduction new for old:—

Graving dock expenses.

Cost of removals.

Use of shears, stages, and graving dock appliances, and cost of cartage and carriage.

Cost of anchors and of provisions and stores which have not been in use.

Cost of temporary repairs.

Cost of straightening bent iron-work.

All repairs of damage sustained by a vessel on her first voyage.

Chain cables are subject to a deduction of one-sixth.

All other repairs of damage sustained after the first voyage are subject to a deduction of one-third.

Metal sheathing must be dealt with by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus proceeds of the old metal. Nails, felt, and labor metaling, are subject to one-third, also the cost of replacing metal lost.

Chalmers & Owen, Ins. (1907), p. 154.

4

Illustrative Statement of General Average Prepared for This Book by Harrington Putnam, Esq., of the New York Bar, assisted by Messrs. Johnson & Higgins, average adjusters, in Case of the British Steamer "Vesper." See § 224

This Vessel sailed from Hamburg, November 18th, 1906, with a cargo of sugar bound to New York via Cardiff, Wales.

On November 22d, while proceeding up the Bristol Channel, she was run into by the steamer *Exeter* sustaining such damage as required entry of port of refuge, dry docking, temporary repairs with partial discharge of cargo, after which the cargo was replaced and the voyage resumed, so that she arrived in New York, January 15th, 1907.

Under the terms of the contract of affreightment, the general average is stated in accordance with York-Antwerp Rules, 1890. The eighteenth of these Rules provides that, as to matters not covered specifically in the York-Antwerp Rules, the adjustment shall be drawn up "in accordance with the law and practice which would otherwise have governed the adjustment," which refers to the law of the place of destination.

The average, therefore, is stated in accordance with the York-Antwerp Rules, supplemented by the law and usages of the port of New York.

These charges are borne by the common interests, without recourse against the *Exeter* for the reason that although the fault of the *Exeter* was clearly established, she became a total loss.

While by British law the owners might still be liable at the rate of £8 a ton,[1] yet as this steamer was owned by a "single-ship" limited company, no property was left to answer for any judgment that might be recovered against the *Exeter* or its incorporated owner.

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[1] Mer. Ship. Act, 1894, § 503.

CHARGES AND EXPENSES

Disbursements at Cardiff

[For brevity, some items charged to owners are omitted.]

		General Average		Owners
Gilbert Robertson				
For fees for noting and extending protest	£ 3 6 4	£ 3 6 4		
Lloyd's Register of British and Foreign Shipping				
For fees for special damage survey held on the Steamer *Vesper*, 3,896 tons	18 18 0	6 6 0		£12 12 0
John Bovey & Co.				
For our time and services reporting steamer's arrival, surveying before and after repairs, watching and superintending handling of cargo, otherwise looking after cargo interests, including Survey Report, examination of accounts, etc., ten guineas	10 10 0			
Telegrams, cablegrams and petties	1 2 6			
	11 12 6	11 12 6		
Rea Transport Co., Ltd.				
For assistance in Roads, 3 tugs	21 0 0	21 0 0		
Note:—All extra towages				
John & Frank Davies				
For tending lines and mooring ship in Roath Basin	15 0			
Extra boat, do., do.	15 0			
	1 10 0	1 10 0		
The Bute Shipbuilding, Engineering and Dry Dock Co., Ltd.				
This charge includes various repairs to the vessel and other items not general average, from which the adjusters have separated as general average charges, the cost of cargo-boxes made for hoisting out the sugar, expense of removing the cargo and replacing and restowing the same after the completion of repairs, also for hire of				
Forward		£43 14 10		£12 12 0

Disbursements at Cardiff, cont'd		General Average ⅓ Off	General Average Net	Owners
Brought forward			£43 14 10	£ 12 12 0
watchman, and other like common charges, which, less credits, are	£ 72 15 11		72 15 11	5,016 14 1
Balance of %	5,016 14 1			
	5,089 10 0			
The Bute Shipbuilding, Engineering and Dry Dock Co., Ltd.				
For vessel dry docked with full cargo and specially shored, cradled, etc., including the first 24 hours' dock dues, as agreed[1]	200 0 0		169 0 0	31 0 0
50 extra tides @ £24 7 0	1,217 10 0		608 15 0	608 15 0
Ship's bottom painted from keel to light line with owner's material	10 10 0			10 10 0
	1,428 0 0			
Note:—Charge to G. A. for extra cost of dry docking vessel, and dock dues on account of cargo on board.				
Sydney D. Jenkins & Son				
For making fore and main trysails, 336 yds. @ ⅛	28 0 0			
For making bridge and forecastle awnings, 342 yds. @ ⅛	28 10 0			
Remainder of account	133 5 4			
	189 15 4			
Less Discount	5 0 1			
	184 15 3	56 10 0[2]	3 18 2	124 7 1
Note:—Charge to G. A. for replacing sails and awnings, used over the bows to stop leak, and damaged. The item of £3 18 2 was for replacing new ropes sacrificed.				
Forward		£56 10 0	898 3 11	5,803 18 2

[1] If the *Vesper* had had no cargo on board, the cost of docking her and the first 24 hours' dues would have been but £31. The extra expense of £169, due to having cargo on board, is treated as general average. The vessel was at Cardiff and needed repairs to enable her to resume the voyage. The master was confronted with the alternative, either of discharging and storing the cargo while the vessel was being repaired, and then reloading it after the repairs were completed, or of dry-docking the vessel with her cargo on board, which in fact was done. Had her cargo been discharged, the cost of discharging, and the expense of warehousing and reloading it, would have been treated as general average.

[2] The *Vesper* being between one and three years old, one-third is deducted from her sails, etc., under G. A. Rule XIII.

Disbursements at Cardiff, cont'd		General Average ½ Off	General Average Net	Owners
Brought forward	£	£56 10 0	898 3 11	5,803 18 2
William Jeremy				
For night watching	£ 6 19 6		6 19 6	
Hugh Evans & Co.				
For laborers employed in removing all stores and gear from fore peak, boatswains and sail lockers and landing and stowing same in the stores on the quay; assisting in clearing out, etc.	54 9 0		5 0 0	49 9 0
Note:—Charge to G. A. for labor, covering and securing with sails and tarpaulins, cargo in way of repairs, and afterwards replacing same.				
Rea Transport Co.				
For agency fee per steamer *Vesper* at Cardiff	15 15 0			
Telegrams, telephones, stamps, etc.	10 6			
	16 5 6		10 17 0	5 8 6
Josiah Thomas				
For professional attendance re the above steamer:				
Proceeding to Cardiff as per instructions, arranging to dry dock the steamer, consulting Lloyd's Registry and Salvage Association as to docking with cargo on board, calling surveys on ship and cargo, arranging docking terms, superintending all interests during repairs, collecting survey reports and examining all accounts for adjustment, etc.				
30 days @ £2. 2*s*. 0*d*. per day	63 0 0			
Hotel, personal and traveling expenses	31 10 0			
	94 10 0		31 10 0	63 0 0
For cost of telegrams, etc.	4 16 5		3 4 3	1 12 2
Forward		£56 10 0	955 14 8	5,923 7 10

Disbursements at Cardiff, cont'd		General Average ⅓ off	General Average Net	Owners
Brought forward		£56 10 0	£955 14 8	5,923 7 10
The Salvage Association				
For services of the Cardiff staff, surveying damage and supervising repairs, etc., including checking accounts and reporting	£63 0 0			
Capt. E. Hall, for surveying cargo and supervising handling and shifting and restowage of sugar in the holds during repairs	12 12 0			
Expenses	10 0			
Photographs	2 5 0			
	78 7 0		34 10 6	43 16 6
F. H. Smith & Co.				
For services investigating the accounts at Cardiff, and obtaining information as to items chargeable to the general average, correspondence, etc.	10 10 0		10 10 0	
		£56 10 0	£1,000 15 2	5,967 4 4
@ Exchange $4.87		$275 16	$4,873 69	29,060 35
One-third off "New for Old"		91 72	183 44	91 72
		$183 44		
		General Average		
Thomas A. Keyes				
For repairing cargo ex *Vesper* including all material used.	$230		$130 00	100 00
Note:—Charge to G. A. extra cost of mending bags owing to the handling of the cargo at Cardiff.				
For Commission				
On general average disbursements and for advancing funds @ 2½%	129 68		129 68	
For Allowance				
For replacing coal and engine stores used during the extra detention at Cardiff	142 76		128 74	14 02
Forward			$5,445 55	29,266 09

	Disbursements at Cardiff, cont'd		General Average	Owners
$34,711 64	Brought forward		$5,445 55	$29,266 09
1,017 85	*For Wages and Provisions*			
	Of ship's company during the extra detention of the vessel at Barry Roads and Cardiff, one month:			
	Wages			
	Master, per mo. £18			
	1st Mate " 9			
	2d " " 7			
	Steward " 6			
	Asst. " " 2.10			
	Cook " 5			
	Carpenter " 4.10			
	Boatswain " 5			
	5 Seamen,			
	@ £3.5 ea. " 16.5			
	1st Eng'r " 17			
	2d " " 12			
	3d " " 8			
	4th " " 6			
	Donkeyman " 5			
	8 Firemen			
	@ £3.10 ea. " 28			
	per month £149. 5*s*. 0*d*.			
	@ Each $4.87, $726.85			
	for 1 month	$726 85		
	Provisions			
	Master, per day $1.00			
	6 Officers and Engineers, per day, @ 50c. 3.00			
	19 men, per day @ 30c. 5.70			
	per day 9.70			
	for 30 days	291 00		
		1017 85	1,017 85	
	Interest			
259 08	For interest[1] on general			
$35,988 57	Forward		$6,463 40	$29,266 09

[1] Interest is allowed in the United States on authority of the *Mary*, 1 Sprague, 51, and by a rule of the Association of Average Adjusters of the United States, adopted April 21, 1885.

	Disbursements at Cardiff, cont'd		General Average	Owners
$35,988 57	Brought forward		$6,463 40	$29,266 09
	average disbursements and allowances during probable outlay @ 6% per annum			
	Disbursements $5,187.13 for 8 mos. = 4%	$207 48		
	Allowances $1,146.59 for 9 mos. = 4½%	51 60		
		259 08	259 08	
20 00	*Frank S. Martin* For valuation of vessel	20 00	20 00	
32 00	*John H. Ward* For lithographing statement	32 00	32 00	
5 00	*For Drawing Average Agreement* and obtaining signature thereto	5 00	5 00	
15 00	*For Extending Protest* and furnishing certified copy of same	15 00	15 00	
325 00	*For Services and Advice* For consultations with agents, and correspondence in regard to the repair accounts and the expenses of handling and protecting the cargo at Cardiff, for procuring and verifying contributory value, and for this statement	325 00	325 00	
177 98	*Commission* For commission for collecting and settling the general average @ 2½% [1]	177 98	177 98	
$36,563 55	Total		$7,297 46	$29,266 09

[1] Allowance of Commissions sustained in *Sturgis* v. *Cary*, 2 Curtis, 382; F. C. 13,573.

CONTRIBUTING INTERESTS AND APPORTIONMENT OF GENERAL AVERAGE

Vessel				
Estimated value in her damaged condition	$120,000 00			
Add. amount made good	202 46	$120,202	Pays	$2,824 06
Freight				
Amount at risk	8,661 08			
Less wages and port charges	3,289 83	5,371	"	126 19
Cargo				
Consigned to Arbuckle Bros. 50,498 Bags Sugar	185,031 71	185,032	"	4,347 21
		$310,605	Pays	$7,297 46

At 2.34943 *per cent*

Apportionment Under Policies on Vessel

Underwriters on vessel pay proportional general average, as follows:

Vesper insured for $150,000

	insured		
Hudson Insurance Company	$50,000	pay	$941 35
Orient Insurance Company	25,000	"	470 68
Commercial Insurance Company	25,000	"	470 68
Lloyd's, Individual Underwriters	50,000	"	941 35
	$150,000		$2,824 06

New York, October 1, 1907.

(Signed) John Smith & Co.,
Average Adjusters.

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